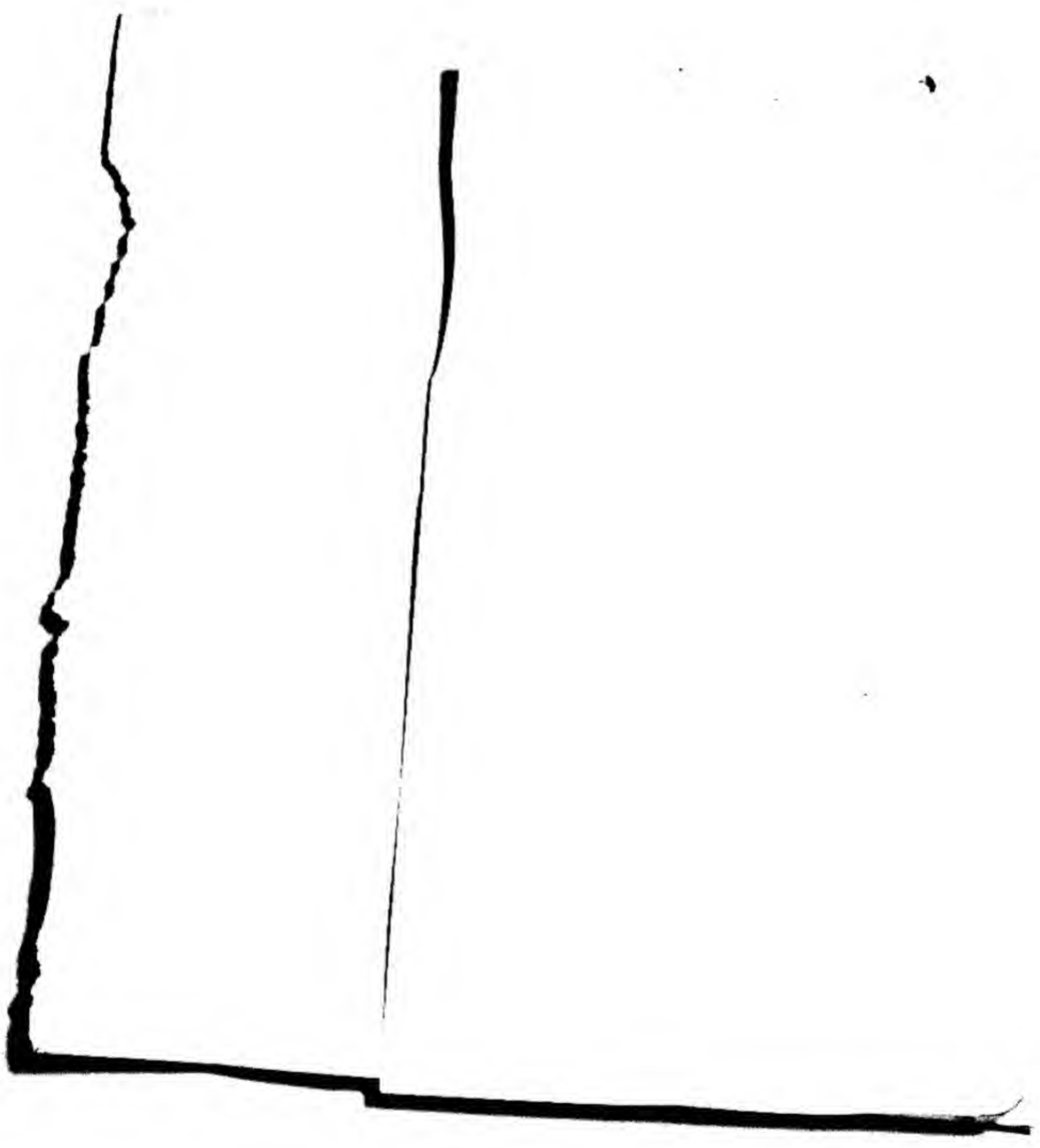


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BOMBAY. VOL. X.



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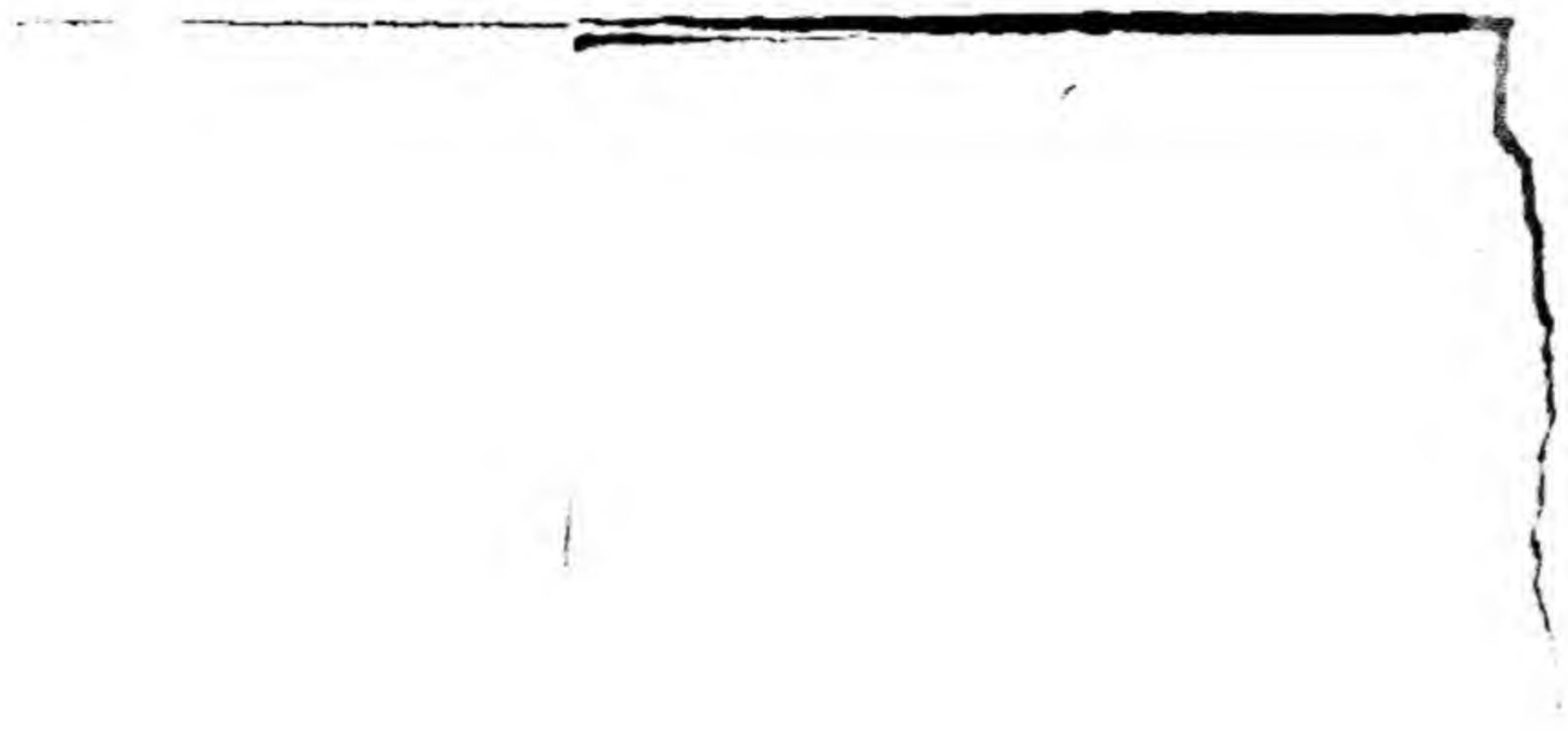
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THE
INDIAN DECISIONS
NEW SERIES.
BOMBAY—VOL. X.

I.L.R., 19 BOMBAY.

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19 B. 1 (P.C.) = 21 I.A. 139 = 6 Sar. P.C.J. 498.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.

[*On appeal from the High Court at Bombay.*]

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BOMBAY BURMAH TRADING CORPORATION, LIMITED (*Defendant*), *Appellant v.* FREDERICK YORKE SMITH (*Plaintiff*), *Respondent.**

[19th and 20th June, 1894.]

Company—Preferential dividend payable to holder of one set of shares—Contract—Construction—Construction of contract by the Company to pay it to the share-holder and to his executor holding the same—Death of the share-holder—"Holder" of shares—Legal title to shares—Meaning of the word "hold"—Administration.

The goodwill of a business which a merchant had carried on, and the capital, property, and assets with it, were transferred by him in 1864 to a joint stock limited company, who agreed with him that in consideration of the transfer by him of property referred to in the contract as "the fixed assets," one hundred paid up shares of Rs. 2,500 each, of which any assignment by him during the next five years from the registration of the company should not be recognized by them as valid, should be allotted to him. It was also agreed that, in consideration of the transfer, he and "his executors or administrators shall be entitled, so long as they hold the said hundred shares, to an extra or preferential dividend."

On this agreement the parties acted, and the shareholder held the shares till he died in England in 1888, having by will directed that his executors or administrators should hold the hundred shares in trust for his surviving brothers of whom the executor who proved the will was one. Administration with the will annexed was granted in India to the plaintiff in this suit as the attorney of the executor. A note of this was made in the register of the company, leaving the hundred shares still in the name of the testator. The company then discontinued to pay the preferential dividend, and now contended that it was no longer payable inasmuch as the testator's estate had been administered, and that the executor no longer held the shares as executor but as trustee for the beneficiaries under the will.

***Held*, that the contract was still in operation, the executor still "holding" the shares within its meaning; and that the preferential dividend continued payable**

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to the estate of the testator, the company being only concerned with the legal title to the shares, and not with any claims, if there were any, that might be made by beneficiaries under the will against the executor as trustee.

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[2] APPEAL from a decree (5th December, 1892) of the appellate High Court, affirming in all essential points a decree (11th March, 1892) of the Court in its original jurisdiction.

This appeal related to the construction of the provisions of a contract, made on the 22nd July, 1864, between William Wallace, a merchant till then carrying on a trade in timber at Rangoon, and a joint stock company incorporated in 1863 under Act XIX of 1857 for the purpose of taking over from him the good will, property, capital and assets of his business. The contract, among other provisions, provided in cl. 13 that so long as William Wallace, his executors and administrators, should hold one hundred fully paid up shares, allotted to him in consideration of the transfer of property, referred to as "the fixed assets," the company would pay to him, or them, an extra or preferential dividend upon those shares. This dividend was to be equal to one-third of surplus profits calculated in the manner specified in the contract, and subject to certain deductions.

The question now was whether this preferential dividend was still payable to the estate of William Wallace, who died in England in 1888. The appellant company was incorporated in Bombay in 1863 originally under the name of the "Burmah Trading Company," having a nominal capital of Rs. 25 lakhs divided into 1,000 shares of Rs. 2,500 each, afterwards increased by additional shares of the nominal value of 12½ lakhs. The firm of Wallace & Co., of Bombay, where the head office was, were their secretaries, that firm having acted previously as the agents of William Wallace whose business had been established in Rangoon. The "fixed assets" were immoveable property, valued at about Rs. 2,76,000. There were, besides, contracts and operations undertaken, forest rights and concessions obtained, which were transferred to the company.

The respondent (plaintiff) represented in India the executor of the will of William Wallace who died in England on the 28th January, 1888. Administration with the will annexed, was granted in Bombay to Frederick Yorke Smith (plaintiff) as the attorney of the executor, limited as the Act provides, on the 27th September, 1888.

[3] The testator appointed his three brothers to be his executors, referred to the perferential dividend on the hundred shares, and directed that his executors, or administrators, should hold these shares upon trust so that the same should be at the absolute disposal of such of his three brothers as should survive him, if more than one, as joint tenants. One of the brothers died in the testator's life-time. One only proved the will as executor. Whatever is material to this report in the agreement of the 22nd July, 1864, in the memorandum and articles of association of the appellant company and in the will of 1880, has already been set forth, as well as the facts of the case, in the report (under the above name (1)) of the proceedings in the Courts below. The facts are also stated in the judgments, which are reported at length at pp. 209 and 219 of the I. L. R. 17 Bom., of Farran, J., in the original jurisdiction and of the Chief Justice, in the appellate.

The first Court held that the executor of W. Wallace, or his attorney, was still the registered holder of the shares. The term "shareholder" in

(1) 17 B. 197.

the agreement, and throughout the memorandum and articles of association, which must be read with, and in explanation of, the agreement, had the fixed meaning of "registered holder." The judgment was that the contract was still in operation as to the preferential dividend, which was payable to the plaintiff as administrator so long as the executor of William Wallace should be the registered holder of the hundred shares (p. 209).

The appellate Court affirmed this judgment. As to what was meant by the executors and administrators "holding" the shares, the agreement of 1864 was to be read in connection with the provisions in the articles of association as to the transmission of shares, in ss. 29, 30 and 31. They showed that the executors and administrators, although not formally on the register, were the only persons whose title could be recognized by the company. It was not advisable to express an opinion as to the construction of the words "executors and administrators" in the agreement, and the decree was varied in this respect (p. 219).

On this appeal,

[4] *Mr. M. Crackanthorpe*, Q. C., Mr. *H. Burton Buckley*, and Mr. *M. I. Joyce*, for the appellant company, argued that the estate to which the Courts below had adjudged the continuance of the payment of the preferential dividend, was no longer entitled to receive it. The executor having administered, and also assented to the bequest of the shares, remained entitled to them as trustee for the beneficiaries under the will, but no longer held them as executor within the meaning of s. 13 of the agreement of 1864. He had ceased to "hold" them in that character, but held them as trustee. As to an executor becoming a trustee forthwith upon assenting to a specific bequest given to him in trust, *Dix* v. *Burford* (1) was cited. The preferential dividend could only be payable, after the death of the testator, so long as the executor held the hundred shares in his character of representative of the estate. He would cease to be in that character on commencing to hold them, either in his own right, or as trustee for others. The liabilities of the estate, on the facts, had all been provided for, and the specific bequest had been assented to. These shares, therefore, were held by the executor only as trustee. Further, it appeared that the sole reason why the shares had not been divided between the legatees "of the absolute interest in them, and all rights attaching to them," was that the latter, both of whom had been named executors, though only one had proved the will, desired to give effect to the wishes of the testator expressed to them before his death. But the executor could not, with reference to the use of the word in cl. 13 of the agreement of 1864, remain permanently in that character, when he had discharged his functions. Had it been that he could so remain, then nothing would be required but a resort to suitable provisions, to enable testator and his successors to entitle themselves in perpetuity to the preferential dividend. It was submitted that the word "hold," in the agreement of 1864, meant "hold with a beneficial title." As to shares remaining in a testator's name in the books of a company, *Turquand* v. *Kirby* (2) was cited. Williams on Executors, Vol. II, Part III, Bk. III, Ch. IV, and Buckley on the Companies Acts were referred to in regard to the position of the executor.

[5] Sir *Richard Webster*, Q.C., Mr. *Cozens Hardy*, Q.C., and Mr. *T.T. Method*, for the respondent, were not called upon.

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(1) 19 Beavan, 409.

(2) L. R. 4 Eq. 123.

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JUDGMENT.

Their Lordships' judgment was thereupon delivered by

LORD MACNAGHTEN.—This appeal raises a question as to the meaning and effect of a provision contained in an agreement of purchase and sale which was made between the appellants and the late Mr. William Wallace in 1864. The question relates to the continuance of a special or extra dividend attached to certain shares, part of the consideration for the purchase.

Mr. Wallace was the possessor of an extensive and valuable business as a timber merchant in Burmah. In 1863, under the Limited Liability Act then in force in Bombay (Act XIX of 1857), a joint stock company, which is now called The Bombay Burmah Trading Corporation, Limited, was formed for the purpose of taking over Mr. Wallace's business. The company was registered with a nominal capital of 25 lakhs, divided into 1,000 shares of 2,500 rupees each.

The company's articles of association, printed in the Record, contain two regulations which it will be convenient to notice in passing. Article 9 gives the company a lien on all the shares of every shareholder for all the debts, liabilities, and engagements of such shareholders. Article 29 provides, in common form, that the executors and administrators of a deceased sharholder shall be the only persons recognised by the company as having any title to his shares, but it requires, as a condition precedent to recognition, the production of probate or letters of administration granted by the High Court of Bombay. It was suggested, in the course of the argument before this Board, that art. 9 was not in existence when the purchase agreement was made. That objection comes rather late. In the Courts below the case was argued on the footing that the articles printed in the Record were the relevant articles of the company. Nor indeed is the objection one of substance. It was part of the arrangement expressed in the agreement itself that the company should alter or modify their existing articles as they might be advised for the purpose of carrying out the agreement. It matters little whether the article in question was introduced for the very purpose of [6] the agreement or contained in the articles of association as originally framed.

The terms and conditions of the transfer of the business to the company are to be found in an agreement dated the 22nd July, 1864, which was ratified and adopted by the company in general meeting and carried into effect. The agreement is expressed to be made by Mr. Wallace of the first part, and five gentlemen, directors of the company, of the second part. Mr. Wallace, it seems, had concessions from the British Government, he had concessions from the King of Burmah, he had forest rights, saw mills, a large establishment and staff of workmen, ships under charter, and a number of pending contracts. The agreement was made on the faith of certain representations by Mr. Wallace as to the value of his business, and the nature and circumstances of the property which he proposed to hand over. After setting out these representations somewhat in detail the agreement proceeds as follows:—"And whereas the said parties hereto of the second part have made such enquiries as were in their power with regard to the said representations, and so far as such enquiries extended, the said representations appeared to be correct; but as to many of the matters about which the said representations were concerned the said parties hereto of the second part have been obliged to rely on such representations alone,it being of great

consequence for the interests as well of the said company as of the said William Wallace that some binding arrangement should be made with the least possible delay. And whereas it was considered by the said parties hereto that having regard to the great difficulty of estimating the value of the said forest operations, rights and grants of the said William Wallace and of the said trained establishment and goodwill, the interests as well of the company as of the said William Wallace would be best consulted by entering into the arrangement hereinafter in cl. 13 contained." Then cl. 12 provided that in consideration of the transfer of certain property, referred to as "the fixed assets," Mr. Wallace should be entitled to have allotted to him 100 shares in the company, of 2,500 rupees each, but at the same time it declared that the company should not be bound to give their consent to or recognise as valid any assignment of the [7] said 100 shares, or any of them, during a period of five years from the date of the registration of the company.

Clause 13, so far as material, is in these terms :—

"In consideration of the transfer by the said William Wallace to the company of the premises hereby agreed to be transferred (other than the said fixed assets and other than the premises mentioned in the clauses six, seven and nine)"—those premises consisted of timber already cut, live stock, stores and plant—"the said William Wallace, his executors or administrators shall be entitled so long as he or they shall hold the said one hundred shares to an extra or preferential dividend equal to one-third of such surplus net profits of the company as may remain in any year after paying a dividend at the rate of twelve per cent. per annum on the paid up amount of all shares in the company (including the said one hundred shares) and after setting apart from time to time out of such surplus profits as a reserved fund or to the credit or any reserved fund already created such sum as the directors of the company for the time being may in their discretion think fit."

That is a provision, not unintelligible and not unreasonable, by which, as the agreement states on the face of it, the interest of the purchasers as well as the interests of Mr. Wallace were intended to be consulted. Mr. Wallace was to receive payment for the goodwill of his business out of future profits, and in proportion to the amount of those profits. He would be paid handsomely if his representations proved correct. If they turned out to be incorrect it would be an advantage to the company to keep Mr. Wallace's name on the register, and to keep within their reach the shares which represented the purchase-money. It must have been obvious to both parties to the agreement that it was not unlikely to lead to difficulties and complications which might last for an indefinite time. It was, therefore, of importance to the company to have Mr. Wallace as a member, and to keep their hold on Mr. Wallace's shares for as long a time as possible. They were not bound to allow a transfer of his shares for five years; after that period they trusted, it seems, to the influence and operation of the inducement held out in the shape of an extra [8] dividend, leaving the duration of the arrangement to depend on the course of events.

Mr. Wallace is now dead. He died on the 28th of January, 1888. He left a will naming executors, two of whom survived him. His will has been proved in England by one of the executors. As the attorney of that executor, Mr. Smith, the plaintiff and respondent in this case, has obtained a grant of letters of administration, with the will annexed, from the High Court at Bombay. The letters of administration have been

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produced to the company, and they have recognised the title of the administrator by noting the letters of administration in the share register. The shares still stand in the name of Mr. Wallace; but it is not disputed, if it was not actually admitted, that all the testator's debts have been paid or satisfied.

The only question, if there be a question, is whether in these circumstances the extra dividend still continues to be payable. The appellants contend that the extra dividend is not payable now, because there is nobody who can be said to hold Mr. Wallace's shares. Mr. Wallace, they say, does not hold them, because he is dead; his executors do not hold them, because their names are not on the register. But then who does hold them? Certainly, no one else. And why are the shares not held by Mr. Wallace or his executors or administrators? There is no magic in the word "hold." Mr. Wallace's name is on the register. The company cannot remove it. As long as it is there the company are bound to credit the proper dividends to his holding, and to recognise the title of his legal personal representatives to receive any dividends which may be carried to his credit.

It was urged on behalf of the company that Mr. Wallace's estate ought to be wound up and distributed, and that some person ought to be put on the register in his own right; and they complain that, if the respondent's contention is correct, this extra dividend may go on for ever. The contention of the company is a singular one, and the complaint they make is no less singular. They complain that the attraction which they themselves held out is attractive still—only too attractive. They think it a hardship that the arrangement should continue when once it has [9] served their purpose. But it must be remembered that the scheme had a twofold object. It was designed for the protection of the company; it was also intended as a mode of payment for the goodwill. Why is the payment for goodwill to stop because Mr. Wallace's representations have proved correct and the provision is no longer needed for the protection of the Company?

But, say the company, if the executors would only do their duty to their beneficiaries under the will, or if the beneficiaries would kindly insist on their rights, the arrangement would come to an end, because the estate would be distributed, and the shares would be appropriated to persons beneficially entitled. What have the appellants to do with that? Naturally the beneficiaries are content with things as they are. How can the company avail themselves of any equities which the beneficiaries may have as between themselves and their trustees? The company are only concerned with the legal title to the shares; the legal title is that of Mr. Wallace, deceased; and his legal personal representatives are entitled to whatever may be payable in respect of his shares.

Their Lordships think that according to the true meaning of cl. 13, and the very letter of its terms, the shares in question are held by Mr. Wallace, or his executors or administrators. They will, therefore, humbly advise Her Majesty that this appeal should be dismissed.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellants:—Mr. *Edward F. Turner.*
Solicitors for the respondent:—Messrs. *Budd, Johnsons, and Jecks.*

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TESTAMENTARY JURISDICTION.

19 B. 10.

[10] TESTAMENTARY JURISDICTION.

Before Mr. Justice Farran and Mr. Justice Candy.

DAME JANBAI (*Original Plaintiff*), *Appellant v.* SALE MAHOMED JAFFERBHOY AND ALLI MAHOMED JAFFERHOY (*Original Defendants*), *Respondents.** [31st July, 1894.]

Civil Procedure Code (XIV of 1882), s. 608—Privy Council—Appeal to Privy Council —Decree—Stay of execution before appeal admitted—Practice—Procedure.

Where a petition for leave to appeal to the Privy Council from a decree of the High Court has been presented, the High Court may grant a stay of execution of its decree although the appeal has not yet been admitted under s. 603 of the Civil Procedure Code (XIV of 1882).

[Diss., 5 C.W.N. 562; 4 Ind. Cas. 106=20 M.L.J. 140=6 M.L.T. 309; R., 16 Ind. Cas. 845=6 S.L.R. 86.]

MOTION to stay execution of the decree of the appeal Court.

The plaintiff was the widow of Sir Tharia Thopan, a Khoja Mahomedan of Bombay. She brought this suit to obtain probate of the will of her deceased husband and of certain codicils, three of which were disputed by the defendants, who were nephews of the testator. On the 9th April, 1894, the appeal Court (Sargent, C.J., and Farran, J.) varied the decree of the lower Court and ordered probate to issue of the said will and codicils. The defendants (respondents) desired to appeal to the Privy Council, and presented their petition for leave to appeal under ss. 598 and 600 of the Civil Procedure Code (XIV of 1882), and notice of this petition was duly served on the plaintiff (appellant).

On the 14th May, 1894, before the appeal had been declared admitted (s. 603), or a certificate granted (s. 600), the defendants (respondents) gave notice to the plaintiff (appellant) that they would move "for an order that execution of the decree of the Court of appeal, dated the 9th day of April last, may be stayed, and that the Registrar be directed not to grant probate of the three codicils dated respectively the 12th January, 1890, 1st November, 1890, and 6th February, 1891, until the proposed appeal to Her Majesty in Council has been heard."

The motion now came on for hearing.

[11] *Anderson*, for the plaintiff (appellant).—As a preliminary point I object that this motion is premature. The respondents have no right to obtain a stay of execution until their appeal to the Privy Council has been admitted. At present they have not got leave to appeal. It is possible that they may not obtain the necessary leave. Section 608 of the Civil Procedure Code plainly contemplates a stay of execution only after the appeal has been admitted.

Inverarity, for the defendants (respondents), *contra*.

JUDGMENT.

FARRAN, J.—The appellant has obtained a decree from the appeal Court ordering that probate shall issue to her of the will and codicils of her deceased husband. The respondents desire to appeal to the Privy Council, and with that view have presented the necessary petition under s. 598 of the Code, but that petition has not yet come before the Court,

* Suit No. 24 of 1891.

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19 B. 10.

and their appeal has not yet been declared admitted. In that state of circumstances they move to stay the execution of the decree which the appellant (plaintiff) has obtained, and the question now raised by the appellant is whether the motion is not premature. On inquiry we find there have been two similar cases before the Court, and there may be others, as the search has not been exhaustive. Those brought to our notice favour the view that the Court at this stage has power to grant the application, but they are not sufficiently numerous to enable us to say that a course of practice has been established which would relieve us from considering the matter upon its merits. The question turns on the construction of s. 608 of the Civil Procedure Code. Does it preclude such an application as this until after the appeal has been admitted? We think not. The first clause of the section, referring to the admission of an appeal,—which must, we think, mean the final admission of the appeal under s. 603,—declares and enacts what the result of such admission is in the absence of directions to the contrary: the decree notwithstanding such admission shall be unconditionally enforced. The words "admitting the appeal" following the word "Court" in the same clause has, we think, no reference to the time when the Court is to give directions, but are descriptive of the Court which is to give them. They compendiously describe the Court **[12]** referred to in s. 598, *viz.*, the Court whose decree is complained of. Then follow the remaining clauses of the s. (608). They enable "the Court," *viz.*, the Court "admitting the appeal," or in other words "the Court whose decree is complained of," to take steps to impose conditions and to give directions as to the execution of the decree sought to be appealed from, but they impose no limitation as to time upon the exercise by such Court of its powers. Nor is there any reason why they should. As to the power of impounding moveable property, it is plain that to be of avail it must be exercised at a very early stage. The same principle must be applied to all. This Court then being the Court admitting the appeal, and not being limited as to time in the exercise of its powers can, if it thinks fit, exercise its powers as to staying execution at the present time. We are, therefore, of opinion that we have jurisdiction now to hear the application, and that it is not premature, though the appeal has not been admitted.

Attorneys for appellant.—Messrs. *Roughton and Byrne.*

Attorneys for respondents:—Messrs. *Little, Smith Nicholson and Bowen.*

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19 B. 12.

ORIGINAL CIVIL.

Before Mr. Justice Candy.

GOKULDAS MUCCANJI (*Plaintiff*) *v.* VASSANJI JAIRAM AND OTHERS (*Defendants.*)* [31st July, 1894.]

Deed—Creditors' trust deed— Assignment of all his property by debtor to trustees for payment of creditors—Suit by creditor who had signed as creditor and as trustee to recover his debt notwithstanding the deed.

On the 30th March, 1894, the plaintiff sued the defendant, who traded under the name of Vasanji Jairam, to recover Rs. 7,705 due on an adjusted account. On the 17th April following the suit was on the Board for hearing, but by consent of

* Suit No. 129 of 1894.

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parties was adjourned for three months. Later on the same day the defendant executed a deed whereby he assigned all his property to the plaintiff and three other persons as trustees in trust for the payment of his creditors. The deed was executed by the plaintiff and the other trustees both as trustees and as creditors. It contained no release and no agreement by the creditors to take less than the full amount of their debts. It conveyed all the defendant's property to the trustee, who was to collect the estate and divide it rateably among the creditors "without prejudice to the rights of the several creditors to recover" the balance (if any) which might [13] remain due to them after receiving such rateable distribution, and it declared that the said agreement for the payment of the debts was accepted by the creditors, and that "upon payment to the said creditors, respectively, of the full or whole amount of their respective claims these presents shall operate as fully and effectually as an order of discharge from the Insolvent Court in respect of the debts now due from the said debtor, or the said firm of Vassanji Jairam, to the said creditors respectively, and may be pleaded in bar to any claim in respect of such debts; and each of them the said creditors for himself, his heirs, executors and administrators doth hereby covenant with the said debtor, his heirs, executors and administrators that he or they will not, if the said debtor shall pay the said full amount of the debts due by him or his said firm of Vassanji Jairam to the said creditors, bring any action, suit or proceeding against them or any of them for or in respect of the debts now due from the said debtor or the said firm of Vassanji Jairam to the said creditors respectively." On the execution of this deed the trustees took possession of defendant's books of accounts, and proceeded to recover the defendant's estate.

The three months for which, as above mentioned, the suit was adjourned in April, 1894, having now expired, it came on for hearing. The defendant pleaded the deed, and contended that the plaintiff having accepted the trust, and signed the deed, was not entitled to continue the suit against him.

Held, that it would be inequitable that the defendant having handed over all his property to four of his creditors as trustees with a view to the payment of his debts in full should be harassed by one of those creditors who had accepted the trust. The conduct of the plaintiff had been such as to deprive him of the right to present payment of his debt except by the assignment made to him and the other trustees. There had been a concluded agreement which precluded him from proceeding with his suit, and to allow him to proceed would be a fraud on the creditors. Under the circumstances there was an implied condition that the creditors should not sue until their remedy under the assignment was exhausted. The creditors should get what they could under the assignment, and then proceed for the rest.

THE plaintiff sued the defendant to recover the sum of Rs. 7,705 due upon an adjusted account dated 9th November, 1893. The suit was filed in March, 1894, and now came on for hearing as a short cause.

The defendant pleaded that on the 17th April, 1894, he had made over all his property to the plaintiff and three other creditors as trustees for the rateable distribution thereof among all his creditors, and that the plaintiff had accepted the said trust and, with the other trustees, had signed the deed. He contended that under these circumstances the plaintiff was not entitled to continue the suit against him or to get a decree.

In the 4th and 5th paragraphs of his written statement he further alleged that in respect of certain partnership transactions [14] he had cross claims against the plaintiff which ought to be set off against the plaintiffs' claim in this suit.

The deed in question was made between the defendant Vassanji Jairam, called "the debtor," of the first part; the plaintiff and three other persons, called "the trustees," of the second part; and "the several persons and firm's creditors of the firm of Vassanji Jairam, whose names are herewith affixed and hereinafter designated the said creditors, of the third part," and it contained (*inter alia*) the following recitals:—

"And whereas the said Vassanji Jairam being pressed has, as partner of the said firm of Vassanji Jairam, agreed to pay the said creditors the

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amount of their respective claims out of the assets of the said firm of Vassanji Jairam, so far as the said assets will extend, rateably in proportion to the respective claims of the said creditors and to secure such payment or composition by a grant and assignment of all the moveable and immoveable properties, estate and effects unto the said trustees, their executors, administrators and assigns upon the trusts hereinafter appearing for the realization of such estate and effects and the payment out of the proceeds thereof of the said rateable distribution or composition and by the covenant of the said trustees hereinafter contained to pay to the said creditors the said rateable distribution or composition; And whereas it has been agreed that the said arrangement shall be without prejudice to the rights of the said several creditors to recover from the said Vassanji Jairam and Gokuldas Meghji and their personal property the balance which may remain due to them after payment of the rateable distribution payable to them out of the said firm of Vassanji Jairam; And whereas the said creditors have agreed to the said proposal of the said debtor and to accept the said rateable distribution or composition and further payment of the balance of the said claims as is hereinbefore recited, and on payment thereof to give to the members of the said firm of Vassanji Jairam such release from the respective debts due to them the said creditors respectively as is hereinafter contained, &c."

The deed then "in pursuance of the said agreement" assigned to the trustees all the assets of the firm of Vassanji Jairam "and all other property of the said debtors" upon trust to recover and realise all the said assets and property and out of the same to pay the creditors rateably in proportion to the amount of their respective debts. It further contained (*inter alia*) the following clauses:—

"And the said trustees hereby for themselves and their heirs, executors and administrators covenant with each of the said creditors respectively and their respective executors, administrators and assigns that they the said trustees, their executors or administrators shall and will out of the net proceeds of the said sale, collection and conversion into money hereinbefore directed to be made, pay to each creditor the rateable distribution or composition payable to them on the amount [15] of their respective debts. And it is hereby agreed and declared that these presents are without prejudice to the rights of the said several creditors to recover the balance, if any, which may remain due to them (after receiving payment of the said rateable distribution or composition from the assets of the said firm of Vassanji Jairam) from the said debtor and the said Gokuldas Meghji personally, or from the personal estate and effects of the said Vassanji Jairam and Gokuldas Meghji. And the said debtor doth hereby for himself, his heirs, executors, and administrators, and for the said firm of Vassanji Jairam covenant with said trustees, their executors, administrators or assigns that he the said debtor now hath good right and power to assign the said premises in manner aforesaid. And this indenture also witnesseth that in consideration of the premises it is hereby agreed and declared that the said arrangement hereinbefore contained for payment of the debts due to the said creditors by the said debtor shall be and the same is hereby agreed to be accepted by the said creditors, and that upon payment to the said creditors respectively of the full or whole amount of their respective claims, these presents shall operate as fully and effectually as an order of discharge from the Insolvent Court in respect of the debts now due from the said debtor or the said firm of Vassanji Jairam to the said creditors respectively and may be pleaded in bar to any claim in respect of such

debts. And each of them the said creditors for himself, his heirs, executors and administrators doth hereby covenant with the said debtor, his heirs, executors and administrators that he or they will not, if the said debtor shall pay the said full amount of the debts due by him or his said firm of Vassanji Jairam to the said creditors, bring any action, suit or proceeding against them or any of them for or in respect of the debts now due from the said debtor or the said firm of Vassanji Jairam to the said creditors respectively."

The deed was duly signed by the plaintiff and the three other trustees as trustees, and was also signed by them as creditors.

At the hearing the material issues were whether, having regard to the provisions of the above deed, the plaintiff could maintain this suit, and whether, in case the alleged partnership transactions were proved, the defendant was in this suit entitled to have the accounts taken, and to set off any amount which might be found due to him.

It appeared that this suit had been on the board for hearing on the morning of the day the above deed was signed, but that by consent of the parties it was postponed for three months, and later on that day the deed was executed.

The plaintiff gave evidence and stated that he had not agreed to abandon this suit, but merely to postpone the hearing. Evidence was also given that on execution of the deed the trustees had taken possession of the defendants' books and had [16] filed suits to recover the defendants' outstandings. Only a sum of Rs. 348 had been as yet recovered, and other suits would be necessary.

Inverarity for plaintiff:—The plaintiff is entitled to get a decree. This suit was filed before the execution of the deed, and the plaintiff never agreed to abandon it. The deed is not a composition deed. It contains no release, and no covenant to take less than the full debt. The Court cannot stay the suit though perhaps it may stay the execution of the decree. He commentod on the terms of the deed, and cited the *Ipstones Iron Ore Co* v. *Pattinson* (1); *Clarke* v. *Williams* (2); *Eyre* v. *Archer* (3); Civil Procedure Code (XIV of 1882), s. 243. No set-off could be permitted in this suit—Civil Procedure Code, s. 111.

Kirkpatrick, for defendant:—It would be inequitable to pass a decree when the defendant has given over all his property to the trustees for distribution. The trustees themselves are empowered by the deed to recover his property, and are actually doing so—Robson on Bankruptcy (6th Ed.), pp. 254, 780, 794; *Norman* v. *Thompson* (4); *Kheta Mal* v. *Chuni Lal* (5). As to set-off, he cited *Niaz Gul Khan* v. *Durga Prasad* (6); *G. Chisolm* v. *Gopal Chunder Sarma* (7.)

JUDGMENT.

CANDY, J.—This is a suit filed on the 30th March, 1894, by Gokuldas Muccanji against Vassanji Jairam and Gokuldas Meghji trading under the name and firm of Vassanji Jairam, on an account signed by the defendant on 9th November, 1893, when the amount of Rs. 7,705-10-3 was found due.

The written statement of the defendants filed on 30th July, 1894, the day before the hearing of this suit, raised two defences, *viz.*, (*a*) first,

(1) 2 H. & C. 828 (833). (2) 3 H. & C. 508. (3) 16 C.B. (N.S.) 638.
(4) 4 Ex. 755. (5) 2 A. 173. (6) 15 A. 9.
(7) 16 C. 711.

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that by a deed made on 17th April, 1894, the plaintiff and three other creditors of the defendants were appointed trustees of the estate and effects of the defendants, with power to realise the same and to pay the creditors of the defendants the amount of their claims, it being provided by the said deed that until such estate and effects were collected, no suit should be [17] maintained or instituted against the defendants. (*b*) Second, that plaintiff and defendants were partners in any business in cotton which either plaintiff or defendants should do, and that on an account being taken of their partnership transactions it would be found that a large sum was due to defendants from plaintiff; and this the defendants claimed to set off.

This second plea was also used as an argument by the Advocate-General for transferring the case to the long-cause list. But I disallowed the plea, it being admitted by the Advocate-General that the alleged partnership transactions were distinct from the signed and adjusted account which forms the subject-matter of the present suit. No "ascertained sum of money" was claimed, no particulars of the debt sought to be set off tendered: so s. 111 of the Civil Procedure Code (XIV of 1882) was not applicable. Nor was this an equitable set-off independently of the provisions of that section, for the cross-demands do not arise out of one and the same transaction, nor are they so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit.

For the same reason, when the case came on for hearing, I intimated that it was not open to defendants in the present suit to prove the allegations in the 4th or 5th paras. of the written statement, because the alleged partnership had no connection with the two specific accounts which were adjusted by the settlement of 9th November, 1893. This disposes of the second and third issues.

There remains the first and the most important issue, whether, having regard to the deed above mentioned, this suit is maintainable,—that is, whether the deed can be pleaded in bar to the present action.

Mr. Inverarity, for plaintiff, contended that the deed did not apply to a suit filed before the deed was executed, and that the first defendant had failed to fulfil his covenant according to the deed: further, that the deed contained no release, and that it was worthless, because the first defendant denied the deed, while the second defendant was wrongly omitted therefrom. Counsel [18] quoted *Ipstones Park Iron Ore Co.* v. *Pattinson* (1), *Clarke* v. *Williams* (2), and *Eyre* v. *Archer* (3).

Mr. Kirkpatrick, in support of the plea of the defendant, referred to Robson on Bankruptcy (6th Ed.), pp. 254, 780, 794, and quoted *Norman* v. *Thompson* (4) and *Kheta Mal* v. *Chuni Lal* (5).

In the last noted case the debtor and some of his creditors, including the plaintiff, agreed to an award made by arbitrators, by which the debtor was expressly released from certain debts. The plaintiff received certain payments under that award. It was held that if creditors who had not signed the award obtained decrees, the creditors who had signed it could only protect themselves under the terms of the award. They could not rescind the award, and fall back on their old debts in satisfaction of which the debtor had assigned all his property for the benefit of his creditors. The acceptance by one or more of the creditors of the assignment by the debtor of all his estate deprived them of all further

(1) 2 H. & C. 828 (833).
(2) 3 H. & C. 508.
(3) 16 C. B. (N. S.) 638.
(4) 4 Ex. 755.
(5) 2 A. 173.

relief against the debtor. Plaintiff being one of the creditors who accepted that mode of settlement was bound by it, and could not recover any balance that might remain over after the event of the award in the arbitration proceedings.

So here it is contended that if the plaintiff has accepted the settlement evidenced by the deed in question, and if that deed releases defendants so as to bar any present recovery of the debt due to plaintiff except by the settlement, then this suit cannot now be maintained. Thus the important question will be, what are the exact terms of that settlement?

In *Norman* v. *Thompson* (1) the question was one of pleading, *viz.*, whether there was a variance between the plea and the facts found in the special verdict; but Mr. Kirkpatrick quoted the case as an authority for the proposition that an agreement by two or more of the creditors to enter into a composition is perfectly good and binding as to such parties, whether the others do so or not. In the present case it is not contended that the deed is invalid because all the creditors have not yet signed it. Plaintiff has signed it, and (it is said) has acted under it. It may be remarked **[19]** that in *Norman* v. *Thompson* (1) the composition was to accept from the debtor, in certain instalments, the sum of 10*s.* in the pound in full satisfaction and discharge of the creditors' respective debts and demands, and the defendant pleaded that he was ready and willing to pay the instalments at the time and place so appointed for the payment thereof. Such an agreement, no doubt, may be pleaded by the debtor by way of accord and satisfaction as a defence to an action by one of the compounding creditors for the original debt. So, too, where a creditor undertook to accept a composition and to sign a composition deed with a clause of release, and where everything on the debtor's part was done, it was held that there was both accord and satisfaction which could be pleaded in bar of an action for the original debt—*Bradley* v. *Gregory* (2).

The cases quoted by the learned counsel for the plaintiff have special reference to the English Bankruptcy Act of 1861. Thus in the *Ipstones Park Iron Ore Co.* v. *Pattinson* (3) it was held that a deed under the 192nd section of that Act does not operate as a statutable release of the debtor, pleadable in bar of an action by a creditor, and the debtor can only avail himself of it by application to the Court of Bankruptcy to stay the proceedings, or after certificate by application to the Court, in which judgment has been obtained, to stay execution. I did not understand Mr. Inverarity to contend that the only way in which defendants in the present suit could avail themselves of the deed was by application to the Court of Insolvency in Bombay to stay proceedings, or, after certificate obtained in that Court by application to this Court, to stay execution. On the contrary he contended that the only way in which stay of execution could be obtained was under s. 243 of the Civil Procedure Code (XIV of 1882), and that that section was not applicable in the present case.

The point to be noticed in the case just quoted is that the question was whether the deed could be pleaded as a *statutable* release. As the deed did not contain any provisions by which the creditors, in addition to a covenant not to sue, had agreed that, **[20]** if they did sue, the deed might be pleaded as a release, the only question was whether the statute, under which the deed purported to have been executed, made the deed operate as a bar to an action. The Court said—no; the relief indicated

(1) 4 Ex. 755. (2) 2 Camp. 383. (3) 2 H. & C. 828.

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by the Legislature is by application to the Court of Bankruptcy, and so forth.

In the present case, the deed is not put forward as a *statutable* bar to the action. It is unnecessary, therefore, to further consider the above case, or that of *Clarke* v. *Williams* (1), in which the judgment of the Court was simply based on the cases of *Eyre* v. *Archer* and the *Ipstones Park Iron Ore Co.* v. *Pattinson*; and as was subsequently pointed out in *Garrod* v. *Simpson* (2) "in *Eyre* v. *Archer*, the deed was in the form of sch. D of the Bankruptcy Act, 1861, and was, therefore, a mere assignment and not a composition deed. In the deed in the *Ipstones Park Iron Ore Co.* v. *Pattinson* there was an agreement by the creditors to accept a particular composition, as well as an assignment by the debtor; but there was no allegation of tender. The question argued and decided was, whether the plea was good as a statutable release, and not whether, if it had averred a tender, it would have been good."

It may be remarked that the judgment in *Clarke* v. *Williams* (referred to above) was subsequently affirmed in the Exchequer Chamber (3), on the ground that the deed which operates under the Bankruptcy Act, 1861, is no bar to an action unless the statute makes it so. During the course of the argument Willes, J., remarked: "Suppose an assignment by a debtor of all his estate and effects to trustees to pay his creditors rateably, would there be an implied condition that they should not sue the debtor?" And Crompton, J., in his judgment said: "At common law this deed would not have afforded a defence to the action. Where a debtor assigns all his property to trustees for the benefit of his creditors, any creditor has a right to get what he can under the assignment and proceed for the rest. In deeds under the Bankruptcy Act, 1861, the requisite majority in number and value of creditors binds the rest: but they are only bound according to the terms **[21]** of the deed. This deed contains no release. Neither does it come within the principles of the decision in *Clapham* v. *Atkinson* (4) and other cases in which a composition deed has been held a bar to an action. Nor is it within that class of cases in which a composition deed is pleadable by way of accord and satisfaction."

Thus the question in the present case is, whether, apart from any statute, the defendants can plead that the effect of the deed is to bar the plaintiff's action?

The deed is to the following effect:—It recites that it is between the present defendants on the one part, four trustees of the second part (whose names are given, plaintiff being one of them), and the creditors of the defendant's firm of the third part ("whose names and seals are hereunto set and affixed"): that whereas Gokuldas (second defendant) retired from the firm and Vassanji (first defendant) is the only remaining partner; and he has agreed to pay the creditors the amount of their respective claims rateably out of the assets of the firm, without prejudice to the right of the creditors to recover the balances due to them after the rateable distribution, and the creditors have agreed on payment of such rateable distribution or composition and further payment to give a release to the members of the firm; in pursuance of the said agreement Vassanji conveys to the trustees the property described in the schedule, as also the personal or moveable estate and property of the firm and all other property of Vassanji, in trust to collect the estate and divide it rateably amongst the

(1) 3 H. & C. 508.
(2) 34 L. J. Ex. 70.
(3) 3 H. & C. 1001.
(4) 4 B. & S. 722.

creditors of the firm, without prejudice to the rights of the creditors to recover the balances (if any due to them) from Vassanji and Gokuldas; and it is agreed that the said agreement for payment of the debts is accepted by the creditors, and upon payment to them of the full or whole of their respective claims, these presents shall operate as fully and effectually as an order of discharge from the Insolvent Court in respect of the debts now due, and may be pleaded in bar to any claim in respect of such debts: and the creditors covenant that if the debtor shall pay the full amount of the debts, they will not bring any action, suit or proceeding in respect of the debts.

[22] This deed was signed and sealed by Vassanji and the four trustees one of whom is the plaintiff. There is a schedule describing certain property, and there is a list with columns to show "names of creditors," "amount due to each creditor," "signature of crditors," "witnesses." In the third column the four trustees have signed as creditors. No other creditor has signed, and there is no entry in the other columns.

It is admitted that the managing trustee is in possession of defendants' accounts; that the trustees have filed one suit to recover a debt due to defendants; that they will have to file other suits, and that they have collected Rs. 348 as part of the estate of the firm.

On these facts as between the present plaintiff and defendants, I hold that it is not open to plaintiff to contend that the deed is inoperative because the defendants have contested the present suit, or because the second defendant has not signed the deed. Defendants have not denied the signed and adjusted account, and the second defendant has joined in admitting in the present suit the validity of the deed. Defendants have done all that is in their power to do, and they can plead the deed if it is really in their favour. But the question is whether the terms of the deed are such that it can be pleaded as a bar to the action.

Now it must be noticed that the present action was filed before the deed was executed. The suit was called on for hearing on the 17th April, 1894, the very day on which the deed was executed, and was adjourned by consent for three months; and there is not any record of any application being made for adjournment on the grouud that the parties were intending to execute a deed of assignment, the effect of which would be that this action could not proceed further. On the contrary, it is clear, from the solicitor's letter and plaintiff's deposition, that all that was intended was a settlement out of Court,—that is, a payment of the whole or part of the debt.

Further, it is clear that the only mention of any covenant not to sue is to be found in the concluding portion of the deed, which recites that upon payment of the whole of the respective claims of the creditors these presents may be pleaded in bar to any claim **[23]** in respect of such debts, and the creditors covenant that they will not, if the said debtor, his heirs, executors and administrators shall pay the said full amount of the debts due by him or the said firm to the said creditors, bring any action, suit or proceeding against them or any of them for or in respect of the debts now due from the said debtor or the said firm to the said creditors respectively.

It is fairly argued that if the deed was intended to operate as a bar to any action, clear language to that effect would have been used; that by covenanting not to sue *after* full payment, the right to sue *before* full payment was clearly not taken away; that this is not a composition deed

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by which the creditors agreed to accept a certain composition in full satisfaction of their claim, but simply an assignment deed by which the debtor conveyed all his property to four of his creditors as trustees to pay his debts rateably out of the assets, leaving the creditors free to sue for the balance (if any) of such debts, and only debarring them from suing when payment had been made in full.

On the other hand, it may be argued that the covenant not to sue on full payment was surplusage. If the debt is paid, that is a bar, the debt being extinguished. So, too, if it is released. But it is quite possible that here, though the debt has not been paid or released, the creditor's right to sue may be suspended. In the *Ipstones Park Iron Ore Co.* v. *Pattinson* (*supra*) the judgment of Pollock, C. B., was "although a debtor, who has effected an arrangement with his creditors, is entitled to protection," it was clear with reference to the language of the Bankruptcy Act under which the arrangement was made, and by analogy to proceedings under former Bankruptcy Acts, that protection can only be given in a particular way, and not by pleading the deed of arrangement in bar of an action filed by a creditor. Pigott, B., in his judgment, said: "No doubt there is a seeming anomaly in leaving a debtor to be harassed with actions after he has assigned all his property to trustees for the benefit of his creditors. But I suppose the Legislature thought that such actions would not be brought without good reason." This is illustrated by a remark of Channell, B., that such a deed under the Bankruptcy Act "has the beneficial effect of deterring creditors from harassing the [24] debtor with actions; for the object of a creditor in suing is not merely to obtain judgment, but to get the fruit of it, and he knows that if the proceedings under a deed of this kind are carried out, and the debtor obtains a certificate, the judgment is inoperative."

But here the deed is not under any statute, which provides a remedy or protection for the debtor in a particular way. The seeming anomaly still exists. The learned counsel for plaintiff did not pretend that he would be contented with a bare judgment, or that he could be prevented from getting the fruits of it.

Is it equitable that the defendants, having handed over all their property to four of their creditors as trustees with a view to a payment of their debts in full, should be harassed with an action by one of those creditors who has accepted the trust? *Tatlock* v. *Smith* (1) is a strong case in support of this argument in favour of defendants. In that case by an agreement between the defendants and their creditors, all defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to the trustees a conveyance of all their estate. The trustees carried on defendants' business and paid the creditors 10*s.* in the pound. Tindal, C. J., said "This agreement seems, by its terms, to contemplate a suspension of the right of action on the part of the creditors, and in our judgment that suspension still continues." Then after reciting the terms of the deed he says: "This of itself implies, that the trustees are to take the defendants' tangible property for the payment of their debts. They have taken it and they have made payments to the extent of 10*s.* in the pound. Is it reasonable that debtors who have surrendered so much, and have thereby deprived themselves of any other mode of effecting payment, should remain liable to hostile proceedings at the suit of their creditors? Their situation itself seems to preclude the possibility of any such intendment."

(1) 6 Bing. 339.

Parke, J., said: "On the face of this agreement certain things are to be done which plainly imply a suspension of the creditors' right to sue, and there is no evidence of anything having occurred to remit them to their rights."

[25] So, too, in *Good* v. *Cheesman* (1) it was held that an agreement by creditors to accept payment by the debtor agreeing to pay to a trustee one-third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof, amounted to a consent to forbear enforcing their demands. During the argument, reference was made to *Heathcote* v. *Crookshanks* (2) and Littledale, J., remarked: "It was observed by Buller, J., there that no fund was appropriated for the payment of the debt; and that if the debtor had assigned over all his effects to a trustee for distribution among the creditors, that would have been a good consideration for a promise of forbearance;" and Parke, J., said: "It did not appear by the pleadings in that case that the creditors agreed to forbear. Here it may be inferred that they did."

Again in *Garrard* v. *Woolner* (3), where the plaintiff and other creditors of the defendants signed resolutions for entering into a composition deed with the defendants upon their property being assigned to trustees for the payment of the creditors, and where the defendants and their trustees refused to allow the plaintiff to come in as a creditor under the deed, it was held that he might sue defendants notwithstanding the execution of the resolutions. Tindal, J., said: "The defendants contend that a party who concurs in resolutions for the distribution of the property of his debtor brings himself within the operation of a subsequent deed by which the debtor's property is assigned for the benefit of the creditors at large, and that his separate right is thereby suspended till the creditors are satisfied, or at least placed in the situation in which they originally stood. *As a general proposition this is true.*" So here, though there is no composition or release, and no covenant not to sue, except when full payment has been made of the debts, it would be a fraud on the other creditors if the plaintiff was permitted to go on with the present suit. A century ago Lord Kenyon enunciated the principle upon which such an action could not be maintained. In *Butler* v. *Rhodes* (4) the debtor had proposed to pay his creditors a composition, and for that purpose to execute an assignment of all his effects to trustees for their benefit. Plaintiff and one of the **[26]** creditors assented, but subsequently refused to sign the deed and brought an action to recover the whole of his demand. Lord Kenyon ruled that the evidence was a complete answer to the plaintiff's answer. He said:—

"The principle upon which the action could not be maintained was, that in consequence of this act of the plaintiff's, the defendant had parted with all his property, and the other creditors had been induced to execute the deed: that this was putting the defendant into a very awkward situation, as by assigning all his property he was committing an act of bankruptcy: that it, therefore, never should be allowed to the plaintiff to recede from what he had undertaken, and to evade the effect of the composition, by a refusal to execute the deed which had been prepared with his consent."

So in the present case, admitting that defendant's plea, that the deed expressly provided that until the estate was collected no suit by a creditor should be maintained, is incorrect, and admitting that it is doubtful whether the debtors at first had any clear idea on the point, and possibly thought

(1) 2 B. & Ad. 328. (2) 2 T.R. 24. (3) 8 Bing. 258. (4) 1 Esp. 235.

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that they were bound to meet the plaintiff's action by at once paying the debt; admitting that the present suit was filed before the deed was executed, still in my opinion the defendants are entitled to set up any equitable defence which they may have to the action. If the conduct of the creditor has been such as to deprive him of the right to the present payment of the debt except by the assignment made to him and the other trustees, then the suit must be dismissed. There has been a concluded agreement—not a mere preliminary step—which precludes the plaintiff from proceeding with this action. To allow him to proceed would amount to a fraud on the other creditors. With reference to the remarks, above noted, of Willes and Crompton, JJ., in *Clarke* v. *Williams*, I would say that under circumstances such as are found in the present case, there is an implied condition that the creditors shall not sue the debtor till their remedy under the assignment is exhausted. The creditors must get what they can under the assignment and then proceed for the rest. For these reasons I find on the first issue in favour of the defendants, and dismiss the suit with costs.

Suit dismissed.

Attorneys for the plaintiff :—Messrs. *Pestanji, Rustim and Kola.*
Attorneys for the defendants :—Messrs. *Brown and Moir.*

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[27] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

DAVE HARISHANKAR AND ANOTHER (*Original Plaintiffs*), *Appellants* v. THE TOWN MUNICIPALITY OF UMRETH (*Original Defendant*), *Respondent.** [15th December, 1893.]

Municipality—Municipal Act (VI of 1873), s. 33, cl. 1—Notice of proposed building—Want of such notice—Want of permission to build—Demolition of building.

On the 18th August, 1890, plaintiffs sent a notice to the Town Municipality of Umreth, intimating their intention to erect a building on their land, and giving a rough sketch plan of the land intended to be built upon. In this notice plaintiffs did not expressly state their intention to build the wall in dispute.

On the 28th August, 1890, the Municipality wrote to the plaintiffs, requiring them to furnish a plan showing the design of the proposed building with its measurements.

On 30th September, 1890, the plaintiffs, without furnishing the plan as required, built a wall on their land. Thereupon the Municipality gave a notice to the plaintiffs requiring them to pull it down, as it had been built without their permission. The plaintiffs having failed to comply with this notice, the wall was demolished, and its materials were carried away by the municipal servants. Thereupon the plaintiffs sued the Municipality to recover damages for the wrongful demolition of the wall.

Held, that the plaintiffs had contravened the provisions of cl. 1 of s. 33 of Bombay Act VI of 1873, inasmuch as they had built the wall without giving any notice, or (if they did give notice) without affording the information required by the Municipality. The Municipality were, therefore, justified in ordering the wall to be demolished.

[F., 2 Bom. L.R. 572; D., 27 B. 221.]

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* Second Appeal, No. 459 of 1892.

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SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad, in appeal No. 271 of 1891 of the District file.

This action was instituted by plaintiffs to recover damages from the Town Municipality of Umreth for the wrongful removal of a wall erected by them on their private ground.

The undisputed facts of the case were as follows :—

On the 18th August, 1890, the plaintiffs sent a notice to the municipal secretary, intimating their intention to erect a building upon their land, and giving a rough sketch plan of the land intended to be built upon.

[28] On the 28th August, 1890, the municipal secretary wrote, in reply, that the plaintiffs should within ten days produce the title-deeds of their property, and a plan showing the form of the intended building with its measurements and should abstain from constructing any work until permission was granted.

On the 7th September, 1890, the plaintiffs informed the Municipality that they had sent a copy of their title-deeds with a municipal karkun, and that the form of the proposed building together with its measurements had been sufficiently set forth in their notice of the 18th August, 1890.

On the 30th September, 1890, plaintiffs erected the wall in question upon their land.

On the 9th October, 1890, the managing committee passed a resolution to the effect that as the wall had been built without permission, a notice should be given to demolish the wall within ten days. A notice was accordingly given to the plaintiffs to pull down the wall.

On the 16th November, 1890, the wall was demolished, and its materials were carried away, by municipal workmen.

The plaintiffs thereupon filed the present suit to recover damages from the Municipality for the wrongful removal of their wall.

The municipality pleaded (*inter alia*) that the plaintiffs had been required under s. 33 of the Bombay District Municipal Act (VI of 1873) to furnish a plan showing the limits and the form of the proposed building; that they did not comply with this notice ; and that they were not entitled to build without permission.

The Subordinate Judge held that the wall had been built without notice, and without furnishing the information required by the Municipality under cl. 1 of s. 33 of Bombay Act VI of 1873, and that the Municipality under s. 78 had a right to demolish it. The plaintiffs' claim was, therefore, rejected with costs.

On appeal, the District Judge was of opinion that the plaintiffs had no authority to build without fulfilling the conditions laid down by the Municipality. The Municipality were, therefore [29] justified in ordering the removal of the wall under s. 48 of Bombay Act VI of 1873. The decree of the Subordinate Judge was confirmed with costs.

Against this decision the plaintiffs appealed to the High Court.

Nagindas Tulsidas (with him *G. K. Parekh*) for appellants (plaintiffs):—The lower Court erred in treating this case as one of encroachment in a public street. Neither party to this suit contends that the wall in dispute encroached on a public street. Section 48 of Bombay Act VI of 1873 has, therefore, no application. The action of the Municipality can only be justified under s. 33 of the Act. But we have complied with the requirements of that section.

G. M. Tripathi for respondents :—The plaintiffs have not acted in accordance with s. 33 of the Act. They have neither obtained permission

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to build, nor furnished the information required by the Municipality. In their first notice, there is not a word about their intention to build the wall in question. There was, therefore, no notice of the building of this wall. But assuming that the wall was a part of the proposed building, they refused to furnish the plan as required by the Municipality. We were, therefore, justified in pulling down the wall.

JUDGMENT.

PARSONS, J.—Both the lower Courts agree that under s. 33 of the District Municipal Act the defendants had the power to require the wall built by the plaintiffs to be demolished. Both, however, have quoted a wrong section as justifying the demolition. The District Judge says: "Build, however, they did without showing their title to the land, and consequently the Municipality removed the building under the provisions of s. 48. In this action they were acting within their legal rights." As, however, there was no finding, and no allegation even, that the plaintiffs built their wall in a public street, the District Judge was wrong in holding that the defendants were justified under s. 48 of the District Municipal Act in removing it.

The Subordinate Judge says that "the wall in question was built without notice, and also without affording the information [30] required by the managing committee under cl. 1 of s. 33. The defendant Municipality had, therefore, power to require the plaintiffs to demolish it. That not having been done, they were empowered by law under s. 78 to have it demolished." Section 78, however, only enacts that the occupier, in default of the owner, may execute works, and it has no bearing on the case at all. It is the second clause of s. 75 which applies to the case of non-compliance with a notice under s. 33 as expressly therein stated.

The effect, however, of both the decisions is the same. They both support a demolition, the illegality of which is alleged by the plaintiffs. The facts are these. The plaintiff sent the defendants a notice of their intended building on the 18th August, 1890. In that they gave a rough sketch plan of the land intended to be built on, but they did not show the wall in question, or state any intention of building it. On the 28th August the defendants asked the plaintiffs to furnish their title-deeds and a full plan showing the form of the intended building with its measurements, and to abstain from building until their permission was granted. On the 7th September the plaintiffs sent a copy of one deed of title, and said that sufficient information of the building had been given in their first notice. No notice of that letter was taken by the defendants, and on the 30th September the plaintiffs erected the wall in question. This having come to the knowledge of the defendants, a notice was on the 9th October given to the plaintiffs requiring them to demolish the wall within ten days, as it was built without permission. The plaintiffs ineffectually remonstrated against this order and failed to obey it. On the 16th November the defendants demolished the wall.

The point, therefore, is, whether in building the wall the plaintiffs contravened the provisions of s. 33 so as to justify the action of the defendants in demolishing it. It is clear that the defendants had no right to ask the plaintiffs for any title deeds—*In re Jamnadas Dulabdas* (1). They had a right, however, to ask for a plan and to refuse permission to build till the plan was furnished. Whether, had the plaintiffs built after

(1) 15 B. 516.

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the expiry of a month from the date of their letter of the 7th [31] September, they would have been within their rights, is not a point that need be considered in the present case, because they began to build their wall before the month had expired. By so building it is clear that they contravened the section if any notice at all was required. It is not a part of the plaintiffs' case that no notice was required. It is evident from the pleadings that the wall either was a part of the building which the plaintiffs proposed to erect, or was a building in itself as defined in the Act. The plaintiffs rely on the assertion that the notice they gave was a sufficient one, but both the Courts below have found against them on this point, and we think that they were quite right in that decision. For these reasons we confirm the decree with costs.

CANDY, J.—The District Judge was mistaken in thinking that the Municipality removed the wall in question under s. 48 of the Bombay District Municipal Act. That section (as the District Judge remarked) empowers a Municipality to remove all obstructions in any public street. But neither side in the present case alleged that the wall was erected in a public street.

However, the facts, as to which there is no dispute, are sufficient to support the finding recorded by the District Judge on the only issue raised before him, *viz.*, whether the Municipality had authority to remove the wall erected by the plaintiffs. The decision of that issue depends upon the question whether in building the wall the plaintiffs contravened the provisions of s. 33 of the Municipal Act, so as to justify the Municipality in issuing the notice, dated 9th October, requiring the plaintiffs to demolish the wall within ten days, as it was built without permission. If that notice was according to law, then, on the plaintiffs refusing to comply with its terms, the Municipality under cl. 2 of s. 75 of the Act had power to demolish the wall.

It is evident from the pleadings that the wall either was a part of the building which the plaintiffs proposed to erect, or was a building in itself as defined in the Act. If the former, then the Municipality were justified by their notice of 28th August, 1890, in calling for a plan giving the requisite information [32] with regard to the proposed building; and the fact that a demand was also made for documentary proof of plaintiffs' ownership of the land—a demand which would not be justified—*In re Jamnadas Dulabdas* (1)—would not invalidate the notice calling for a plan. On the other hand, if the wall was a building distinct from the building which plaintiffs by their original notice proposed to erect, then due notice of the same was never given. In either case the plaintiffs began or made a building without the requisite notice or without affording the information legally demanded from them. The action of the Municipality was, therefore, justified, and the present claim was rightly dismissed. We must confirm the decree with costs.

Decree confirmed.

(1) 15 B. 516.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

GANGARAM KUSHABA RANGOLE (*Original Plaintiff*), *Applicant v.* NARAYAN BABAJI RANGOLE (*Original Defendant*), *Opponent.**

[19th December, 1893.]

Stamp—Letters submitting to arbitration.

Letters written by parties authorizing arbitrators to arbitrate between them do not require to be stamped.

[R., 39 C. 669=16 Ind. Cas. 153.]

THIS was an application under the extraordinary jurisdiction of the High Court against the decision of Rao Bahadur Jayasatya Bodhrao Tirmalrao, First Class Subordinate Judge of Satara.

The plaintiff and the defendant agreed to refer their differences to certain arbitrators, and they did so by two separate letters which were addressed to the same arbitrators, and which were exactly in the same terms, except that one was signed by the plaintiff and the other was signed by the defendant. The arbitrators made their award, and the plaintiff applied to the Court to have it filed. The Subordinate Judge declined to file the award, holding that the letters of submission required to be stamped as an agreement, and that not being so stamped, the arbitrators had no authority to act.

[33] The plaintiff applied to the High Court under its extraordinary jurisdiction, contending that the letters of reference did not require any stamp, and that if they did, the Subordinate Judge was wrong in not accepting the penalty which the plaintiff had offered to pay. A rule *nisi* was granted, calling upon the defendant to show cause why the order of the Subordinate Judge refusing to file the award should not be set aside.

Mahadeo V. Bhat, for the applicant (plaintiff) in support of the rule.—Each letter merely says that the person to whom it is addressed should settle the dispute. It is a submission by each party, and nothing more; and as such does not require a stamp.

Gangaram B. Rele, for the opponent (defendant), showed cause.—The two letters, when read together, amount to an agreement between the parties to refer the dispute to arbitration, and as such require a stamp duty of eight annas under art. 5, cl. (*c*), sch. I of the Stamp Act (I of 1879).

JUDGMENT.

SARGENT, C. J.—The letters written by the parties authorizing the arbitrators to arbitrate between them did not require to be stamped. Each letter is to be read as against the party writing it, and operates as a submission to arbitration by that party. Together they might, no doubt, be used as evidence of a verbal agreement to submit to arbitration, if that were a question necessary to be determined. But the letters of authority by the parties to the arbitrators are of themselves sufficient to support the arbitration and, therefore, the award.

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* Application No. 110 of 1893 under extraordinary jurisdiction.

We must, therefore, in the exercise of our extraordinary jurisdiction, make absolute the rule *nisi* and discharge the order of the Court below, and direct the First Class Subordinate Judge to proceed to dispose of the case on the merits. Costs to abide the result.

Rule made absolute.

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19 B. 34.

[34] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

SHA KARAMCHAND GOKALDAS AND ANOTHER (*Original Opponents*), *Appellants v.* GHELABHAI CHAKALDAS AND ANOTHER (*Original Applicants*), *Respondents.** [19th December, 1893].

Civil Procedure Code (Act XIV of 1882), *s.* 235, *cl.* (*j*), *and s.* 260—*Decree—Execution—Application for execution—Form of application—Practice—Procedure.*

In a suit brought under s. 539 of the Code of Civil Procedure (Act XIV of 1882) a decree was passed appointing the defendants managing trustees of a Hindu temple, and laying down certain rules for their guidance in future. The plaintiffs applied for execution of the decree and filed a *darkhast* praying that the defendants be ordered to act as directed by the decree, and that, if they failed to do so, steps be taken according to law.

Held, that the *darkhast* was not in accordance with s. 235, cl. (*j*), or s. 260 of the Code of Civil Procedure (Act XIV of 1882) as it did not specify the mode in which the assistance of the Court was sought.

[F., 11 Ind. Cas. 696; R., 112 P.L.R.1902; 116 P. R. 1907; D., 33 C. 306=3 C.L.J. 112=10 C. W. N. 297.]

APPEAL from the decision of G. McCorkell, Esquire, District Judge of Ahmedabad, in *darkhast* No. 8 of 1893.

The applicants Ghelabhai Chakaldas and Balabhai Chaganlal filed a suit under s. 539 of the Code of Civil Procedure (Act XIV of 1882) against Sha Karamchand Gokaldas and his brother Chhotalal Gokaldas as trustees of a public temple called the *derasar* of the Soda Somji, praying for the removal of the trustees, and for an account of the trust funds in their hands.

The suit was referred to arbitration, and an award was made by which the arbitrators settled a scheme for the future management of the temple, and appointed six trustees to manage the temple property. One of these trustees was the defendant Karamchand.

The award was filed in Court and a decree passed in terms of the award on the 29th October, 1891.

On the 9th January, 1893, the applicants filed a *darkhast* for the execution of the decree. It set forth certain specific directions contained in the various clauses of the decree, and prayed that the defendants (opponents) should be ordered to obey them, and it concluded as follows:—

[35] "We pray that the defendants Karamchand and Chhotalal Gokaldas be ordered to act in the manner above stated, and, if they fail to act as above directed, steps be taken according to law."

The defendants raised several objections to this *darkhast*, but they were all overruled, and the Court passed an order directing execution to proceed.

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* Appeal No. 130 of 1893.

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Against this order the defendants appealed to the High Court.

Ganpat Sadashiv Rao, for appellants.—The *darkhast* is not in accordance with s. 235 of the Code of Civil Procedure (Act XIV of 1882). The applicant is bound to state the mode in which the assistance of the Court is required, whether by arrest of the person of the judgment-debtor, or by attachment of his property, or otherwise. The plaintiffs do not seek either to arrest the person, or attach the property, of the judgment-debtor. They merely ask that the defendant be ordered to act in accordance with the decree. This is not a compliance with cl. (*j*) of s. 235. The *darkhast* is, therefore, not according to law. The plaintiffs ought to have sought the assistance of the Court as provided by s. 260 of the Code—*Protap Chunder Doss* v. *Peary Chowdhrain* (1) and *Vaman* v. *Lakshman* (2).

Goverdhan M. Tripathi, for respondents.—The present objection to the form of the *darkast* was not taken in the Court below. If it had been taken in time, we would have got the *darkhast* amended. The objection is a technical one, and the Court will not reject the *darkhast* on a purely technical ground. The case of *Protap Chunder Doss* (1) cited for the appellant shows that in a case like this the Court, rather than dismiss the *darkhast*, will give the decree-holder an opportunity to amend it. We apply for an amendment of the *darkhast*.

JUDGMENT.

JARDINE, J.—The respondents in their application for execution of the decree have ignored the requirements of ss. 235 (*j*) and 260 of the Code of Civil Procedure. Following *Vaman* v. *Lakshman* (2), we are of opinion that the District Judge ought to have refused the application in its present form. We now reverse his order and reject the application. Costs on the respondents in both Courts.

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[36] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

ANTAJI (*Original Defendant*), *Appellant v.* DATTAJI (*Original Plaintiff*), *Respondent.**

[19th December, 1893.]

Hindu law—Widow—Alienation by widow—Purchaser from one of several divided co-sharers—Suit for joint possession—Partition suit—Registration—Evidence—Notice of attornment admissible without registration.

The property in dispute (consisting of 12 *thikans* or plots of land) was originally held by A and B as tenants-in-common, and they divided the income according to their respective shares. After A's death his widow adopted Chitko on condition that she was to remain in absolute possession and enjoyment for her life, and that Chitko was to succeed to the estate after her death. The widow mortgaged 9 out of the 12 *thikans*, sold one, and granted a perpetual lease of another to the defendant. All these alienations to the defendant were made without any legal necessity. The defendant also purchased B's share in the *thikans* in dispute. The plaintiff purchased Chitko's rights, and on the widow's death sued to set aside her alienations and to obtain joint possession with the defendant of all the

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* Second Appeal, No. 329 of 1893.

(1) 8 C. 174.

(2) P. J. (1890), 22.

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thikans. The defendant pleaded (*inter alia*) that the widow's alienations were valid and binding on the plaintiff, and that the plaintiff's remedy was a partition suit.

Held, that A's widow, not having higher powers than those of an ordinary Hindu widow who succeeds as heir to her sonless husband, could only make valid alienations for purposes warranted by the law. As no legal necessity was shown in respect of the alienations in question, which were made long after disputes had commenced between her and her adopted son, they were not binding on him or on his alience the plaintiff.

Held, also, that plaintiff was entitled to be put into joint possession with the defendant. Both were outside strangers who had purchased the several shares of the separated owners of the *thikans* in dispute. A partition suit was not, therefore, necessary.

Where on the redemption of a mortgage the mortgagee executed a document which purported to be a notice of attornment to the tenants in occupation of the mortgaged property, containing a recital that the property had been redeemed.

Held that the document, though unregistered, was admissible in evidence for its own proper purpose of proving the attornment, though not for the purpose of proving that the mortgage charge was satisfied.

SECOND appeal from the decision of Rao Bahadur Kashinath B. Marathe, First Class Subordinate Judge, A.P., at Ratnagiri, in appeal No. 86 of 1892.

The property in dispute consisted of 12 *thikans* originally held by one Chitko Raghunath and his co-sharer as tenants-in-common. [37] They used to divide the income of the *thikans* according to their respective shares.

On Chitko's death his share of the property in dispute devolved on his daughter in-law Jankibai, the widow of his predeceased son.

On 26th April, 1863, Jankibai adopted a son, also called Chitko, under an agreement which provided that she was to remain in exclusive possession and management of the property during her lifetime, and that the adopted son was to succeed to the estate after her death.

In 1870 Chitko came of age. Thereupon he sued Jankibai for possession of his adoptive father's property, alleging that the agreement of the 26th April, 1863, was invalid, and was not binding on him.

This case came up on appeal to the High Court, which ultimately decided that the agreement in question was valid, and that Chitko was not entitled to the possession of the property during Jankibai's lifetime(1).

After this decision Jankibai mortgaged 9 out of the 12 *thikans*, sold one, and granted a permanent lease of another *thikan* to the defendant. She also released a *thikan* from the charge of a mortgage-debt due to him. All these alienations were made to the defendant shortly before Jankibai's death. At the same time defendant purchased the interest of Chitko's co-sharer in the property in dispute.

Jankibai died in 1886.

In 1890 plaintiff sued as purchaser of the right of Chitko (the adopted son) to set aside the alienations of Jankibai, and to obtain joint possession with the defendant of all the *thikans* alienated by her.

The defendant pleaded (*inter alia*) that the alienations in question were valid and binding on the plaintiff, and that he was in possession of the whole property not only as Jankibai's alienee, but also as a purchaser of the rights of Chitko's cosharer, and that the plaintiff's proper remedy was a partition suit.

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(1) 11 B. H. C. R. 199.

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[38] The Subordinate Judge held that Jankibai's alienations not being supported by any legal necessity were not binding after her death, either on her adopted son or on his alienee (the present plaintiff), and that the plaintiff was entitled to be put into joint possession with the defendant. He, therefore, awarded the plaintiff's claim.

This decision was confirmed on appeal.

The defendant thereupon preferred a second appeal to the High Court.

Ghanasham Nilkanth, for appellant (defendant).—The property in dispute was held jointly by Jankibai and her co-sharers. At Jankibai's death defendant was in possession partly as Jankibai's alienee and partly in his own right. He had purchased the interest of Janki's co-sharer. On the other hand, plaintiff claims as purchaser of Chitko's rights. He is not entitled to be put into joint possession with the defendant. His proper remedy is a partition suit—*Babaji* v. *Vasudev* (1); *Kallapa* v. *Venkatesh* (2); *Vishnu* v. *Venkatrav* (3). I next contend that Janki's alienations were valid. The lease granted to the defendant was within the scope of her authority. It was a lawful use of the powers conferred on her by the adoption deed. But assuming that the lease is invalid, defendant is entitled to be reimbursed the cost of improvements.

Vasudev Gopal Bhandarkar, for respondent.—This is a suit between two purchasers from different members of a family already divided. Each member was in separate possession of his own share. In such a case the plaintiff need not bring a partition suit. The cases cited refer to the claims of a person who has purchased the rights of a member of an undivided family. Those cases, therefore, do not apply. A partition suit is not necessary between tenants-in-common—*Khan Mahomed* v. *Krishnarav* (4); *Sakharam* v. *Govind* (5). As to the alienations of Jankibai, they were clearly in excess of her authority. The adoption deed does not confer on her any proprietary rights over the estate. It merely [39] confers on her the powers of a sonless Hindu widow succeeding to the separate or self-acquired property of her deceased husband. She had no authority to mortgage, sell, or otherwise alienate the property except for strict necessity. The *onus* of proving such necessity lies on the alienee. The defendant has not discharged this *onus*. It is found as a fact that the alienations were made by the widow without any necessity whatever. That being so, they cannot bind the plaintiff. Refers to *Mussamat Bhagbutti* v. *Chowdry Bholanath* (6); *Koonjbehari Dhur* v. *Premchand Dutt* (7); *Hirabai* v. *Lakshmibai* (8); *Lalla Byjnath* v. *Bissen* (9); *Roy Mukhun Lall* v. *Stewart* (10); *Narayan* v. *Yamunabai* (11). The lease being invalid, the defendant is not entitled to compensation for improvements—*Herman* v. *Jeuchner* (12). Exhibit 81 is not admissible in evidence for want of registration. It was put in to prove the extinction of the mortgage—*Faki* v. *Khotu* (13).

JUDGMENT.

JARDINE, J.—In this case the appellant's pleader rested his contentions chiefly on four grounds. He contended (1) that the suit was improperly framed and that plaintiff's remedy was a partition suit; (2) that Jankibai was competent to make the alienations, and her acts bound the

(1) 1 B. 95. (2) 2 B 676. (3) P.J. (1889), p. 248.
(4) P.J. (1885), p. 102. (5) P.J. (1885), p. 194. (6) 24 W R. 168.
(7) 5 C 684. (8) 11 B. 573. (9) 19 W. R. 80.
(10) 18 W. R. 121. (11) P.J. (1889). p. 136. (12) 15 Q.B.D. 561.
(13) 4 B. 590.

plaintiff; (3) that even if the other alienations were set aside, the permanent lease of plot No. 3 granted by Janki to defendant should hold good, and if set aside, defendant was at least entitled to compensation for improvements made by him; (4) that the redemption of plot No. 8 by defendant from Janki bound the plaintiff, who could not ask the defendant to repay the mortgage-debt charged on it, and already satisfied, twice over. We feel satisfied that none of these contentions are at all tenable.

Plaintiff was purchaser of the rights of one Chitko, the adopted son of Janki. Under the adoption deed, Janki reserved to herself full powers of management for her life. Janki died in 1886, and before her death she mortgaged nine out of the twelve plots now in dispute with defendant, sold in part one of them **[40]** (No. 12) to him, gave a permanent lease of plot No. 3, and released plot No. 8 from the charge of a mortgage-debt due to her.

The lands in dispute were held in joint ownership by Janki's husband and a co-sharer, whose rights defendant purchased. After Janki's death, plaintiff, as purchaser of Chitko's rights, brought this suit to cancel Janki's alienations in defendant's favour and to obtain joint possession with defendant of the lands to the extent of Chitko's share therein. Defendant admitted (Ex. 65) that he had purchased the interest of a co-sharer of Janki's husband. He further admitted that he paid to Janki the rent due for her share of the jointly owned lands. Under these circumstances, we do not think that defendant could legally require plaintiff to bring a partition suit in respect of these lands, when plaintiff only sought to be placed in the same position as Janki occupied before. The authorities (*Vishnu* v. *Venkatrav* (1), *Babaji* v. *Vasudev* (2), *Kallapa* v. *Venkatesh* (3)) cited by the appellant's pleader all relate to claims brought by the purchasers of the rights of a member or members of an undivided family. This was not the case here. Both plaintiff and defendant were outside strangers, and had purchased the several shares of separated owners of jointly owned lands. The rulings reported in *Abaji Vithal Prabhu* v. *Govind Apaji Waradkar* (4), *Khan Mahomed* v. *Krishnarav* (5) and *Sakharam* v. *Govind* (6) appear to us to govern in the present case the rights of such purchasers.

As regards the nature and extent of Janki's powers over the property managed by her during her lifetime under the terms of the adoption deed (Ex. 146), they have formed the subject of previous litigation, and were adjudicated upon in second appeal No. 547 of 1888 and also in the case of *Chitko* v. *Janaki* (7). Jankibai's powers could not fairly be placed on a higher level than those of a Hindu widow, who succeeds as heir to her sonless husband. The adoption deed itself gives her only unrestricted enjoyment during her lifetime. It confers **[41]** on her no proprietary rights. As such Hindu widow, Janki could only make valid alienations for certain purposes. No such legal necessity has been shown in respect of the mortgages and sales effected by her in 1883 and 1885 a short time before her death. Chitko would not have been bound by these alienations and plaintiff stands in Chitko's place. The mortgage bonds (Exs. 72, 76) and the sale-deed (Ex. 77) were not passed to pay all her husband's debts. She had, according to the defendant's

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(1) P. J. (1889), p. 248. (2) 1 B. 95. (3) 2 B. 676.
(4) P. J. (1885), p. 68. (5) P. J. (1885), p. 102. (6) P. J. (1885), p. 194.
(7) 11 B. H. C. R. 199.

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own evidence, a net income of Rs. 300 a year, and her alienations, therefore, made long after disputes commenced between her and Chitko, must be set aside as having no legal validity after her death—*Koonjbehari Dhur* v. *Premchand Dutt* (1), *Hirabaï* v. *Lakshmibai* (2), *Annaji Dattatraya* v. *Chandrabai* (3), *Lalla Byjnath* v. *Bissen* (4) and *Roy Mukhun Lall* v. *Stewart* (5).

The permanent lease (Ex. 79) of plot No. 3, passed also in 1885, cannot be placed on ony other footing than Janki's mortgages and sales. It has been held that a manager of temple property cannot grant a valid permanent lease—*Narayan* v. *Yamunabai* (6)—and Janki's lease could have no legal force after her death. The lease was not merely voidable but void as against Chitko and his assigns.

As regards the alleged expenditure on improvements, the Court of first instance characterized the Commissioner's report (Ex. 21) as an extraordinary document of no value. The appellant did not choose to take objection to this finding, and he cannot now be permitted in second appeal to urge this equitable claim for compensation.

As regards plot No. 8, it certainly stands on a different footing from the other lands. It did not belong to Chitko, and it was only mortgaged with him by the owner, whose equity of redemption was bought by defendant. Defendant subsequently took back the mortgage bond from Janki in September, 1885 (Exs. 80, 81). The endorsement of satisfaction made on the back of this bond (Ex. 80, which is for more than Rs. 100) is clearly inadmissible in evidence, as it was not registered. Exhibit [42] 81 was held to be inadmissible by the lower Court of appeal on the same ground. This document is, however, not a release or *sodchitti*, but is a notice of attornment to the cultivating tenants of the lands redeemed. As such under the authority of *Faki* v. *Khotu* (7), *Sangappa* v. *Basappa* (8), *Shidlingapa* v. *Chenbasapa* (9), *Annapa* v. *Ganpati and Vishnu* (10), *Jagappa* v. *Latchappa* (11), *Gireedhur Doss Mohunt* v. *Nitto Gopal Doss* (12), and *Bharmava* v. *Ningava* (13), it would be admissible in evidence for its own proper purpose of proving attornment, though not for the purpose of proving that the mortgage charge was satisfied—*Basawa* v. *Kalkapa* (14), *Varada* v. *Krishnasami* (15), *Gopi* v. *Markande* (16), *Jagappa* v. *Latchappa* (11), and *Deb Narain Mundul* v. *Baharee Lall Ghose* (17). The Court of first instance, however, held that Ex. 81 was not proved to be a genuine and *bona fide* document. The appellant took no objection to this finding in the lower Court of appeal, and it is doubtful if it is open to him to raise this question in second appeal. Exhibit 81 being thus not proved to be genuine, the question of its admissibility or otherwise is really one of minor importance. We accordingly overrule the objections urged by the appellant in support of his case and confirm the decree of the First Class Subordinate Judge, A. P., with costs.

Decree confirmed.

(1) 5 C. 684.
(2) 11 B. 573.
(3) 17 B. 503.
(4) 19 W. R. 80.
(5) 18 W.R. 121.
(6) P. J. (1889), p. 136.
(7) 4 B. 590.
(8) 7 B H.C.R (A.C.J.) 1.
(9) 4 B. 235.
(10) 5 B. 181.
(11) 5 M. 119.
(12) 19 W.R. 291.
(13) P. J. (1889), p. 197.
(14) 2 B. 489.
(15) 6 M. 117.
(16) 3 B. 30.
(17) 18 W.R. 329.

[43] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt. Chief Justice, and Mr. Justice Candy.

BHIKAJI BAJI AND ANOTHER (*Original Plaintiffs*), *Appellants v.* PANDU (*Original Defendant*), *Respondent.** [20th December, 1893.]

Vendor and purchaser—Right of purchaser to have lands registered in his name in revenue records—Collector's books—Suit for declaration of such right—Limitation—Limitation applicable to such suit—Such right not an interest in immoveable property—Cause of action in respect of such right—Declaratory decree—Jurisdiction—Objection taken for first time in second appeal—Practice.

Plaintiffs having purchased certain lands in 1867 brought this suit in the year 1890 to obtain a declaration of their right to have the land registered in their name in the revenue records. The lower Court dismissed the suit as barred under art. 144, sch. II of the Limitation Act (XV of 1877).

Held, reversing the decree, that a right to be placed on the register was not an interest in immoveable property, and that art. 144 of the Limitation Act did not apply. The right is one which does not give rise to cause of action until it is asserted or denied, and a suit for a declaratory decree in respect to it must be brought within a period of six years from that date. In the present case the right had not been asserted or denied until the suit was filed, and the suit was, therefore, not barred.

An objection having been raised, in second appeal, that the Court had no jurisdiction to entertain the suit, as the plaintiffs had not previously asked the Collector to place them on the register.

Held that this circumstance was not necessary to give jurisdiction, although it might be a reason for treating the suit as premature. That objection, however, being taken for the first time in second appeal, was disallowed.

[R., 20 A. 35 ; 1 C.L.J. 73.]

SECOND appeal from the decision of Rao Bahadur R. D. Paranjpe, First Class Subordinate Judge of Ahmednagar with appellate powers.

The plaintiffs sued in 1890 for a declaration of their right to have certain land transferred to their names from that of the defendant in the revenue records. They had purchased the land at a Court sale held in 1867 in execution of a decree against one Jayabai, and had been ever since in possession. They complained that in December, 1886, after Jayabai's death, the defendant wrongfully got the lands transferred to her (Jayabai's) name. The defendant pleaded that the lands belonged to him, and that he was entitled to have them now entered in his own name.

[44] The Subordinate Judge found that the defendant had no right to the lands, and he passed a decree for the plaintiffs.

On appeal by the defendant the Judge held the claim time-barred, and reversed the decree, for the following reason :—

"The right, title and interest of Jayabai sold to plaintiff at the auction sale includes also her right to have the lands registered in her name in the Collector's book.

"But plaintiff purchased that right in 1867, and sued to have it declared in 1890, after a lapse of twenty-three years. From the date of sale the continuance of the lands in Jayabai's name became adverse to plaintiff. So under art. 144 of the schedule to the Limitation Act, the suit is barred by the law of limitation."

Plaintiffs preferred a second appeal.

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* Second Appeal No. 536 of 1892.

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Ghanasham N. Nadkarni, for the appellants (plaintiffs) :—We purchased the lands at a Court sale and were put in possession. We are, therefore, entitled to a declaration as between ourselves and the defendant, who has induced the Collector to transfer the lands to his name, that we have a right to get our name registered in Government records. We are the sole owners, and the defendant is endeavouring to make evidence that will support some future claim by him by having the lands registered in his name. It would be dangerous for us to allow such evidence to exist against us—*Ganpatrav* v. *Narayan* (1).

Balkrishna N. Bhajikar, for respondent (defendant) :—As soon as the plaintiffs had purchased in 1867 and obtained the certificate of sale, the right to have their names registered in the revenue record accrued to them. It is one of the rights of ownership. They bought this right with the property, but they omitted to take it, and it was retained by the judgment-debtor Jaya adversely to the plaintiffs. They took no steps to claim the right and to get their names registered for twenty-three years after their purchase. Therefore, the present suit is barred. There is no evidence to show that before the institution of the present suit they ever asserted their right. A suit for a declaration is governed by six years' limitation, and the present suit not [46] having been brought within that period from the date of the plaintiff's certificate of sale, is time-barred. Further, we contend that a Civil Court has no jurisdiction to entertain such a suit until the refusal of the Collector to enter the plaintiffs' names in the Government record. The plaintiffs ought first to have gone to the Collector and asked him to enter their names under s. 71 of the Land Revenue Code (Bombay Act V of 1879). Under that section the Collector has a right to inquire as to the person to be next put on the record after the death of the registered holder. Under s. 196 of the same Code the Collector is invested with the functions of a Civil Court, and the plaintiffs ought to have sought their remedy before the Collector. The suit should, therefore, be rejected for want of jurisdiction to entertain it.

[SARGENT, C. J.—This point was not urged in either of the lower Courts.]

The point being one of jurisdiction can be taken for the first time in second appeal.

JUDGMENT.

SARGENT, C.J.—The object of the plaint in this case is to obtain a declaration of the plaintiffs' preferential right as between themselves and Pandu to have their names placed on the register. The lower appeal Court has dismissed the plaint on the ground that their right to be placed on the register was barred by art. 144 of the Limitation Act. But a right to be placed on the register is not an interest in immoveable property. It is, moreover, a right which does not give rise to a cause of action until it is asserted or denied. The question, therefore, is, when their right was disputed, from which time the plaintiffs would doubtless have only six years to file a suit for a declaratory decree. It was not alleged in the plaint that the right had ever been asserted or denied until the present plaint was instituted, and the defendant Pandu, when made a defendant, did so by his written statement. The suit is, therefore, not barred.

It has been said, however, that the Court had no jurisdiction, as the plaintiffs had not asked the Collector to place them on the register. But

(1) P.J. (1886) p. 313.

that is not necessary to give jurisdiction, although it might be a reason for treating the suit as premature. That [46] objection, however, has been taken for the first time in this Court and cannot now be entertained. We must, therefore, reverse the decree and send back the case to be decided on the merits. Costs to abide the result.

Decree reversed and case sent back.

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19 B. 46.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

MANAJI BAHIRJI (*Original Defendant*), *Appellant v.* NARAYAN RAO MADHAVRAO (*Original Plaintiff*), *Respondent.**
[9th January, 1894.]

Dekkhan Agriculturists' Relief Act (*XVII of* 1879), *s.* 4—*Practice—Procedure—Jurisdiction—Jurisdiction of Second Class Subordinate Judge.*

The plaintiff sued to establish his title to, and recover a moiety of a cash allowance payable to him from the Mamlatdar's treasury at Satara. The claim was valued at Rs. 455-4. The plaint was filed in the Court of the First Class Subordinate Judge at Satara, who transferred the case for trial to the Joint Subordinate Judge of the Second Class. The latter Judge dismissed the suit on the merits, holding that the plaintiff had no right to the moiety of the allowance which he sought to recover. This decision was reversed, on appeal, by the Assistant Judge, on the ground that the Joint Subordinate Judge of the Second Class had no jurisdiction to hear the suit under s. 4 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

Held, that the requirements of s. 4 of Act XVII of 1879 were sufficiently complied with by the suit having been *filed* in the Court of the Subordinate Judge of the First Class. He was competent under s. 23 of Act XIV of 1869 to transfer the suit to the Joint Subordinate Judge of the Second Class who was deputed to assist him.

THIS was an appeal from the decision of the Assistant Judge of Satara, in appeal No. 12 of 1892.

This suit was instituted by the plaintiff to obtain a declaration of his title to a moiety of the allowance payable to him from the Mamlatdar's treasury at Satara, amounting to Rs. 455-4, and that it was not liable to be attached in execution of a decree against one Bahirji, deceased. The plaintiff also prayed that the amount attached be ordered to be paid to him, and not to defendant.

[47] The plaint was originally filed in the Court of the First Class Subordinate Judge at Satara who transferred the case for trial to the Joint Subordinate Judge of the Second Class who had been deputed to assist him.

The Joint Subordinate Judge of the Second Class dismissed the suit on the ground that the plaintiff had no title to the portion of the allowance in respect of which the declaration decree was sought.

On appeal the Assistant Judge of Satara was of opinion that the Joint Subordinate Judge of the Second Class had no jurisdiction to try the suit under s. 4 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). He, therefore, reversed the decree of the first Court and returned the case for

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* Appeal No, 15 of 1893 from order.

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re-trial in a Court of proper jurisdiction. The following extract from his judgment states his reasons:—

'The remaining point for decision is whether s. 4 of the Dekkhan Agriculturists' Relief Act excludes the jurisdiction of a Second Class Subordinate Judge. *Prima facie* the exclusion is clear, for the language of the section is imperative—'shall be instituted.' I find no force in the contention of respondent's (defendant's) pleader, that this suit was as a matter of fact 'instituted' in the Court of the First Class Subordinate Judge, Satara, and that the First Class Subordinate Judge had power to transfer the case for trial to the Joint Subordinate Judge, Second Class, who had been deputed to assist him. No authority is quoted in support of this contention. The language of s. 4 is clear. It provides for cases where a Subordinate Judge, First Class, and a Subordinate Judge, Second Class, have ordinary jurisdiction in the same local area. The section may, therefore, be said exactly to apply to the present circumstances. I have no option, therefore, but to find that the Second Class Joint Subordinate Judge had no jurisdiction to try the present suit in accordance with s 4 of the Act."

Against this decision the defendant appealed to the High Court.

Balaji A. Bhagvat, for appellant.—Section 4 of Act XVII of 1879 has been misconstrued by the lower Court. A suit is said to be "instituted" when the plaint is presented to the proper officer of a Court: see s. 48 of the Code of Civil Procedure (XIV of 1882). In the present case the suit was actually instituted in the Court of the First Class Subordinate Judge. The plaint was filed in his Court. But he transferred the case to the Joint Subordinate Judge, which he was competent to do under **[48]** s. 23 of Act XIV of 1869. When it was so transferred, the Joint Subordinate Judge was competent to try the suit.

Mahadev V. Bhat, for the respondent.—Reading s. 23 with s. 12 of Act XIV of 1869, it is clear that the First Class Subordinate Judge had no power to transfer the case to the Joint Subordinate Judge of the Second Class. Refers to *Balaji* v. *Nana* (1).

JUDGMENT.

JARDINE, J.—The requirements of s. 4 of the Dekkhan Agriculturists' Relief Act were complied with by this suit having been *filed* in the Court of the Subordinate Judge of the First Class. That Judge was competent under s. 23 of Act XIV of 1869 to make over the suit to the Subordinate Judge of the Second Class who had been deputed to his Court to assist him in the disposal of suits on his file. Having regard to the language of the Code of Civil Procedure (XIV of 1882), s. 48, s. 15 *et seq.*, where the institution of suits is regulated, and to other sections of the Dekkhan Agriculturists' Relief Act (XVII of 1879), such as ss. 3, 6 and 11, where the words "heard," "heard and determined" and "tried" are used, we cannot treat the word "instituted" in s. 4 as meaning "heard and determined." We, therefore, reverse the order of the Assistant Judge and remand the appeal to the District Court for disposal on the other issues. Costs to be costs in the cause.

Decree reversed.

(1) P. J. (1881), p. 196.

19 B. 48.

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APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

MAHADEV BALVANT AND ANOTHER (*Original Plaintiffs*), *Appellants* v. LAKSHMAN BALVANT (*Original Defendant*), *Respondent.**

[15th January, 1894.]

19 B 48

Limitation Act (XV of 1877), sch. II, arts. 170, 178—*Pauper—Application for leave to appeal in* forma pauperis—*Practice—Procedure.*

Plaintiffs filed a suit for partition, which was dismissed on 9th December, 1890. On 17th March, 1891, plaintiffs presented an appeal to the High Court on a Court-fee stamp of Rs. 10.

[49] On 18th January, 1892, the High Court held that the memorandum of appeal was insufficiently stamped, being chargeable with an *ad valorem* stamp on the value of the plaintiffs' share.

On 16th February 1892, plaintiffs applied for leave to appeal in *forma pauperis*. This application was granted *ex parte*.

At the hearing of the appeal, however, the respondent contended that the pauper appeal was time-barred.

Held, that the application for leave to appeal in *forma pauperis* having been presented beyond the thirty days allowed by art. 170 of the Limitation Act (XV of 1877), was barred by limitation. The pauper appeal could not, therefore, be proceeded with. Article 178 of the Limitation Act had no application to the present case.

APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge, in suit No. 382 of 1889.

The plaintiffs sued to recover their two-thirds share by partition of certain ancestral property in the possession of the defendant.

The suit was filed in the Court of the First Class Subordinate Judge at Poona, who rejected the plaintiffs' claim on the 9th December, 1890.

Thereupon plaintiffs appealed to the High Court. The memorandum of appeal was filed on 17th March, 1891, on a Court-fee stamp of Rs. 10.

On 18th January, 1892, Sargent, C.J., held, on a reference by the taxing officer, that the memorandum of appeal was chargeable with an *ad valorem* stamp on the value of the plaintiff's share (1). The appeal was, therefore, returned as insufficiently stamped.

On 16th February, 1892, *i.e.*, within thirty days allowed by s. 8, Chap. V of the High Court Rules to pay the proper stamps, the appellants applied for leave to appeal in *forma pauperis*. This application was granted on the 5th October, 1892.

The appeal came on for hearing before a Division Bench (Jardine and Ranade, JJ.).

Daji Abaji Khare (for the respondent).—The application on the 16th February, 1892, for leave to appeal as a pauper was not made [50] within thirty days from the date of the decree appealed against, as required by art. 170 of the Limitation Act (XV of 1877). The application was filed more than a year after the date of decree. This delay cannot be excused under art. 170.

Shivram v. *Bhandarkar* (for the appellant).—The appeal was filed in time on a Rs. 10 stamp. The question of stamp was not settled till 18th January, 1892. We then applied for leave to sue as a pauper.

* Appeal No. 145 of 1892.

(1) P. J. (1892), 13.

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The application was no doubt beyond thirty days from the date of the decree. But the case is governed by art. 178, and not 170, of the Limitation Act (XV of 1877). At any rate, as we acted in good faith, we should be allowed to pay the proper stamps even now.

JUDGMENT.

JARDINE, J.—After two hearings on the merits it has been pointed out by Mr. D. Khare for the respondent that the application for leave to appeal as a pauper was filed on a date beyond the thirty days allowed by art. 170 of the Limitation Act. The appeal petition first presented was returned on the ground that it was insufficiently stamped, the Chief Justice so deciding on the 18th January, 1892, on a reference from the taxing officer. Within the thirty days allowed by our rule, Ch. 5, s. 8, the appellant saying he could not pay the proper stamps asked leave to appeal in *forma pauperis*. Mr. Shivram contends not that the thirty days allowed by art. 170 ought, under the circumstances, to be computed from 18th January, 1892, but that he has three years' limitation under the general art. 178. The result would, in our opinion, be to extend the period allowed by art. 170 for the benefit of an appellant who first puts on insufficient stamps and then applies to appeal in *forma pauperis*. We cannot read such an alteration into art. 170. The Court had ordered the original appeal to be returned, but it was retained as the appeal petition, when two Judges of this Court, not having noticed the point of limitation, allowed the petition for leave to appeal in *forma pauperis* to be filed. After referring to *Lakshmi* v. *Ananta* (1) and *Parbati* v. *Bhola* (2) the utmost indulgence we can allow is to give fourteen days' time to the appellant to supply the proper stamps, which ought to have been affixed, *viz.*, Rs. 623-8-0.

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19 B. 51.

[51] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* KARIGOWDA.* [18th January, 1894.]

Penal Code (Act XLV of 1860), ss. 211, 500—Falsely charging a person with an offence—Defamation—Defamatory statement made by a person examined in the course of an official or departmental inquiry—Privilege—Qualified privilege—Criminal Procedure Code (Act X of 1882), ss. 191, 197.

The complainant was Deputy Collector and First Class Magistrate of Bijapur. Certain petitions said to emanate from the accused were received by Government charging the complainant with bribery and corruption. Government thereupon ordered Mr. Monteath, Collector and Magistrate of the District, to inquire into the matter. Mr. Monteath enforced the attendance of the accused by writing to the police, who brought the accused before him. In answer to questions put to him, the accused denied having sent any petition to Government, but stated that he had paid a bribe to the complainant to secure the acquittal of his son, who was then on his trial on a charge of theft before him. Mr. Monteath examined other witnesses and reported the result of his inquiry to Government. Government permitted the Deputy Collector to prosecute the accused, and he accordingly lodged a complaint against the accused for defamation, under s. 500 of the Indian Penal Code (XLV of 1860), in having stated to Mr. Monteath, in the course of the inquiry, that he (the complainant) had accepted a bribe from him.

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*Criminal Appeal, No. 328 of 1893.

(1) 2 M. 230.

(2) 12 A. 79.

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19 B. 51.

The trying Magistrate was of opinion that the offence fell under s. 211 of the Penal Code. He at first framed charges both under ss. 211 and 500. But subsequently he struck out the charge of defamation under s. 500 and convicted the accused under s. 211 of making a false charge.

On appeal, the Joint Sessions Judge was of opinion that the charge under s. 211 could not be maintained, as the accused had not made any "false charge" to a Court or officer having jurisdiction to investigate it. As regards the charge of defamation, he was of opinion that the fact of bribery was not proved. But he held that in making the statement to Mr. Monteath the accused had acted in good faith, and that his case fell under exception 8 to s. 499 of the Indian Penal Code. He, therefore, reversed the conviction under s. 211 and acquitted the accused of defamation under s. 500 of the Code. Against this order of acquittal Government appealed to the High Court.

Held that the accused was guilty of defamation.

Held, also, that s. 211 of the Penal Code had no application to the present case. The accused was brought before Mr. Monteath against his will. He did not make any complaint before that officer; and though what he stated, in answer to questions put to him, was defamatory, the imputations did not constitute a "false charge" within the meaning of s. 211, as he did not intend to set the criminal law in motion.

[52] *Per* RANADE, J.—The words "falsely charging" in s. 211 must be construed along with the words which speak of the "institution of proceedings." These latter words are obviously used in a technical and exclusive sense, and the same restricted sense must be given to the words which relate to a false charge as implying a false complaint.

Karim Buksh v. *Queen-Empress* (1) followed.

Held, also, that in the absence of sanction from Government, the inquiry held by Mr. Monteath, the District Magistrate, was not a taking cognizance of the offence.

Held, also, that as Mr. Monteath was not sitting as a "Court" when he made the inquiry and examined the accused, the accused was not entitled to claim the absolute protectionfroma chargeof defamation as a witness in a judicial proceeding. The accused was only entitled to a qualified privilege depending on the exceptions to s. 499 of the Indian Penal Code.

Per RANADE, J.—The High Court, in exercising jurisdiction in the matter of appeals, against acquittals, should confine its exercise to the particular grounds of objection which are raised by Government against the acquittal complained of.

[**Expl.**, 25 B. 90 (95); **F.**, 17 C. P. L. R. 75 (93); **Cited.**, 269 P. L. R. 1914; **R.**, 11 Cr. L. J. 428=6 Ind. Cas. 964=12 P. R. 1913 (Cr.)=26 P. W. R. 1910 (Cr.); 12 Cr. L. J. 73=9 Ind. Cas. 436=63 P. L. R. 1911; 12 Cr. L. J. 433=8 A. L. J. 1106=11 Ind. Cas. 617; 2 L. B. R. 285; 7 P. R. 1904 (Cr.)=97 P. L. R. 1904; Rat. Unr. Cr. Cas. 844 (846).]

APPEAL by the Government of Bombay under s. 417 of the Criminal Procedure Code (X of 1882) against an order of acquittal made by the Joint Sessions Judge of Bijapur.

Certain petitions having been received by Government containing charges of bribery and corruption against the District Deputy Collector of Bijapur (J. M. Kharsedji), Government ordered Mr. Monteath, the Collector and District Magistrate of Bijapur, to inquire into the matter and report. In the course of his inquiry Mr. Monteath sent for the accused (among others), who, however, refused to appear before him. His attendance was subsequently secured by the police, who took him before Mr. Monteath, by whom he was examined. In answer to Mr. Monteath's questions, he denied that he had sent any petition to Government, but alleged that the statement contained in it was true, and that he had himself paid J. M. Kharsedji a sum of Rs. 300 to prccure the acquittal of his son, who was then on his trial for theft. Mr. Monteath subsequently made his report to Government. Both the inquiry and report were

(1) 17 C. 574.

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departmental: the provisions of s. 132 of Act I of 1872 did not apply, and J. M. Kharsedji was permitted by Government to prosecute his detractors and (among others) the accused. He accordingly lodged a complaint against the accused, charging him with defamation.

[53] At the commencement of the proceedings, however, the Magistrate (Mr. Knight) was of opinion that, on the facts alleged against the accused, the proper charge to frame against him was a charge under s. 211 of the Penal Code (XLV of 1860) and not one under s. 500. The accused had stated to Mr. Monteath that J. M. Kharsedji had been guilty of what was a criminal offence, and the Magistrate held that, if that statement was false, s. 211 of the Penal Code was applicable and ought to be applied. The following passage from his judgment sets forth his views on the point:—

"Complaints charging the accused with defamation were accordingly lodged before me. At the commencement of the proceedings I at once raised this difficulty. The facts alleged against the accused, if substantiated, would amount to an offence under s. 211, although they included the offence of defamation. Could an accused person be properly put upon his trial for defamation when he had in fact, if the complaints were true, committed the major offence of bringing a false charge? There was no question of the offence alleged amounting merely to defamation and falling short of the more serious crime, it was either a false charge or nothing at all. I held and still hold that a Magistrate has no option but to proceed under the one section which includes all the ingredients of the offence, and that he is not justified in charging the accused with an offence which is only part of the offence he is said to have committed. For any argument that would justify me in charging the accused under s. 500 in this case would equally justify me in charging a man accused of grievous hurt with causing simple hurt, or one accused of ravishing a married woman with committing adultery. Emphasizing the fact that the alleged defamation in these cases was the imputation to Mr. Kharsedji of a distinct and specific criminal offence, and that such defamation is expressly provided for in the Penal Code by s. 211, I did not consider it open to me to proceed under s. 500. As a final, though not conclusive, argument in support of this view, I may adduce the illustrations to s. 499, in none of which a prosecution for defamation is contemplated when a specific criminal offence has been imputed to the complainant."

He considered that as the taking of any subsequent proceedings in the matter depended upon Mr. Monteath's report, he (Mr. Monteath) might be regarded as "an officer with power to investigate the case and send it up for trial" (see *In re Jamoona* (1)), but that as he was not a "Court," no sanction was now required under s. 195 of the Criminal Procedure Code (X of 1882).

On this charge the Magistrate convicted the accused under s. 211 of the Penal Code. The following is an extract from his judgment:—

[54] "Now before discussing the value of the evidence adduced in support of this story, I feel that I must determine some standard by which to measure the amount of proof which I must require from the accused to entitle him to an acquittal. Considering the nature of the case, it is manifestly unjust, to my mind, to expect him to offer evidence which would suffice to convict Mr. Kharsedji, were that officer in the dock. On the other hand, the corroboration which he adduces must be sufficient to create a

(1) 6 C. 620.

reasonable doubt of the falsity of his story ; and if he is so unfortunate as to have told the truth, but yet to be unable to produce any proof worthy of the name in support of it, the law, I am afraid, allows me no alternative but to convict him. After the most lengthy and careful consideration, therefore, I have finally fixed on the following test by which to determine his conviction or acquittal. Suppose that he were the complainant, and Mr. Kharsedji the accused, would the case he lays before me justify me in sanctioning his prosecution for bringing a false charge ? If so, I shall consider it my duty to convict him. There are many considerations which commend this test to my mind, the first and the foremost being that were Mr. Kharsedji not a Government servant, such a sanction would have been the ordinary forerunner of Karigowda's conviction. I must also guard carefully against any impression that an acquittal of the accused is tantamount to a declaration of the truth of his allegation to a moral conviction of Mr. Kharsedji ; at the most it will but be an equivalent of the Scotch verdict of 'not proven.' It will mean, that is to say, that I am unable, on the evidence before me, to determine whether his allegations are true or false, and that, therefore, although Mr. Kharsedji is a virtual accused, the actual accused is entitled to his right of the benefit of the doubt." (After a minute examination of the evidence the Magistrate continued :—) "Under the circumstances I consider that I am justified in saying that his (the accused's) story is false : to apply the test I gave above, I would certainly have accorded sanction for his prosecution had he been the complainant."

On appeal the Joint Sessions Judge reversed the conviction and acquitted the accused. He held that s. 211 of the Penal Code did not apply, and that the conviction under it was, therefore, illegal ; that the proper charge against the accused was one of defamation under s. 500 of the Penal Code. On that charge, however, he acquitted the accused, holding that although the truth of the statement made by the accused as to bribing the complainant had not been proved, nevertheless it had been made by the accused in good faith and was protected by exception 8 to s. 499 of the Penal Code. In his judgment he said :—

" ..... I am not prepared to find that the truth of the alleged bribery is proved, and I decide issue 3 in the negative.

" Although the non-proof of the bribery in question might be sufficient to acquit the complainant if he was in the dock, it does not necessarily follow from it (*i. e.*, the non-proof) that the charge in question is false as a matter of fact. If, therefore, the charge was made by the appellant in good faith, which means with due care and caution **[55]** (s. 52, Indian Penal Code), he would fall within the purview of exception 8 to s. 499, Indian Penal Code, and he would not be guilty notwithstanding the above non-proof. For the reasons given below, due care and caution appear to have been used by him (appellant) in this matter, and if so, good faith is established. No private grudge is proved between the complainant and the appellant, and the latter had no motive to make any false imputations against the former, thereby exposing himself to unnecessary risks. No evidence is on record to prove that the petition sent to Government in appellant's name was made or investigated by him, and if so, he is not guilty of resorting to that kind of trick. He did not seek any remedy by resorting to any Courts of law, and this indicates that, whatever the truth, he had no intention to resort to that mode of obtaining relief, probably from the fear that he had no materials to substantiate his charge. These circumstances indicate that he acted just as a man of ordinary prudence would act and not with any rashness and if so he cannot be said to have acted without due care

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and caution. He did not make the imputation in question to the Collector rashly of his own accord, and he made it only when he was sent for by that officer and was specially questioned about it. It is true that he was not bound by law to make any statement at all to the Collector; but, unless the imputation made by him was positively false to his knowledge and was made maliciously with ulterior motives, it cannot be said, under the peculiar circumstances of this case, that by making it he exceeded the limits of due care and caution. The non-proof of the truth of the imputation does not arise from any proof of the falsehood of the charge, but it arises from circumstances which do not detract from the *bona fides* of the appellant. On the whole, although the charge of bribery and corruption is not proved by any sufficient evidence against the complainant, it is not proved that it was false and invented,—maliciously made to harm him, and there are ample circumstances in this case which strongly indicate that in making it (charge) before the Collector the appellant did act with sufficient care and caution, and that he was within the limits of *bona fides*."

The local Government appealed against the order of acquittal. The appeal now came on for hearing.

Jardine (with Government Pleader) for the Crown.—The acquittal is wrong. The accused should have been convicted of defamation. He stated before Mr. Monteath that he had given a bribe of Rs. 300 to the Deputy Collector to get his son acquitted. This statement is clearly defamatory of the Deputy Collector, who is the complainant here. It was made in the course of a departmental and not a judicial inquiry, and, therefore, the accused was not privileged as a witness. Nor did he make the statement on a privileged occasion. Mr. Monteath did not hold the inquiry as a Magistrate, though he might have taken cognizance of a complaint under s. 197 of the Criminal Procedure Code (X of 1882). It was optional with the accused to make [56] the statement or refuse to answer Mr. Monteath's questions. He was not on oath. He was not bound to answer any questions put to him, and if he did make any statement, he did so at his own risk. The statement in question being *prima facie* defamatory, the accused must bring it under some one of the exceptions to s. 499 of the Indian Penal Code, or he must prove its truth. Both the Magistrate and the Session Judge have found that the accused failed to prove that his statements were true and that he had not proved that the Deputy Collector had accepted a bribe from him. If the statement is not proved to be true it must be taken to be false. But the Joint Sessions Judge holds that the statements were made in good faith. If, however, it was not true, it could not possibly be made in good faith, as it was a statement of something alleged to have been done by himself, and, therefore, if untrue, was untrue to his knowledge. The complainant has reason to complain of this finding. I submit that the accused is guilty of defamation and should be convicted under s. 500 of the Penal Code.

Kirkpatrick (with him *N. G. Chandavarkar*), for the accused.—The conviction of the accused by the first Court of "making a false charge" under s. 211 was wrong. The accused had made no "charge" against the complainant to Mr. Monteath. He merely answered questions put to him in a private departmental inquiry—*In re Jamoona* (1). On the other hand, if the inquiry was not private, and if Mr. Monteath is to be considered a "Court," no sanction from him for this prosecution was

(1) 6 C. 620.

obtained, and there was, therefore, no jurisdiction to try him. The Joint Sessions Judge was, therefore, right in reversing the conviction.

The Joint Sessions Judge was also right in acquitting the accused of defamation under s. 500. As to the principles on which this Court should act when the Government appeals against an acquittal, see *Empress* v. *Gayadin* (1). The accused was taken by the police before Mr. Monteath, and was induced or coerced to answer the questions put to him. His answers to these questions are said to be defamatory, and he is now charged with [57] defamation and required to prove their truth. If he had been warned that the burden of giving strict legal proof of the truth of what he said would be laid upon him, he would not have answered the questions. An inquiry by Government will be useless for the future if informants are to be exposed to this risk. They may know the truth, but they may know that they cannot produce the evidence that is necessary legally to prove it. It is for the public interest that they should be protected, and the law will regard the occasion as privileged—*Hunt* v. *Great Northern Railway Company* (2); *Stuart* v. *Bell* (3); *Clark* v. *Molyneux* (4); *Dawkins* v. *Lord Paulet* (5); *Dawkins* v. *Lord Rokeby* (6); *Beatson* v. *Skene* (7).

The accused ought not now on appeal to be convicted of defamation. He has never really been tried on that charge. The Magistrate at the outset of the proceedings stated that he considered the complaint to be "one of making a false charge or nothing," and he subsequently struck out the charge of defamation, which he had at first framed against the accused. He commenced his judgment by stating that "the accused stands charged under s. 211." It is clear, therefore, that the accused was not tried on a charge of defamation, but was tried on a charge framed under s. 211. On that charge the burden of proof lay on the prosecution, and in his defence to that charge the accused was not called on to prove the truth of the facts stated by him to Mr. Monteath, but only his good faith in making the statement. But on appeal the Court is now asked to alter the charge into one of defamation, and to consider the evidence with reference to it. That will shift the burden of proof over upon the accused, who must on that charge strictly prove the truth of the facts stated by him, and he must do this now in appeal by means of the evidence before the Court which was recorded on a different charge and for a different purpose. The evidence of good faith, which would be a defence to a charge under s. 211, would be no answer at all to a charge of defamation. [58] It is clear that if a person is acquitted on a charge framed under s. 211, but on appeal the charge is altered to one of defamation, he must inevitably be convicted, for the burden of proof is shifted, and the evidence which is a defence to the one charge is no defence to the other. To find the accused guilty of defamation on appeal is really to find him guilty on a charge which he has never been called on to meet. The two charges ought never to be joined. If they are joined, the accused must be greatly prejudiced in his defence. He referred to *Empress* v. *Imad Khan* (8) and *Queen-Empress* v. *Appa* (9).

Rao Saheb *Vasudeo J. Kirtikar*, Government Pleader, in reply.—Section 211 of the Indian Penal Code does not apply, there being no charge before a judicial officer. Mr. Monteath was not acting as a Magistrate.

(1) 4 A. 148. (2) L. R. (1891) 2 Q.B. 189. (3) L.R. (1891) 2 Q.B. 341.
(4) 3 Q. B. D. 237. (5) L. R. 5 Q. B. 94.
(6) L. R. 8 Q. B. 255; and 7 Eng. and Ir. Ap. 744. (7) 5 H. and N. 838.
(8) 8 A. 120. (9) 8 B. 200.

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[JARDINE, J.—Could he divest himself of his magisterial functions ?]

I submit it was open to him to say that he was not acting as a Magistrate *qua* the enquiry.

[JARDINE, J.—That would render s. 211 unavailable against anybody defaming a Magistrate for bribery, unless the defamatory statement was made to a Government official as a Judge.]

Yes, that would be so. Unless a formal complaint is made in a Court, s. 211 would not apply. As to privilege, if the accused had been examined as a witness in a judicial proceeding, he would have been protected—*Queen-Empress* v. *Balkrishna Vithal* (1). But he was not. He made a purely voluntary statement. The statement is defamatory *per se*, and it lies on the accused to show that it falls within one of the exceptions to s. 499 of the Penal Code. Section 105 of the Evidence Act applies.

JUDGMENT.

JARDINE, J.—The Government of Bombay gave leave to Mr. Jehangir Manekji Kharshedji, who is a Magistrate in the district of Bijapur, to prosecute the accused, Karigowda, for defamation by words spoken by him in reply to questions put by Mr. [59] Monteath at Muddebihal on the 6th December, 1892. The trying Magistrate, Mr. Knight, framed heads of charge under ss. 211 and 500 of the Indian Penal Code, but at the end of the trial struck out the head under s. 500, and convicted and sentenced the accused under s. 211.

The Joint Sessions Judge, Mr. Venkatrao Inamdar, in appeal, held that s. 211 was inapplicable, and that the case fell under s. 500. He acquitted the accused on the ground that the defamatory statements, though not proved to be true, were made in good faith. so that exception 8 to the definition of s. 499 applied in his favour. This exception applies to an accusation made in good faith to some one having lawful authority over the person accused with respect to the subject-matter of accusation.

The defamation consists of statements to the effect that Mr. Jehangir himself accepted a bribe of Rs. 300 from the hands of the accused as an inducement to acquit Sanganbassapa, accused's son, of an offence which Mr. Jehangir was trying. At the time the words were uttered, Mr. Monteath was, and is now, Collector and District Magistrate of Bijapur.

Questions having been raised, under the circumstances in which the words were uttered, as to which section—s. 211 or s. 500—the charge should specify, and as to whether the *onus* of proving the truth of the words lies on the prosecution or the defence, and also as to whether the speaker had any privilege, qualified or absolute, it is necessary to consider what capacity Mr. Monteath filled at the time he elicited the answers from Karigowda. Some petitions charging Mr. Jehangir, the complainant, with bribery had been received by the Government of Bombay, which forwarded them to Mr. Fleet, the Revenue and Police Commissioner. This official, on the 29th October, 1892, sent them to Mr. Monteath, who is addressed as Collector and District Magistrate, for inquiry and report, with directions to take evidence in support of the charges if the petitioners persisted in them, and to give Mr. Jehangir full opportunity of rebutting them. Mr. Monteath, after this "preliminary inquiry," as Mr. Fleet called it, was to submit a report. As it does not appear [60] that Mr. Fleet had any special authority to issue orders to the District Magistrate in the matter of the alleged taking of bribes, unless Mr. Fleet had been

(1) 17 B. 573.

commissioned by the Governor in Council to convey the sanction of the Government under s. 197 of the Code of Criminal Procedure (X of 1882) to the District Magistrate taking cognizance of the offence, and as it seemed that in some sense Mr. Monteath had taken cognizance and recorded the statements of a number of persons, we suggested to the Government Pleader that he should take further instructions in the matter. He has since shown us a letter from the District Magistrate, stating that at the time he considered that he had received no such sanction, and that, therefore, he could take no magisterial cognizance. But the Collector's Chitnis has deposed that after the Mamlatdar had been unsuccessful in procuring the attendance of Karigowda, Mr. Monteath sent an order to the police to produce Karigowda before him, and thus it was that the latter came up to be questioned. Karigowda denied having sent the accusatory petition bearing his name. Then he went on to state how he had paid the bribe.

Whatever view may be taken of the legality of the orders to the police to produce the body of Karigowda before Mr. Monteath, I am of opinion that, in the absence of the Government sanction under s. 197, he cannot be considered, in law, as having taken cognizance of the offence by holding his inquiry. The great powers of initiating prosecutions which he holds under s. 191 are restricted by the latter section. But this consideration by itself does not determine Mr. Monteath's position. Mr. Jardine, who appears for the complainant, but with the Government Pleader, contends that Mr. Monteath and Karigowda were in no special relation any more than two people at a dinner table; and it has been suggested by the Government Pleader that Mr. Monteath, was, at the time he took Karigowda's statement, divested of his magisterial functions and acting as any person might act whom the Government had commissioned to make inquiries, as, for example, a solicitor sent to Muddebihal for that purpose. I am of opinion that this view of Mr. Monteath's legal position at the time cannot be entertained. A [61] Magistrate cannot divest himself of his duties at his own will. As explained in the case of the corrupt Mamlatdars—*In re Ganesh Sathe* (1), Magistrates have to use diligence and vigour to repress crime. Magna Charta says that justice must not be sold, and to this the sovereign is bound by the Coronation Oath. The Petition of Right requires the officers and ministers of justice to proceed against offenders.

The duty of the Government being thus clear, and the Government having through the Commissioner informed Mr. Monteath of the petitions, he must be considered as a public servant put upon inquiry. I think that he was in a position analogous to the Secretary of State in *Harrison* v. *Bush* (2), and to the officials mentioned in the other cases there discussed by Lord Campbell as regards his duty to the Crown and the public. Moreover, the laws made by Parliament or the Indian Legislature to punish corruption on the part of public servants are in perpetual force; and if on Mr. Monteath's report the Government were to give sanction for the prosecution of the complainant, his powers under s. 191, cl. (*c*), of the Code of Criminal Procedure would come into operation unrestricted by the other section.

On these grounds I have taken time to consider whether, if the imputation of bribery were falsely made, s. 211 of the Penal Code would apply to punish. This depends on the meaning of the words "false charges"

(1) 18 B. 600.

(2) 5 E. & B. 344. See 25 L. J. (N.S.) Q. B. 25.

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and the word "charge" as used in s. 211. Considering that Mr. Monteath was making a formal inquiry into the bribery, and that he was District Magistrate, Karigowda was using a means of eventually setting the law in motion against the complainant. It has been contended that the Joint Sessions Judge was right in holding that s. 211 does not apply, because Mr. Monteath had no powers to investigate or send up for trial. The authority he cites, *In re Jamoona* (1), relates to a complaint of rape made to a military officer who had no official duty at all in the matter. I think that case inapplicable. The present case, however, seems to me to be taken [62] out of s. 211 by the fact that Karigowda did not apparently intend to set the criminal law in motion. He had been produced before Mr. Monteath against his will; and though what he said is "information" under s. 191, cl. (*c*), of the Procedure Code, and "defamation" under the Penal Code, I am of opinion, after considering the Full Bench case (2), that the imputations do not make up a "false charge."

Next, Mr. Kirkpatrick, as counsel for the accused, contends before this Court that as Karigowda was dragged before Mr. Monteath to make his statement, he must be considered as coerced to answer through awe of that officer's powers and position, and, therefore, entitled to that absolute protection from prosecution for defamation which has been extended to witnesses in Courts of justice by decisions of this Court—*Queen-Empress* v. *Babaji* (3) and *Queen-Empress* v. *Balkrishna Vithal* (4). The learned counsel cites the cogent reasons stated in the House of Lords for giving similar protection to a military witness summoned to give evidence before a Military Court of Inquiry—*Dawkins* v. *Lord Rokeby* (5), and see *Dickenson* v. *Hilliard* (6). But, for the reasons given above, while I regard Mr. Monteath as a Magistrate, I do not go the length of holding him to have been a "Court," and, after such consideration as I have been able to give, I do not think public policy requires that Karigowda should receive more protection than did the informant against the misbehaving Magistrate in *Harrison* v. *Bush*. The privilege is only a qualified one, and depends on the exceptions to s. 499. He was not bound to answer Mr. Monteath's questions. Coercion was not pleaded below, and there is nothing to lead even to a conjecture that the accused was offered any improper inducement to make the imputations he did. It has not been suggested that he was asked to speak falsehoods.

But even to freedom to tell falsehoods under official coercion s. 94 of the Penal Code applies—see *Queen* v. *Sonoo* (7) and the discussion of the effect of official coercion as an excuse [63] for crime in *Queen-Empress* v. *Maganlal* (8), where this Court had to rectify the error of a Magistrate who had been misled by the expression of some views of Sir R. West, *arguendo* in a published minute, as a member of the Government of Bombay, about the *Crawford case*. The accused had greater reason to feel security in stating the truth, whatever the truth may be, in that he was before a Magistrate, and one of high position and experience. I see no objection to the Government making use of such an officer in such an inquiry where the investigation requires much skill and experience, and the person accused is an official on whose character the Government does not wish by any inadvertence to cast a taint. Inferior and less judicial agents are liable to proceed with undue zeal. In *Chhagan's case* this

(1) 6 C. 620. (2) 17 C. 574. (3) 17 B. 127.
(4) 17 B. 573. (5) L.R. 7 Eng. & Ir. Ap. 744. (6) L. R. 9 Ex. 79.
(7) 10 W.R. (Cr. R.) 48. (8) 14 B. 115.

Court had to censure the offer of illegal indemnities to witnesses by a Mamlatdar getting up the case. Mr. Justice Wilson and his colleagues, who held the investigation of the charges in the *Crawford case*, comment on the minds of witnesses being unduly influenced in this manner. Mr. Monteath was right in not administering oaths to Karigowda and the rest, and there is nothing to show that they were not free agents.

Now, turning to deal with the facts on the appeal of the Government against the acquittal, we are hampered by the way the Courts below have recorded their conclusions. The Magistrate, after a very careful discussion of the evidence, finds that Karigowda's story is false; but he explains that he means thereby only that, if Karigowda had been the complainant, and told that story, he would have sanctioned the prosecution of Karigowda for bringing a false charge. In plain English, this means that there are good *prima facie* grounds for holding the story to be false. But under s. 211 the Magistrate ought to have found one way or other—whether beyond reasonable doubt the falsity of the story was proved. The Joint Sessions Judge finds in distinct terms on the third issue that the truth of the story is not proved. But on the fourth issue he finds that the story was told in good faith, which is impossible, unless it be true, as Karigowda does not speak from information given by third persons, but tells, in detail, how he himself set to work to corrupt the complainant, [64] and at length himself paid over a bribe of Rs. 300 to the complainant himself. It is very difficult to understand the reasoning of the Joint Sessions Judge; but it is clear he thinks the witnesses who contradict Karigowda's story are false witnesses, and have been tampered with; and I believe the Joint Sessions Judge really means to be understood as saying that Karigowda has told the truth, but is unfortunate in not being able to prove his story, and that the bribe was really paid. But then, again, the Joint Sessions Judge writes that, on the evidence recorded, the complainant Mr. Jehangir, would have to be acquitted. If the Judge means that on the evidence there is reasonable doubt whether complainant took the bribe, he ought to have said so plainly. Perhaps in dealing with the fourth issue he means to say that, if he went on surmise or suspicion, he would hold Mr. Jehangir guilty. I do not understand the reasoning of the following passage:—"It is true that he (Karigowda) was not bound by law to make any statement at all to the Collector; but, unless the imputation made by him was positively false to his knowledge, and was made maliciously with ulterior motives, it cannot be said, under the peculiar circumstances of the case, that by making it he exceeded the limits of due care and caution."

We must now strip the case of this verbiage and decide whether Karigowda's story is proved to be true. The burden of proof lies on him (1). If it is false, there was no good faith; if true, he is protected. I will deal shortly with the facts. (His Lordship then discussed the evidence at length and stated his conclusion, that the story told by the accused was not proved. He then continued:—)

Stripped of prejudice and surmise, the case stands thus. There is no corroboration of Karigowda's story about the payment of the Rs. 300 at the tent. It is utterly denied by the complainant, by Girimalla, and by Tammana. It is inconsistent with the story told by Basapa and Irappa. It was started in a petition sent to the Government by post, which nobody will own; and it would probably have been heard no more

(1) 9 B.H.C.R. 451.

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of, if Mr. Monteath, upon Karigowda's refusal to attend his camp, and his later denial [65] of the petition being his, had ceased to make inquiry. About the parentage of the petition we have no information. It is obvious that if a man in a written petition makes a false charge against a Magistrate of taking bribes, he is put in an awkward position when such petition is inquired into, and must either disown it, or adhere to the false statements and try to prove them.

As noticed earlier in this judgment, the Joint Sessions Judge, while recording that the charge of bribery is not proved against the accused Magistrate, treats it as if it were, and reverses the conviction of the man that made it. The Judge seems to act on conjecture and surmise rather than evidence; and this may possibly have been caused by the fact that a number of depositions made by other people accusing this Magistrate of taking other bribes made before Mr. Monteath, form part of the record of the present case. They must, of course, be entirely excluded from our judicial consideration of the present charge. In another recent case, where another Magistrate was accused of improper behaviour about a purchase of land in his district, we had to reverse an acquittal, by the Sessions Judge, of the person defaming him, and to remove the stigma so placed on the Magistrate. We were of opinion that there was no evidence worthy of the name to justify the defamatory article. Mr. Jardine has argued that there is a tendency, when a Magistrate is accused of corruption, to assume that he is guilty, and to weigh all the evidence in the scales of prejudice. I think it important, therefore, and especially as the reported decisions on corruption show that even Magistrates of experience are liable to very serious mistakes in applying the law against corruption (*In re Ganesh Sathe* (1), *Queen-Empress* v. *Maganlal* (2), *Queen-Empress* v. *Chagan* (3),) to point out that the Courts must begin the trial of cases against Magistrates without prejudicing the particular case by admitting irrelevant matters to influence the mind of the Court. As this Court has pointed out in *Queen-Empress* v. *Fakirapa* (4), this freedom from prejudice is secured by the general rules of the Procedure Code, s. 233, that every charge shall be separately tried. As Lord Blackburn [66] points out in *Castro* v. *the Queen* (5). the mere fact of accusing a man of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him, so that a Judge wishing to keep the Court clear of prejudice might say, "I will not work this injustice by trying them together, let us diminish them in number and try a reasonable number, and no more." The Courts will find guidance as to the exceptions allowed to the general rule in *Queen-Empress* v. *Fakirappa* and in *Queen-Empress* v. *Vajiram* (6). They are bound to administer the law as interpreted by the decisions of this Court. The Judges are the voices of the law. We are the *leges loquentes*. I think it is time to point this out, because, in the other case lately before us, the error of the Sessions Judge consisted in the view he took of the evidence which he called "cumulative," but which, in our opinion, was of the very weakest sort. "Cumulative effect" has even before us, and once not without a sense of humour by the Government Pleader, been used to cover decisions based more on conjecture than evidence. But the phrase, when used in forensic pleading, does not really convey that sort of meaning. This phrase "cumulative effect of the evidence" occurs in the letter, which has been published, in

(1) 13 B. 590 (600). (2) 14 B. 115. (3) 14 B. 331. (4) 15 B. 491 (501).
(5) 6 Ap. Ca. 229. (244, 245.) (6) 16 B. 414.

which the local Government of the time adopt Sir R. West's argument against the view taken by the Commissioners in the *Crawford case*, who had acquitted the accused of all the thirty-two charges of corruption. Sir R. West's remarks on evidence in this argument have reference to inquests under Act XXXVII of 1850, and whether the contention is right or wrong about them, it has no reference to cases under trial by the ordinary tribunals, where the ordinary rules of procedure and evidence based on enacted law and long experience are binding. While Sir R. West criticises the English system, which narrows the issues for trial in the way pointed out by Lord Blackburn, and while apparently he would, if allowed, improve our time-honoured system of trial by jury, by expedients of jurists and legislators of foreign countries and let in collateral matters, which our law excludes, because he says our exclusions are the reverse of the mode of investigation employed in the physical sciences, and are, [67] in his opinion, defective in logical standpoints, it is quite obvious that Sir R. West distinguishes between the law as it is and the law as he opines it ought to be. The settled rules of evidence are those which the Courts must apply. On them, as Lord Abinger remarks, the property, the liberty and the life of men depend; by them the position and character of the servants of the Crown are protected. The Legislature, being aware of the danger to which officials are exposed from the malice of disappointed petitioners and suitors, interposes also the requirement of official sanction for prosecution; and *In re Clive Durant* (1), where we refused to allow a suitor to defile our records with a petition containing scandalous attacks on Magistrates, Judges, and some high officials of the Government of India, we laid down a principle from *Butt* v. *Conant* (2) that "the people have a serious interest in the characters and conduct of the Judges and others who are appointed to serve in high and important offices, and the individual men have a valuable property in their respective characters." It is of great importance in all countries and as the Lords of the Privy Council remark, more particularly in a country like India, that the Courts and officers should be above suspicion—*In re Ganesh Sathe* (3). On this principle, corrupt persons must be removed from office. But the same considerations require that any one proved guilty of making false charges of corruption should feel the weight of the criminal law.

For the above reasons I am of opinion that the story of the bribe is false, and that the accused was rightly convicted by the trying Magistrate, but that the conviction should be for defamation under s. 500 of the Indian Penal Code. We must, therefore, reverse the acquittal and convict the accused. In measuring the punishment we think it proper to give weight to the opinion of the trying Magistrate, as shown by his sentence. We fear that the sentence of fine might affect innocent people, the family or friends of the accused. We now sentence Karigowda to four months' simple imprisonment.

RANADE, J.—I deem it necessary in this case to record my reasons separately, as the case is of some importance in the interests of [68] the administration of justice. The complainant originally charged Karigowda with an offence under ss. 499-500. The Magistrate, who heard the complaint, was of opinion that the offence complained of fell under s. 211 of the Indian Penal Code. He at first framed charges both under ss. 499-500 and s. 211, but at the last stage of the inquiry, he struck out the charge of defamation, and convicted Karigowda of the offence under s. 211

(1) 15 B. 488. (2) 1 Bro. and Bing., 548 (587). (3) 13 B. 590 (600).

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of the Code. This amendment was made by the Magistrate on two grounds: (1) that the imputation complained of had the graver character of a false charge under s. 211, and that the charge under s. 211 included the defamation; and (2) that the charge under ss. 499-500 would throw the burden of proof on the accused, thereby prejudicing his interests. The Magistrate further held that no sanction was necessary, as the charge was not made before any Court. In appeal, the Joint Sessions Judge held that sanction was necessary in this case, and that, for want of sanction, the charge could not be maintained under s. 211. The Judge, moreover, held that the Magistrate was in error in striking out the charge under ss. 499-500. He inquired into that charge, and held that the accused was protected by reason of his good faith, and accordingly acquitted the accused. It is from this sentence of acquittal that Government appeals, and all the grounds set forth assert the sufficiency of the evidence to establish the charge of defamation, and disprove the exceptions. There is no reference to the decision of the Joint Session Judge on the point that the charge under s. 211 was not maintainable for want of sanction.

In the first place, I am of opinion that the High Court, exercising its jurisdiction in the matter of appeals against acquittals, should confine its exercise to the particular acquittal complained of by Government. The Allahabad High Court has, indeed, in *Empress* v. *Gayadin* (1), gone so far as to limit the exercise of this jurisdiction to cases of obstinate or egregious failure of justice. This view of the Allahabad High Court was not concurred in by the Calcutta High Court, *Queen-Empress* v. *Bibhuti* (2), and for the purposes of the present case, the view of the Calcutta Court may be accepted as more authoritative. At the same time, it seems to me, **[69]** that it would not be proper for this Court to consider the appeal on grounds not contained in the objections urged on behalf of the Government, and that this Court should only consider whether or not the acquittal, by the Joint Sessions Judge of the accused on the charge under ss. 499-500 could be sustained, and that it is not open to us to consider whether the charge under s. 211 was or was not maintainable, as no objection was urged on that point.

In the next place, it appears to me clear that the action of the accused in making the statement he made before Mr. Monteath cannot be regarded as bringing his case within the purview of s. 211. The words "falsely charging" used in that section must be construed along with the words which speak of the "institution of proceedings." These latter words are obviously used in a technical and exclusive sense, and by parity of reasoning, the same restricted sense must be given to the words which relate to a false charge. Mr. Monteath was, no doubt, District Magistrate, but he was also the departmental head of the service to which the complainant belonged. Mr. Monteath admittedly held the inquiry, under orders of Government, as a departmental inquiry, and not as a Magistrate. He enforced the attendance of Karigowda not by the usual processes, but by writing to the police. He administered no oath. A more formal inquiry would still have been necessary, and this preliminary investigation was only intended to satisfy Government whether or not there were grounds for ordering such an inquiry. The accused Karigowda made of his own accord no complaint. He even disowned the petition sent in his name to Government. He appears simply to have answered certain questions put

(1) 4 A. 148.

(2) 17 C. 485.

to him, in the first instance, by the Chitnis, and later on by Mr. Monteath, who took down his statement for the information of Government.

Taking all these circumstances into consideration, I do not think that Karigowda can properly be regarded as having made a complaint which could, if shown to be false, bring his act within the purview of s. 211. At the most, he gave information to a public servant which, under certain circumstances, might furnish ground for a charge under s. 182. The [70] Magistrate, therefore, who tried the case was not quite correct when he stated that Karigowda's statement was either a false charge or complaint, or nothing at all. Mr. Monteath's inquiry under orders from Government, though not carried on by him as Magistrate, was entrusted to him as a public servant, and information given to him, though not a charge or complaint, might well be an act for which Karigowda could be brought to account under conceivable circumstances.

It is, however, urged that men in the position of Karigowda, making statements to a District Magistrate, need, in the public, more than their own interests, protection. In so far as the public interests are concerned, it is clearly desirable that men, who have any knowledge of the malpractices of public servants, should not be deterred from giving information to the superior authorities, and this they cannot do unless they enjoy the protection extended to witnesses examined on oath. As a matter of fact, however, this protection is extended to such persons, both under ss. 182 and 211, for offences under these sections cannot be taken cognizance of without sanction under s. 195. They, moreover, enjoy the protection under one or other of the exceptions to s. 499, and are not liable to punishment not only when they are in a position to establish the truth, but also when they can show that they gave the information in good faith and for the public good. Any further protection can only encourage undue license in the matter of the attacking the character of public servants, whose good reputation is also a matter of public concern. A public officer defamed, and ordered to clear his character, though he is nominally a prosecutor, is really the party accused, and his failure to establish the charge of defamation involves his ruin. He cannot well be expected to prove a negative, and the law, therefore, very properly requires that the accused in such cases should be required to bring his act under one or other of the many exceptions before he can protect himself. There appears to me nothing unreasonable in requiring a person, who imputes corrupt conduct to a Magistrate, to prove it, or at least to show that he made the imputation under circumstances which justified his belief. The Magistrate (Mr. Knight) appears to me not to have fully considered the peculiar nature of the offence of defamation [71] when he thought that the person defamed stood in less need of protection than the person who published the defamation.

I have accordingly come to the conclusion that the Magistrate was in error in holding that the offence fell under s. 211, and in striking out on that account the charge under ss. 499-500 at the last stage of the inquiry. It is no doubt open to a Magistrate to amend his charges, and if he is satisfied that the graver charge includes the smaller complained of, to proceed upon the graver charge. In this case, however, both the charges were not *ejusdem generis*. They did not fall under the same or similar class of offences, one being only an aggravation of the other. Moreover, the charge shifted the burden of proof sensibly from one side to the other. The powers given under ss. 236-237 cannot, in my opinion, justify the

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amendment made in this case at the last stage of the inquiry, thus virtually setting aside the particular complaint made by the prosecutor with a view to clear his character.

As regards the decision in appeal, the Joint Sessions Judge, after holding that the charge under s. 211 could not be maintained for want of sanction, examined the evidence to see how far the charge under ss. 499-500 was made out. Mr. Justice Jardine has examined the whole of the evidence at great length in his judgment, and as I agree with his finding on the question of facts, I do not deem it necessary to go over the same ground again. The Joint Sessions Judge found that the accused failed to make out any case under the first exception, and that the truth of the story told by Karigowda about the alleged bribery was not proved. That being so, it is clear that, under the circumstances, Karigowda could not claim any protection for having acted in good faith. He paid the bribe himself—that is his story. If that story was not true, there could be no justification based on good faith. He did not make the statement on the basis of information supplied to him by others. It is mere casuistry to hold that though the truth of the alleged bribery was not established, it did not follow from it that the charge in question was false as a matter of fact. It is, similarly, not correct to say that, because Karigowda did not act rashly in making the imputation, therefore he must be [72] held to have acted with due care and caution. This same sort of confusion runs throughout the judgment. There is no more *prima facie* ground for holding that Girmalla and Tammappa have assumed a false attitude in this matter, than for holding that Karigowda gave false information. The Magistrate, it may be noted, fixed a special standard of his own, with a view not to press hard on the accused, and notwithstanding this leniency, he was led to hold that Karigowda's statement about the alleged bribery was not only not proved, but was false. The Joint Sessions Judge should not have set aside such a finding on mere surmises and probabilities, which were more than counterbalanced by the evidence of the accounts, the evidence of the village extracts, the admitted credit of Rs. 128 shortly after the alleged loan borrowed from the 'savkar,' the discrepancies and contradictions noticed by the Magistrate, and the denial of the principal witnesses of all knowledge of the alleged payment. There is, under these circumstances, no justification on the ground of good faith any more than on the ground of truth. I would, therefore, reverse the order of acquittal, and convict Karigowda with simple imprisonment for four months.

Order of acquittal reversed and accused convicted.

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Before Mr. Justice Jardine and Mr. Justice Ranade.

In re MUKUND BABU VETHE.* [29th January, 1894.]

***Criminal Procedure Code** (Act X of 1882), s. 54—Offence committed by a British subject in foreign territory—Powers of the Police to arrest for such offence without a warrant—Wrongful arrest—Wrongful confinement—Indian Penal Code (Act XLV of 1860), s. 342.*

Section 54 of the Criminal Procedure Code (Act X of 1882) does not empower a police officer to arrest, without a warrant, a British subject in British India on a charge of criminal breach of trust or other cognizable offence committed outside British India.

Mukund was a native Indian subject of the Queen-Empress, residing at Belgaum. A complaint was filed against him in the Sangli State, charging him with committing breach of trust within the territories of that State. Thereupon he obtained an [73] order from the District Magistrate of Belgaum, dated 15th November, 1891, which exempted him from arrest for the offence of criminal breach of trust without a warrant issued by himself or by the Political Agent of the Southern Maratha Country. This order was communicated to Mukund through the accused, who was chief constable at Belgaum. On the 27th November, 1891, a police officer from the Sangli State came to Belgaum with a warrant issued by the Sangli Court for the arrest of Mukund on a charge of criminal breach of trust. The chief constable thereupon directed Mukund's arrest. Mukund brought to the notice of the chief constable the District Magistrate's order of the 15th November, 1891, but he was detained in custody till the matter was reported to the First Class Magistrate, who ordered his discharge. In the meantime the complaint filed against Mukund in the Sangli State was dismissed without requiring his extradition.

Mukund thereupon prosecuted the chief constable on a charge of wrongful arrest and wrongful confinement.

***Held*, that the chief constable had no power to arrest the complainant without a warrant, and that he was guilty of the offence of wrongful confinement under s. 342 of the Indian Penal Code (XLV of 1860).**

[D., 7 Bom. L. R. 463 (465).]

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882) under the revisional jurisdiction of the High Court.

The complainant Mukund Babu Vethe was a native Indian subject of Her Majesty, residing at Belgaum.

A criminal prosecution was instituted against him in the Sangli State for criminal breach of trust committed within the territories of that State.

Thereupon he obtained an order from the District Magistrate of Belgaum, dated 15th November, 1891, which exempted him from arrest of the offence in respect of which he was prosecuted in the Sangli State without the warrant of the District Magistrate, or of the Political Agent of the Southern Maratha Country. This order was communicated to Mukund through the chief constable at Belgaum.

On 27th November, 1891, a jamadar from Shahapur, a town in the Sangli State, came to the chief constable at Belgaum, bearing a warrant issued by an officer of the Sangli State for the arrest of Mukund on a charge of criminal breach of trust committed in the Sangli State.

The chief constable thereupon directed the arrest of Mukund. Mukund pointed out to the chief constable the order of the [74] District

* Application for criminal revision, No. 321 of 1893.

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Magistrate of the 15th November, 1891, but he was not released from custody till the matter was reported to the First Class Magistrate, who ordered Mukund to be discharged.

In the meantime the complaint filed against Mukund in the Sangli State was dismissed without requiring his extradition.

On the 2nd December, 1891, Mukund prosecuted the chief constable of Belgaum on a charge of wrongful confinement under s. 342 of the Indian Penal Code (XLV of 1860).

The trying Magistrate discharged the accused under s. 253 of the Code of Criminal Procedure (Act X of 1882) and at the same time gave sanction for the prosecution of the complainant and his witnesses for giving false evidence.

Against this order the complainant applied to the Sessions Judge, but he declined to interfere.

The complainant thereupon made the present application to the High Court under its revisional jurisdiction.

Anderson (with him *Mahadeo C. Apte* and *N. G. Chandavarkar*), for complainant.—The District Magistrate had passed an order exempting the complainant from arrest without a warrant either issued by himself or by the Political Agent. We brought this order to the notice of the accused and yet he did not release us. The arrest was, therefore, illegal. Even independently of the District Magistrate's order, the accused had no power to arrest the complainant without a warrant. Section 188 of the Code of Criminal Procedure (X of 1882) does not authorize the police to arrest without an order from the Political Agent or from a Magistrate in British India. Nor do ss. 11 and 15 of the Extradition Act (XXI of 1879). Nor does s. 76 of the Indian Penal Code justify the arrest. The accused was not labouring under a mistake of fact. If there was any mistake of fact on the part of the accused, there is nothing to show that he acted in good faith. He was aware of the District Magistrate's order, and yet he directed the arrest of the complainant and actually detained him in custody for some time. He was, therefore, guilty of wrongful confinement under s. 342 of the Indian Penal Code. Refers to **[75]** *Queen Empress* v. *Kathaperumal* (1), *Regina* v. *Naryan Babaji* (2); *Queen* v. *Beharysing* (3).

Jardine (with him *B. A. Bhagvat*), for the accused.—The order of the District Magistrate was *ultra vires*. It was a mere expression of opinion that the complainant would not be arrested without a warrant. The chief constable was not bound to take notice of it. When a British subject commits an offence in foreign territory, s. 188 of the Criminal Procedure Code distinctly says that he may be "dealt with" as if the offence were committed in British India. Section 54 of the Code empowers a police officer to arrest without a warrant a person who is concerned in a cognizable offence. The offence of criminal breach of trust, in respect of which the complainant was arrested, was a cognizable offence. This power of the police to arrest without a warrant is not taken away by Act XXI of 1879. Sections 11 and 15 of the Extradition Act do not touch the question of arrest by a police officer. The Act is altogether silent on this point. It leaves intact the powers conferred on the police under s. 54 of the Code of Criminal Procedure. The arrest was, therefore, legal. The accused, moreover, acted in good faith. This is found as a fact by the lower Court. The accused released the complainant as soon as he

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(1) 13 M. 423. (2) 9 B.H.C.R. 346. (3) 7 W. R. Cr. R. 3.

discovered that he was the person mentioned in the District Magistrate's order. Section 76 of the Penal Code, therefore, protects the accused.

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JUDGMENT.

JARDINE, J.—On the 27th November, 1891, a police officer of the Sangli territory, an independent State, and so described in *Ramchandra Dada Naik* v. *Dada Mahadev Naik* (1), came from Shahapur, in that territory, to Belgaum, with a written request from one of the chief officials to the chief constable to arrest Mukund Babu Vethe on a charge of criminal breach of trust committed in the Sangli territory. Mukund is a native subject of the Queen-Empress, residing at Belgaum. The chief constable thereupon directed the arrest, which was performed by the Sangli officer, and Mukund was brought up before the chief constable and showed him a written reply, made to Mukund in October, [76] 1891, by the District Magistrate of Belgaum, to the effect that he could not be arrested without a warrant from either the Political Agent for Sangli or from the District Magistrate. Whereupon the chief constable forthwith brought Mukund before a Magistrate, who discharged him from custody. The question before us is whether the act of arrest was lawful. If not, the confinement was wrongful, and the question, whether the chief constable knew that it was unlawful, is irrelevant in construing s. 342 of the Indian Penal Code; see *Dhania* v. *F. L. Clifford* (2), which differs from s. 220 as interpreted in *Regina* v. *Narayan Babaji* (3). The only treaty or convention between our Government and Sangli about extradition appears to be that printed at p. 230 of Aitchison's Treaties, Vol. 7, Ed. of 1892. It provides that if offenders come into British India from the Sangli Jaghir you (*i. e.*, the Chief) will represent the affair, and they shall on inquiry "be delivered up to you." These words do not justify the arrest. It is not contended that the arrest would be lawful without authority of statute law. It was argued, however, that the words of s. 188 of the Code of Criminal Procedure—"when a native Indian subject of Her Majesty commits an offence at any place beyond the limits of British India, he may be dealt with in respect of any such offence as if it had been committed at any place within British India at which he may be found"—justified the action of the police, because they apply the provisions of s. 54, whereby a police officer may without warrant arrest for any cognizable offence (which criminal breach of trust is) when there is a reasonable complaint or credible information or reasonable suspicion. "Offence" is defined in this Code to mean "any act or omission made punishable by any law for the time being in force."

The real question then is, whether the word as used in s. 54 includes acts of British subjects outside of British India, which if done in British India would amount to cognizable offences? The British Indan law of offences extends to them when they are *out* of British India by s. 8 of Foreign Jurisdiction Act, XXI of 1879, and so does the law of procedure. But if such a person is *within* British India, what law or procedure applies? If there [77] were no enactment at all, the better opinion is that, whatever prerogative the Government of the Queen at home may have to arrest, the police here would have none: see Forsyth's Constitutional Law, 369, and the authorities referred to. Also Maxwell on Magistrates, 125. The Fugitive Offenders Act and the Extradition Act of England do not appear to empower the police to arrest without warrant. The Government

(1) 1 B.H.C.R. 71 (84) app. (2) 13 B. 376. (3) 9 B. H. C. R. 346.

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of one State has no such special interest in the affairs of another as to induce it to be diligent in capturing escaped offenders before any requisition is made. If there is a Political Agent, s. 188 prohibits inquiry in British India after the arrest, unless the Political Agent certifies in favour of such an inquiry. Our Foreign Jurisdiction Act appears to contemplate only two modes of initiating inquiry, namely, by process issued either by the Political Agent or a Magistrate. If the latter officer takes the initiative, he must give immediate information to the Political Agent if there is one: if there is none, he must at once report his proceedings to the Local Government. There is no such requirement about arrests made by the police without the Magistrate's warrant. Yet it cannot be supposed that the Legislature meant this safeguard not to extend to all cases. These directions in this Act indicate that the procedure is special: so does s. 17 about bail. Sections 11 and 16 provide a careful procedure to be worked by Political Agents, Governments, and Magistrates. If the intention had been to empower the police under s. 54 of the Code, it would have been expressed in plain words. The word "offence" must be limited in a manner analogous to the construction put in *Empress* v. *Murgappa* (1) by the majority of the Full Bench, Sargent and Melvill, JJ. For these reasons the arrest and detention of Mukund were illegal; and the Magistrate ought to have held that the confinement was wrongful. The evidence given by the Sangli jamadar of police shows the dangers to the personal liberty of Her Majesty's subjects in Belgaum. He says he is always arresting people in Belgaum for cognizable offences, and that the Belgaum police assist him in so doing, and it is not usual to mention the name of the criminal. What happens after these arrests is not disclosed by the evidence. We do not suppose [78] that the Magistracy allow any subject of the Queen-Empress to be carried out of British India by the police of a Foreign State, and without any warrant from the Government, or the Political Agent, or a British Magistrate. There is no law which allows such things: and, indeed, every civilized Government is very jealous of all attempts to withdraw its subjects from its jurisdiction and hand them over to the Courts of a Foreign State, especially without any protection against prosecution in the Foreign State for offences committed before that for which the surrender is required. Through the mistakes made by the Magistrates who tried the chief constable for wrongful confinement, he has been twice discharged. We are asked by Mukund to use our revisional powers to put him on trial again. But as the Magistrate has found that the chief constable did not act with malice, but only followed an illegal procedure, which his superiors have sanctioned at Belgaum, we do not think the interests of justice require that he should be prosecuted a third time. We, therefore, do not interfere with the order of discharge. Mukund and two of his witnesses ask this Court to revoke the sanctions given by the Magistrate under s. 195 of the Code of Criminal Procedure for their trial for having given false evidence. On examining the record we find that, even as regards the only tangible matter of charge, *viz.*, whether Mukund was sent up to the Magistrate after arrest in a *dhumney* or on foot, the statements are much balanced; the other matters charged relate to a conversation which may have been exaggerated. In no case do we see any public advantage likely to result from allowing these prosecutions to go on at the suit of a private person. We, therefore, use our powers, in revision, to revoke these sanctions, and stop the prosecutions.

(1) 5 B. 338.

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RANADE, J.—I concur. There is, in my opinion, no room for doubt that the practice of police officers in Belgaum lending their help, without orders from British Magistrates, in the execution of warrants of arrest issued by the authorities in the Sangli State in respect of cognizable offences alleged to have been committed by British subjects in the territories of that State, is not in strict conformity with the terms of the treaty engagements with that State, or with the provisions of the Extradition Act. The treaty [79] engagements permit a larger freedom to the British police to follow up offenders who escape into that State than is permitted to the authorities of the Native State to make arrests in British territory. In this latter case, nothing can be done, except after inquiry, presumably by the Magistrates in British territory. The provisions of the Extradition Act are not very clear as regards the action of the police, but they also impose the obligation of a preliminary inquiry by a Magistrate before a British subject can be made over to a foreign tribunal. The action taken by the Chief constable in this case is thus clearly not in conformity with law. At the same time, the existence of the above practice for many years is held proved by the Magistrate, Mr. Boyd; and the fact, that the District Magistrate deemed it necessary to give the protection or assurance contained in his reply (Ex. 30) to the complainant in a particular case, shows clearly that the procedure of direct arrest by the Belgaum police on the requisition of the Sangli State was well known to the district authorities, and has been followed by them in all similar cases. Under these circumstances, the chief constable cannot be held to have perversely acted in this matter when he simply gave effect to the existing practice. The protection of the District Magistrate's order was not meant by him to be a general protection against all arrests. The warrant brought by the Shahapur jamadar specified no details, and the chief constable could not well be expected to follow any other course than the one he followed, namely, of placing the whole matter before a Magistrate, and acting according to his orders. In so doing he does not appear to have exercised his authority harshly or unreasonably. The chief constable should, therefore, in my opinion, not be put on his trial again for a third time. At the same time the counter-complaints for false evidence brought against Mukund and two others, his brother and pleader, appear to me to be of a sort for which there is not any strong justification. The fact appears to be that Mukund had good reason to be vexed, and ignorant people in such a mood of mind, are disposed to a considerable exaggeration of their feelings in the expressions they use, and in such a state of excitement they often utter inaccuracies which should never be mistaken for deliberate falsehoods. If Mukund had the [80] protecting order with him, his showing it to the chief constable may be easily mistaken for his flourishing it about. Further, there is nothing unnatural in such a man showing this order to the Shahapur jamadar, or to the chief constable, and in the jamadar not attending to it, and the chief constable urging that it could not protect Mukund. The only mis-statement of fact relates to the question of conveyance. But it is too small a matter to furnish grounds for further prolonging this unhealthy litigation. No jury would convict the persons so charged with wilfully giving false evidence under such circumstances. I concur, therefore, in refusing to interfere with the order of discharge passed by the First Class Magistrate, and in revoking the sanction given by the same Magistrate to prosecute Mukund and his brother and pleader for giving false evidence in a judicial proceeding.

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JAN. 30.

APPEL-LATE CIVIL.

19 B. 80.

19 B. 80.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice M. G. Ranade.

NAGAR PRAGJI (*Original Applicant*), *Appellant* v. JIVABHAI BAVAJI (*Original Opponent*), *Respondent.** [30th January, 1894.]

Act VI of 1888 (*Bombay*), *s.* 31—*Gujarat Talukdars' Act—Sale in execution of a decree upon a mortgage before the Act—Necessity of sanction of the Governor in Council to the sale—Execution of decree—Sale.*

Certain *talukdari* estate was mortgaged under a *sankhat* executed before the Gujarat Talukdars' Act (Bom. Act VI of 1888) came into force. On the 22nd August, 1889 (*i.e.*, subsequent to the Act coming into force), a decree was passed for sale of the mortgaged property. The decree was transferred for execution to the Collector, who refused to put up the property to sale without the previous sanction of Government as required by s. 31 of the Talukdari Act.

Held, that s. 31 of the Act had no application to the present case. The *san* mortgage having been executed before the Act came into force, and left with its validity untouched by cl. 1 of s. 31, the ordinary remedy of the mortgagee to bring the property to sale was not taken away by that section. The sanction of the Governor in Council was, therefore, not necessary to the sale in execution of the decree on the mortgage.

[R., 11 Bom. L.R. 1372 ; **Expl.**, 22 B. 684 ; **Doubted**, 20 B. 565.]

SECOND appeal from the decision of J. J. Heaton, Acting Joint Judge of Ahmedabad, in appeal No. 210 of 1892.

[81] On the 22nd August, 1889, plaintiff obtained a decree for sale of certain talukdari estate which had been hypothecated under a *sankhat* executed before the Gujarat Talukdars' Act (VI of 1888) came into force.

The decree was transferred for execution to the Collector of Ahmedabad, who refused to put up the property to sell without the previous sanction of the Governor of Bomay in Council as required by s. 31, cl. 2, of Bombay Act, VI of 1888.

The decree-holder thereupon applied to the Subordinate Judge of Dhandhuka, who had passed the decree, praying for an order to the Collector to sell the property as directed by the decree.

The Subordinate Judge rejected this application, on the ground that the decree sought to be executed having been passed *after* the coming into force of the Talukdari Act (VI of 1888), sanction of the Government of Bombay was necessary under s. 31, cl. 2, of the Act, before the property could be sold in execution. He, therefore, declined to interfere with the Collector's order.

This decision was upheld, on appeal, by the Acting Joint Judge.

Against this decision the decree-holder preferred a second appeal to the High Court.

Manekshah Jehangirshah (with him *Gokaldas Kahandas Parekh*), for appellant.—The question is, whether s. 31 of Bombay Act, VI of 1888, is retrospective so as to affect a mortgage effected before the Act came into force. The language of the section shows that it is not. Clause 1 of the section does not affect any incumbrances on a taluqdari estate made before the passing of the Act. An incumbrance includes a mortgage like the present. So, too, cl. 2 of the section does not affect any sale or other alienation made before the Act came into force. In the present case the

* Second Appeal No. 454 of 1893.

decree sought to be executed is based on a mortgage-bond which was passed long before the Act came into force. Under that bond the mortgagee had a right to bring the property to sale. That right was not taken away by s. 31 of the Act. The principle laid down in *Kalian Moti* v. *Pathubhai* (1) [82] applies to the present case. The Act does not affect vested rights. Refers to *Bai Hariganga* v. *Tulsidas* (2) and *Vinayak Moreshvar* v. *Baba Shanbudin* (3).

There was no appearan for the respondent.

JUDGMENT.

JARDINE, J.—The *san*-mortgage was executed before Bombay Act, VI of 1888, came into force. The decree passed upon it and directing the sale of the immoveable property hypothecated bears date subsequent to the Act coming into force, which circumstance distinguishes the present case from *Kalian Moti* v. *Pathubhai* (1).

The Courts below have held that the Collector is justified in declining to carry out the sale, on the ground that the sanction of the Government of Bombay required by the Act has not been obtained.

Mr. Manekhshah contends that the principle of the above cited decision applies, the *san*-mortgage being an incumbrance within the definition of s. 2 and left with its validity untouched by s. 31, cl. 1. We think that the inference is that the Legislature did not intend by that section to interfere with the ordinary remedy of the mortgagee, and we, therefore, must construe cl. 2 by the light of cl. 1 and exempt from the the operation of the latter clause alienations which the former is intended to leave valid. For these reasons we are of opinion that the sanction of the Governor in Council is not required to the sale under the decree obtained on the mortgage. We now reverse the orders of the lower Courts and direct the Subordinate Judge to dispose of the *darkhast* in accordance with this judgment.

Order reversed.

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19 B. 83.

[83] ORIGINAL CIVIL.

Before Mr. Justice Starling.

HAFIZABAI, *Plaintiff* v. KAZI ABDUL KARIM AND OTHERS, *Defendants.** [18th April 1893.]

Receiver—Administration suit—Receiver appointed where executor is in possession—Suit against executor where will not proved—Will of Mahomedan testator—Parties—Civil Procedure Code (XIV of 1882), s. 438.

The rule of the Court of Chancery, that a receiver will not be appointed against an executor unless gross misconduct was showu, is not applicable to the case of an executor of the will of a Mahomedan.

Where a Mahomedan testator had by his will appointed three executors only one of whom had acted and got possession of the estate, a suit by the testator's widow for administration of the estate was *held* sufficiently well constituted for the purpose of a motion for a receiver, although only the executor who had acted was made defendant, the other two executors not being parties to the suit.

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* Suit No. 133 of 1893.

(1) 17 B. 289. (2) P. J. (1887), 69. (3) 13 B. 373.

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19 B. 83.

Quære whether it would not be necessary or advisable to add the said two executors before the suit came on for hearing.

MOTION by the plaintiff for a receiver. The plaintiff was the widow of one Kazi Rahimtula, who died on the 28th February, 1892, leaving him surviving herself (his widow), a son Kazi Ismail, and two daughters Fatmabai and Nonbai.

The plaintiff's husband Kazi Rahimtula was the son of one Kazi Futtay Mahomed, who died in 1886. He left a considerable amount of property including a share in a printing and book-selling business, in which his son (Kazi Rahimtula) and his brother Abdul Karim (the first defendant) were his partners. He left a widow (Khatubai) and two children, *viz.*, the plaintiff's husband and a daughter Khatijabai, who died in 1891. At the time this suit was filed, the estate of Kazi Futtay Mahomed was the subject of litigation (suit No. 282 of 1888), and an inquiry was proceeding to ascertain of what his estate consisted, and who were entitled to share therein.

After the death of Kazi Futtay Mahomed, the partnership business above mentioned was carried on by his brother Abdul Karim (defendant No. 1) and his son (the plaintiff's husband.)

In March, 1893, the plaintiff filed this suit praying for administration, and that her husband's estate might be partitioned **[84]** between herself and her children. She stated that the first defendant Abdul Karim alleged that her husband had a left a will, but she did not admit that it was genuine, and in any event she denied that it was binding on her unless she elected to take under it. She alleged that the first defendant had taken possession of all her husband's property, and continued to carry on the business, and had opened another press which he was carrying on with monies belonging to her husband's estate.

She prayed (*inter alia*) for the appointment of a receiver to collect and hold possession of the estate of her husband Kazi Rahimtula.

She obtained a rule calling on the first defendant to show cause why a receiver should not be appointed. The rule was argued on the 18th April.

Lang (Advocate General) for the defendant showed cause.

Inverarity and *Jardine* in support of the rule.

The Civil Procedure Code (XIV of 1882), s. 438; Tagore Law Lectures, pp. 564, 567; and Macnaghten's Mahomedan Law, p. 54, were cited.

JUDGMENT.

STARLING, J.—This is a suit brought by the plaintiff, who is the widow of one Kazi Rahimtula, against the first defendant, as his executor, for administration of the estate in his hands, and for the delivery to her and the infant defendants (the sons of the deceased) of the property coming to them.

On the 16th March, 1893, the plaintiff obtained a rule calling upon the first defendant to show cause why a receiver should not be appointed to take charge of the estate of the deceased, which came on for argument on the 18th April.

The first objection taken on behalf of the first defendant was that this suit was not properly constituted. The deceased had appointed three persons as his executors, and only one was made a defendant hereto. In

answer to this objection, s. 438 of the Civil Procedure Code (XIV of 1882) was quoted, which provides that executors who have not proved a will need not be made parties to a suit brought by or against the executors. This, however, is a Mahomedan will, and, therefore, need not be proved. But I think the principle of that section is applicable. Not joining in probate [85] is evidence that those not joining do not intend to intermeddle with the estate, and there is no reason why those who do not intermeddle should be worried with suits concerning a matter in which they have no interest. In this case, the property seems to be wholly in the hands of the first defendant, for in para. 13 of his affidavit of 12th April, 1893, he submits that no reason has been shown why the estate "should not remain in my possession," and the affidavits of his two co-executors Ahmed bin Essa Khaliffa and Pirbhai Damji do not lead me to the inference that they have taken possession of the estate; but whatever else they have done, they have left that in the possession of the first defendant. Consequently, I think, for the purposes of this motion, that the suit is sufficiently well constituted. I express no opinion, however, as to whether it may not be necessary, or at any rate advisable, to add the other two executors as defendants before the suit comes on for hearing.

It was then argued that, as the first defendant is an executor, the Court would not appoint a receiver as against him unless gross misconduct on his part was shown. It is quite true that the Court of Chancery will not appoint a receiver against an executor on slight grounds, because his appointment as executor shows that the testator, who must be assumed to have known his character, had confidence in him, and the Court will give the fullest weight to that expression of confidence, and require a much stronger case to be made out for a receiver against an executor than against other persons. In England, however, where this is the rule, a testator by his will disposes only of what is absolutely his among the objects of his bounty; he has, therefore, a right to choose who shall distribute that bounty among those who can claim only under the will. But a Mahomedan testator cannot bequeath more than one-third of his property, in any case, without the consent of his heirs, and the executor has not only to distribute that one-third among the legatees, but also the remaining two-thirds amongst the heirs who claim adversely to the will; consequently there is not the same reason why the appointment by a Mahomedan testator of an executor should receive the same consideration as the appointment of an executor by an English testator does in England.

[86] Bearing these remarks in mind I will proceed to point out the effect that the evidence on affidavit has had on my mind. At a very early stage I find correspondence about the difficulty the legal advisers of the plaintiff have had in getting access to her, and complaint is made of the obstructiveness of a sepoy who is placed at the entrance of the house. The executor says he was put there by the testator during his lifetime. Possibly, but now he must be continued by the first defendant; that clearly appears from his letter of 21st February, 1893, and it also appears from his letter of 30th September, 1892, that he has approved of the sepoy, on one occasion at least, preventing the plaintiff's legal advisers having communication with her. The impression the whole correspondence on this point leaves on my mind is that the first defendant is not anxious that the plaintiff should be encouraged or helped to assert her legal rights, and, without perhaps absolutely ordering the sepoy to stop people from going to see her, has encouraged him in being as obstructive as possible. The plaintiff has a perfect right to assert any claim she may have at law,

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and also is entitled to see her legal advisers whenever she chooses without any obstruction on his part, and the fact that the first defendant tries to put obstacles in her way of so doing does not impress me in his favour.

The next complaint made against the first defendant is the monthly amount of money which he is paying to the plaintiff, which he defends on the ground that she is getting for the *maintenance* of herself and infant children what she got during her husband's lifetime. But the plaintiff's position is now changed. She is entitled not merely to maintenance, but is the absolute owner of one-eighth of her husband's property, and *that* she has a right to receive; whereas the whole tone of the first defendant's affidavits shows that, like most males in this country, he seems to have an idea that females ought not to have the absolute control of their property and are not to get more than maintenance, or certainly not more than the chief male in the family chooses they shall receive.

In considering this point, I take into account the fact that there is some litigation going on in another suit which may diminish the amount of the estate of the deceased; but, as far as I could [87] gather during the argument of the case, that suit can only affect two houses and a portion of the book-selling and printing business. Consequently it seems to me quite possible, and if so, proper, that the plaintiff should receive some amount of income (the calculation of how much does not seem to involve much difficulty) as her own; yet the first defendant in paragraph 14 of his first affidavit alleges that no division of the deceased's estate can be made until that suit is brought to a final close. Probably no final division can be made till then, but that is no reason why no division at all should be made at the present time. All these acts of the first defendant are facts from which, it seems to me, *some* inference may be drawn that in the hands of the first defendant the property of the deceased may be wasted before the time for final division arrives, though I do not think I should on such grounds alone deprive the first defendant of the control of his testator's estate.

Lastly, there is the charge about the partnership carried on by the deceased and the first defendant. Now I cannot come to a definite conclusion that the first defendant has actually been misapplying any portion of the stock, though admitting, as he does, that he has been removing a portion of it, his explanation is not satisfactory, consisting only of general statements, whereas it was in his power to have given a detailed account of what was done with each parcel of property which left the partnership shop. A more serious matter, however, is the fact that before he has wound up the business, he has opened on his own account another shop of the same description, the natural result of which will be that he will attract the former customers of the partnership to his own shop, and thus entirely destroy the value of the goodwill of the partnership business, the share of the deceased in which ought to have formed a portion of his estate. This conduct is certainly not allowable in an executor who is bound to preserve his testator's estate.

Taking all the facts of the case into consideration I think I must come, on the whole, to the conclusion that there is danger that the estate of the deceased will be wasted in the hands of the first defendant, and that this is a proper case for the appointment of a receiver.

[88] Attorney for plaintiff : Mr. *K. D. Shroff.*

Attorney for first defendant : Messrs. *Little, Smith, Nicholson and Bowen.*

Attorney for the other defendants : Mr. *K. D. Shroff.*

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Before Mr. Justice Farran.

IN RE JEHANGIR B. KARANI & Co., LIMITED.

HORMOSJI RUSTOMJI DASAR AND OTHERS (*Petitioners*) *v.* PESTONJI EDALJI DHARWAR AND ANOTHER (*Respondents*).

[6th September, 1894.]

Company — Voluntary winding up—Inquiry into conduct of liquidators — Indian Companies Act (VI of 1882), s. 214—Practice—Procedure.

Where contributories of a company in voulntary liquidation complain of the conduct of liquidators in the winding up, and desire an inquiry under s. 214 of the Indian Companies Act (VI of 1882), the proper procedure is by summons in chambers.

Where it is sought to make an officer of a company liable for misapplication of the funds of a company or for misfeasance or breach of trust in relation to its affairs, the sum sought to be recovered should be definitely stated in the summons, and the grounds upon which the application is based should be fully and adequately set out in an affidavit or affidavits.

RULE *nisi* to set aside an *ex parte* order dated 19th July, 1894, made under s. 214 of the Indian Companies Act (VI of 1882), directing an inquiry into the conduct of liquidators, &c. The Jehangir B. Karani Co., Limited, was registered as a joint stock company in 1892, and carried on the business of book-sellers and publishers, &c. On the 23rd May, 1894, the company went into voluntary liquidation, and Pestonji Edalji Dharwar and Sorabji Kaikhosru Patuk were appointed liquidators.

On the 12th July, 1894, the petitioners presented a petition to the High Court complaining of the conduct of the liquidators, alleging that they had sold a considerable portion of the company's property very much below its proper value, and bringing other charges against them in connection with the said sales. The following clauses of the petition set forth the petitioners' case :—

"14 Your petitioners are at a loss to account for the extraordinary conduct of the liquidators aforesaid in selling the company's assets at the ridiculous prices aforesaid. Before doing so they did not cause any valuation or inventory of the assets to [89] be made, or invite any tenders or advertise, nor did they call any meeting of shareholders or creditors to consult them or ascertain their wishes; and if the said sales are *bona fide* sales, which your petitioners do not admit, your petitioners say that the conduct of the liquidators amounts to gross negligence and misfeasance on their part and is a breach of trust reposed in them.

"15. Your petitioners say that there are 37 shareholders in the said company. The creditors of the company have claims amounting to Rs. 65,000, or thereabouts, out of which creditors to the extent of Rs. 20,000 or thereabouts being secured creditors have been paid off, and creditors to the extent of Rs. 14,000 are in England. All the creditors of the said company, your petitioners believe, support this application. All the independent shareholders also, your petitioners believe, support it."

The prayer of the petition was as follows :—

"(1) That this Honourable Court will exercise, in the case of this company, all the powers which this Court might exercise if the said company were wound up by the Court, and in particular will exercise the powers given by s. 214 of the Indian Companies Act (VI of 1882).

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"(2) That this Honourable Court will examine into the conduct of the said Pestonji Edalji Dharwar and Sorabji Kaikhosro Patuk in and about the matter of the sales aforementioned, and will compel them to contribute such sums of money to the assets of the company by way of compensation in respect of the misfeasance or breaches of trust complained of by your petitioners as this Honourable Court thinks just."

On the 19th July the petitioners obtained an *ex parte* order directing an inquiry in chambers into the conduct of the liquidators with regard to the sales mentioned in the petition, "and as to what sum or sums of money (if any) the said liquidators should be compelled to contribute to the assets of the said company by way of compensation in respect of misfeasances or breaches of trust complained of in the said petition."

On the 30th July, 1894. the liquidators obtained a rule *nisi* to set aside the above *ex parte* order.

The rule now came on for hearing.

Lang (Advocate-General) for the liquidators in support of the rule :— The order of the 19th July was obtained *ex parte*, and without any notice to the liquidators of the charges made against them. The procedure is wrong. The petitioners should have taken out a summons, and the case should have been heard on affidavits filed by both parties before any order was made. There is no precedent for such an order. He referred to ss. 162, 182 **[90]** and 214 (1) of the Indian Companies Act (VI of 1882) and the corresponding sections of the English Act, *viz.*, ss. 115, 138 and 165 ; Lindley on Companies (5th ed.), p. 97 ; Rules 78 and 79 under the English Companies Act.

Inverarity, for the petitioners, showed cause:—Under s. 214 of the Indian Companies Act (VI of 1882) the person proceeded against is not entitled to notice. To get an order under that section it is only necessary to satisfy the Court that there is a *prima facie* case against the persons

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(1) Indian Companies Act (VI of 1882), ss. 182 and 214 :—

182 :—Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound-up by the Court. Any such application may be made by motion. The Court, if satisfied that the determination of such question or the required exercise of the power will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Courts thinks fit, or it may make such other order or decree on such application as the Court thinks just.

214 :—Where, in the course of the winding-up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for, any monies of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator or of any creditor or contributory of the Company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to re-pay any monies so misapplied, or retained, or for which such officer has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

Explanation I.—The banker of a company is not, as such, an officer within the meaning of this section.

Explanation II.—Proceedings cannot be taken under this section against the representatives of a deceased officer.

charged—*Stringer's case* (1). In proceedings under s. 115 of the English Act no notice is given to the person against whom the order is applied for. Section 214 of the Indian Act gives a creditor a right to such order. The English rules do not apply in India. He **[91]** referred to *In re Gold Company* (2); *Re Sir John Moore Gold Mining Company* (3).

Lowndes, for English creditors on the same side.

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JUDGMENT.

FARRAN, J.—In this matter the Advocate-General obtained a rule *nisi* on the 30th July last to set aside an order made on the 19th idem, directing an inquiry into the conduct of the liquidators of the company under s. 214 of the Indian Companies Act (VI of 1882), on the ground that it was improperly made without notice to the liquidators and otherwise than on affidavit.

The point involved is of little importance, and, though it was argued at considerable length, of no difficulty. It involves merely a question as to the proper procedure to be adopted in order to enable creditors and contributories of a company to put the Court in motion under s. 214. Though the company is in course of voluntary liquidation, the Court, on its aid being invoked by the liquidators or contributories, is enabled by s. 182 to determine questions and to exercise powers given by the Act to the same extent as if the company were being wound up by the Court or under its supervision. This section has been interpreted by the Courts in England in the broadest and most extensive sense. In *In re Union Bank of Kingston-upon-Hull* (4) Sir George Jessel, M. R., said: "In a voluntary winding-up, a liquidator may apply to the Court to decide any question fairly arising in the winding up, and it is much cheaper to bring it before me by way of motion than by an action, 809-10."

It was at one time a question whether the Court would exercise the stringent powers conferred by s. 214 in the case of a company being voluntarily wound up, but that doubt was set at rest by *Rance's case* (5), where the Court of appeal, reversing a decision of the Master of the Rolls, made an order, in the case of a company being wound up voluntarily, that one of its past directors should repay a sum of £125 to the company. That case is also important as showing how the Court's aid is invoked in such a case. There the liquidator took out a summons to have it declared that Mr. Rance was liable to pay the sum in question, **[92]** and asking for an order that he should pay it. The same course was adopted in *In re National Funds Assurance Co.* (6), where a summons was also taken out. This was a compulsory winding up. In the case of *In re British Corporation* (7), leave to serve a summons in Scotland, taken out under the section in question, was granted. Mr. Palmer in his work (p. 808, 4th ed.) states that the application was usually made by summons. The form is given at p. 809. I have examined all the cases in the Law Reports cited by Mr. Palmer under the section, and find that in all of them (a very large number), where the nature of the proceedings is indicated (except in *Stringer's case*, where the application was upon notice of motion) they were by way of summons. It may, therefore, I think, be taken that the practice in the Supreme Court in England under the Act of 1862 was to initiate proceedings under s. 214 by summons. Throughout this judgment I refer to the sections by their numbers under the Indian Act (VI of 1882).

(1) L. R. 4. Ch. 475. (2) 12 Ch. D. 77. (3) 25 W. R. 900.
(4) 13 Ch. D. 808. (5) L.R. 6 Ch. 104. (6) 10 Ch. D. 118.
(7) 5 Ch. D. 749.

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The wording of the section corresponding with s. 214 was altered by the Act of 1890, and under it rules have been framed (Rules 78 and 79) which provide that in Courts other than the Supreme Court, application under the revised section shall be by motion (after eight days' notice), while in the Supreme Court the old practice of taking out a summons is to be observed. There can now be no question as to the English practice. The case of *In re Gold Company* (1), cited by Mr. Inverarity, shows that when proceedings allowed by s. 182 of the Indian Act are initiated by contributories, notice to the liquidator ought to be given, as *prima facie* he is, as it were, *dominus litis*, and is presumably the most proper person to conduct the proceedings. When the proceedings are, however, taken against the liquidator himself, it may be presumed that he does not desire to initiate them himself, and in such a case it is not, therefore, necessary that he should have notice beyond the notice given by the service of the summons upon him. It might have been thought, having regard to the closing provision of s. 182 of the Indian Act, that the Court, before issuing a summons under s. 214, should give its leave **[93]** or sanction to such proceedings being taken,—beyond I mean the sanction involved in the issuing of the summons itself. This is not so. I cannot find in the English cases any trace of the Court, when its assistance is invoked under s. 182, to put in force the provisions of s. 214, making any preliminary order or even giving any preliminary sanction. In *Rance's case*(2), where the application of s. 214 to the case of a voluntary liquidation is so fully discussed, the Court does not suggest the necessity of such preliminary order or sanction. The reason is this. The section (182) provides that "the Court, if satisfied that the required exercise of power will be just and beneficial, may accede, wholly or partially, to such application on such terms and subject to such conditions as the Court thinks fit, or it may make such other order or decree on such application as the Court thinks just." It is thus in a certain sense a discretionary jurisdiction given to the Court. The section (182) does not give the applicant an absolute right to call on the Court to exercise its powers. It is, therefore, fit and just that the person attached, on the return of the summons taken out against him, should have an opportunity of showing not only that he has a good defence upon the merits, but also that there are peculiar circumstances in the case; that it would involve him in some peculiar hardship if the claim against him were to be tried in this summary way; which would render it unjust to put the powers of s. 214 in force against him. If an *ex parte* order has already been made under s. 182, that an inquiry shall take place under s. 214, the Judge hearing the summons would be deprived of his power to hear the person sought to be charged in support of such an objection. He would be robbed of his discretion. The case *In re Gold Company* (1) relied on by Mr. Inverarity, and the cases of *In re Silkstone, &c., Coal and Iron Company* (3) and *In re Metropolitan Bank*(4), all decided upon s. 162, are different. They are cases in which the order of the Court was to examine a witness, an officer of the company, in relation to its affairs. Such an order may be made *ex parte*, and the person to be examined has, as a rule, no right to object to his being examined. In such cases the Court, making **[94]** the examination order, considers beforehand (since it is an *ex parte* order) whether it is just and beneficial to make it, and often imposes limits and conditions upon the person applying for it.

(1) 12 Ch. D. 77.
(2) L. R. 6 Ch. 104.
(3) 19 Ch. D. 118.
(4) 15 Ch. D. 139.

For these reasons I consider that the order made on the 19th of July last was not warranted by the English authorities and ought not to have been made in the form in which it has been drawn up. When I made the order, I made it in terms of the petition. The order as drawn up goes beyond these terms, but I do not think that I ought to have made the order even in the terms of the petition. Although I consider that, for the reasons I have given, there was no necessity for an application such as that made on the 19th of July at all, and that a summons taken out in accordance with the practice in England, or a rule applied for on notice, would have been sufficient, I am not prepared to say that it was not open to the applicants to ask for preliminary leave to institute proceedings under s. 214. I shall not, therefore, discharge the order of the 19th July, but amend it by ordering that the petitioners be at liberty to take proceedings under s. 214 in respect of the matters referred to in their petition. Such an order determines nothing against the liquidators, and is such as can be properly made *ex parte*. It should not be served on the liquidators. Though the practice in England is, as I have shown, well established to take out a summons in the Supreme Court, or, in other Courts, a rule upon notice in cases like the present, each founded upon proper materials, the practice in this Court is not equally uniform, and there is no rule to guide practitioners. Petitions in some cases have been presented, and in others summonses have been taken out. I cannot, therefore, say that a petition in the present instance was erroneous. I shall, therefore, now simply accept it and set it down for hearing in chambers on some future day.

I would at the same time point out that where it is sought to make an officer of a company liable for misapplication of the funds of a company, or for misfeasance or breach of trust in relation to its affairs, the sum sought to be recovered should be definitely stated in the summons, and the grounds upon which the application is based should be fully and adequately set out in an affidavit or affidavits. The position taken up by the petitioners **[95]** in the 7th paragraph of their affidavit is, in my opinion, quite untenable. They say "if all the matters are allowed to be disclosed on affidavits, the principal object of the enquiry would be frustrated. The various points upon which the liquidators, and other persons whose evidence is important, have to be examined, and the facts which have to be proved, would become known to them, which, under the circumstances of this case, should not be allowed to be done."

In *Stringer's case* (1), Selwyn, L.J., in pointing out why the Courts should not decline the exercise of the summary jurisdiction given by the Companies Act, uses the following words. (His Lordship here quoted the words, p. 484, and the observations of Giffard, L.J., in the same case, p. 494.) These observations show the spirit in which proceedings under the sections in question (as in all other litigation in British Courts) should be conducted, openly and fairly with full notice to the persons charged of the facts and circumstances upon which the petitioners rely, and of the points and grounds upon which they propose to rest their case. I must, therefore, direct that they support their application by affidavit or affidavits. This or these will be answered by the liquidators, and the case will then come on in chambers and be heard much as though it were a suit. This is in accordance with the 96th rule under the Companies Act. That and rule 10 of the High Court Rules seem to show that a summons rather

(1) L.R. 4 Ch. 475.

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than a rule upon notice is the proper procedure in such a case as this. A petition is more properly presented when the direction of the Court is sought upon admitted facts, than when a hostile order is applied for upon disputed materials.

The order, then, will be that the order of the 19th July be varied by substituting, for the words "that an enquiry be held in chambers on Thursday, the 2nd day of August next, at 10-30 A.M., into the conduct of," the words "that the petitioners be at liberty to take steps under s. 214 of the Companies Act to determine the liability (if any) of." The petition will be accepted and referred to chambers. The hearing of it will be fixed by the [96] Judge in chambers after the filing of the affidavits. The petitioners must pay the costs of this rule.

Attorneys for the petitioners: Messrs. *Pestanji, Rustim and Kola.*
Attorneys for the liquidators: Messrs. *Craigie, Lynch and Owen.*
Attorneys for the English creditors: Messrs. *Turner and Hemming.*

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Before Mr. Justice Starling.

JAGANNTAH RAMJI (*Petitioner*).* [23rd September, 1893.]

Guardian and Ward—Minor—Power of Court to appoint guardian of person and estate of a minor—Power of guardian to sell minor's property.

The power of the Court of Chancery to appoint guardians to infants, whether such infants have property or not, is possessed by the High Court.

***Quære*, whether a guardian appointed by the Court (except under some special Act) has any authority to sell the property of his ward unless the express sanction of the Court is given.**

IN chambers.

The petitioner presented his petition praying that he might be appointed guardian of the person and property of his two minor sons Damodar Jagannath and Bhaskar Jagannath, and that he might be empowered to mortgage certain family property.

The petition stated that he and his two minor sons were joint in food, worship and estate, and resided together in Bombay; that they were possessed of certain ancestral immoveable property described in the schedule to the petition; that the petitioner had incurred costs, amounting to about, Rs. 800, in a suit which was still pending; that he was indebted to various persons and had no moveable property wherewith to pay the said debt; that the creditors were pressing for payment, and that unless paid they would file suits to the detriment of the family. He further stated that subject to the sanction of the Court he had [97] contracted for a loan of Rs. 1,500 on the mortgage of the said immoveable property, and he, therefore, prayed, as above stated, for the sanction of the Court.

Lang (Acting Advocate-General) presented the petition and cited *Re Jairam Luxmon* (1).

JUDGMENT.

STARLING, J.—The petitioner in this case, Jagganath Ramji, has two minor sons Damodar and Bhaskar, and the three together constitute

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* Miscellaneous No. 770.

(1) 16 B. 634.

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a joint and undivided Hindu family possessed of ancestral immoveable property and also of some moveable property, but none which apparently is available to pay off certain debts which the petitioner has incurred. These seem to me *prima facie* to be debts properly incurred for the benefit of the family, and such as would justify the petitioner in selling or mortgaging the family property in order to pay them. The petitioner has arranged to raise a mortgage on the family property for the purpose of paying them, and now petitions the Court to appoint him guardian of the persons and estate of his minor children and to sanction the mortgage in order that he may be able to raise the money at a lower rate of interest than he would otherwise be able to do.

When the petition was presented to me in chambers I refused to accept it, or make any order on it, as I considered that under the circumstances the petitioner had full power to mortgage the property himself, and that, as I did not feel I ought formally to sanction the mortgage without a much fuller enquiry which would cause additional expense to be incurred, the appointing him as guardian would certainly give him no further power than he originally possessed as the father of an undivided Hindu family, but might possibly lead the mortgagee to think that he had fuller powers. The petition was, however, presented to me again by the Acting Advocate General, who called my attention to the case of *Jairam Luxmon*(1), in which a similar order,—with some doubts, however, as to its (propriety—was made by Farran, J.) After hearing his argument, I reserved judgment, and consulted the Chief Justice on the matter, as I felt it was desirable that some definite rule should be laid down on which to act in these cases which are becoming somewhat numerous.

[98] There is no doubt that the Court of Chancery has always had the power of appointing guardians to infants on a proper case being made out, whether such infants have property or not—see *Re Spence*, (2) *Re Fynn* (3)—though it is ordinarily not necessary for a Court to interfere in cases where there is no property—*Wellesley* v. *Duke of Beaufort* (4). This power was possessed by the Supreme Court of Bombay under its charter, and was, amongst other powers, preserved to the High Court by the 24 and 25 Vict., c. 134, s. 9 ; and the Guardians and Wards Act VIII of 1890 also reserves the same power to the High Court. Consequently, I consider I have the power of appointing the petitioner guardian of the persons and estate of his two minor children, and I do so.

As to sanctioning the proposed mortgage, I understood the Acting Advocate General to say that he did not now ask for that ; but under any circumstances I do not consider I could grant that sanction without fuller information as to the means of the petitioner and the nature and amount of the moveable property of the family than is afforded to me in the petition, for it may be (I do not say it is) the case that the petitioner is in receipt of a comparatively large income by way of salary, in addition to the income of the immoveable property, which he has been squandering and thus the necessity of borrowing money for proper purposes has arisen. The Court of Chancery has always exercised a very rigid scrutiny over the dealings of a guardian with the property of his ward. In Daniell's Chancery Practice, Ch. XXIX, s. 5, part 3, it is said : "There is some difficulty in determining with precision the extent of the authority which is possessed by a guardian of the estate of an infant, who has been appointed by the Court of Chancery," and that doubt, except so far

(1) 16 B. 634. (2) 2 Phil. 247 (252). (3) 2 Deg. & Sm. 457 (481). (4) 2 Russ. 1 (20, 21).

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as it has been removed by English statutes, still seems to be in existence. The whole of part 3 is devoted to discussion of the powers of guardians in the management of the property of their wards, and from a perusal of it, it seems to me very doubtful whether a guardian appointed by the Court (except under some particular Act) has any authority to sell the property of his ward, unless of course the express sanction of the Court is given. The result of my granting this application, so far as I have granted it, will [99] be, as Farran, J., says in the above case, to leave the guardian to do on his own responsibility what he thinks right and proper under the circumstances of the case.

Attorneys for petitioner:—Messrs. *Mulji and Raghowji.*

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APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice M. G. Ranade.

MAHADEV BALVANT AND ANOTHER (*Original Plaintiffs*), *Appellants v.* LAKSHMAN BAEVANT (*Original Defendant*), *Respondent.**

[1st February, 1894.]

Hindu Law—Partition—Suit by minors for partition—In what cases such a suit can lie—Malversation.

Under the Hindu law a minor co-parcencer cannot sue for partition unless his interests are likely either (1) to be advanced thereby, or (2) protected from danger. Where an adult co-parcener has taken up a hostile position to the interest of minor co-parceners and denied their rights, or sets up his own independent title, or where the minors live separately and the adult co-parcener does not support them, in all these cases, it is in the interest of the minors that their share shall be partitioned and set apart.

The plaintiffs, who were minors, sued by their next friend for a partition of their ancestral property in the possession of their step-brother, the defendant. It appeared that soon after their father's death disputes and differences arose between plaintiff's mother and their step-brother, which led to their separation in food and residence. The defendant managed the family property, but did not support the minors out of the rents and profits thereof. Hence the suit.

Held, that though no malversation was alleged or proved, the allegation, in the plaint, of disputes and separate residence and defendant's failure to support the plaintiffs were sufficient to justify the Court in permitting the plaintiffs to maintain the suit.

[R., 19 B. 309.]

APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in suit No. 382 of 1889.

Suit for a partition of joint family property.

One Balvant Karandikar died on 23rd April, 1886, possessed of considerable moveable as well as immoveable property. He left behind him a widow by name Jankibai, two minor sons (the plaintiffs) by Jankibai, and an adult son (the defendant) by his first wife.

Within a few months after Balvant's death, disputes arose in his family, in consequence of which Jankibai and her two minor [100] sons separated from the defendant in food and residence. The defendant took possession of the whole of the family property, both moveable and immoveable.

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* Appeal No. 145 of 1892.

In 1889 the minor sons of Balvantrao brought this suit by their next friend to recover by partition their two-thirds share of the family property, alleging that their step-brother, the defendant, had after their father's death taken possession of the whole of the ancestral property, moveable as well as immoveable, and had refused to support them out of the rents and profits of the estate in his hands. The plaintiffs also asked for an account of the income of the property since the date of their father's death.

The defendant pleaded (*inter alia*) that plaintiffs' mother Jankibai had taken away cash and ornaments belonging to the family of the total value of Rs. 10,000, which should be brought into hotchpot; that he had no objection to a partition of the property in dispute, except a house, which he had redeemed with funds belonging to his deceased mother and forming part of her *stridhan*, and that the plaintiffs were bound to contribute their share of the mortgage-debt which had been thus paid off.

The Subordinate Judge dismissed the suit on a preliminary point, holding that under the Hindu law the minors were not entitled to sue for partition without showing that their interests in the joint property would be seriously prejudiced if a partition were not forthwith ordered.

The following extract from his judgment gives the reasons for dismissal of the suit:—

"This suit seems to have been filed either in ignorance or in forgetfulness of the salutary rule of Hindu law, which does not allow of partition at the instance of a minor co-parcener without good grounds to believe that the minor co-parcener's interests in the joint family property would be prejudiced seriously if a partition were not forthwith decreed. The plaint discloses not a single ground to satisfy the requirements of the Hindu law on this point. The officer who registered the plaint seems to have taken no notice of this material omission. The defendant's pleader did not raise the point in his *kaifyat*, and my predecessor in office did not raise that issue. At the close of the trial, however, the defendant's pleader saw the point and asked for a short time to enable him to find authorities on the subject. In addressing the Court both pleaders argued the point, and the defendant's pleader cited some authorities in support of his contention. He cited I.L.R. 8 Calc., 537; S.A. No. 148 of 1871; and 3 Mad. H.C. Rep., 94. The rule of Hindu law, upon which the defendant's pleader has [101] relied, is so well known that it does not require the help of any decided cases. A minor is unfit to attend personally to his affairs, and his (minor's) estates must be managed by somebody else. The Hindu law under the circumstances wisely presumes that a manager of a joint Hindu family is the best person to be entrusted with the management of the shares of the minor members of that family, and until and unless this presumption is rebutted by strong evidence showing that the interests of the minor members cannot be safely entrusted to the manager of the joint family, the law will not allow a partition at the instance of a minor co-parcener. Such being my view of the law applicable to this case, and the plaint being altogether silent as to the existence of any of the grounds required by Hindu law, I proceed to see whether the evidence has made out a case for the sustenance of a partition suit on behalf of the minor plaintiffs.

* * * * *

"There is not a shadow of ground to contend that defendant has been guilty of mismanagement or malversation or has done anything which has prejudiced or is likely to prejudice the interests of the minor plaintiffs.

"I dismiss the plaintiffs' suit with costs."

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Against this decision the plaintiffs appealed to the High Court.

Shivram Vithal Bhandarkar, for appellants.—The lower Court has rejected the plaintiffs' claim for partition on a technical point which is not to be found in the pleadings, or covered by any of the issues in the case. The lower Court holds that a minor cannot demand partition unless he alleges and proves mismanagement or malversation on the part of the adult co-parceners. We contend that this is an erroneous view and is not warranted by any texts of Hindu law. The rule is correctly laid down in placitum 544 of Colebrook's Digest, Vol. III. If a minor's interests are likely to be prejudiced by the property being left in the hands of the adult co-parcener, he is entitled to claim partition—*Thangam Pillai* v. *Suppa Pillai* (1). See also *Kamakshi Ammal* v. *Chidambara Reddi* (2). We go further, and say and contend that if a minor would benefit by partition, the Court would allow it, even though no specific act of malversation be alleged against the adult co-parcener—*Govind Ramchandra* v. *Moro Raghunath* (3). Refers to *Damoodur Misser* v. *Senabutty* (4); *Svamiyar Pillai* v. *Chokkalingam Pillai* (5); West and Bubler's Digest (3rd Ed.), pp. 674, 815; and Mayne's Hindu Law (5th Ed.), s. 435. In the present case [102] the minors have been excluded from all participation in the income of the family property ever since their father's death. The defendant is their step-brother. Their interests are not safe in his hands. A partition is, therefore, not only desirable, but necessary, to protect their interests.

Daji Abaji Khare, for respondent:—There is no allegation in the plaint that the minors' interests would be prejudiced by the property being left in our hands. The lower Court has found that we are not guilty of mismanagement or malversation, or have done anything which is likely to prejudice the minors' interests. That being so, the minors are not entitled to claim partition—*Damoodur Misser* v. *Senabutty* (4); *Alimel Ammal* v. *Aruna Chellam Pillai* (6); West and Buhler (3rd Ed.), 74, 75; Mayne's Hindu Law (5th Ed.), ss. 400 and 432; 2 Vyavastha Darpan, 338. A partition, like a contract, depends upon the agreement and consent of all parties concerned. A minor cannot give such consent. The sovereign as *parens patriæ* acts for him, if his interests are in danger. This is a condition precedent to a minor's suit for partition. This objection to the suit was not indeed taken by the defendant in his written statement. But as it goes to the root of the case, the Subordinate Judge was competent to raise it of his own motion.

JUDGMENT.

RANADE, J.—In this case the minor plaintiffs by their next friend, brought a suit for a partition of their paternal property against their step-brother, the defendant. Defendant filed a written statement, in accordance with which issues were laid down, and evidence received in regard to the same. The lower Court, however, disposed of the suit on a somewhat technical point of law, not raised by the defendant, and not involved in the issues, namely, that, under Hindu law, minor co-parceners cannot sue for partition without showing good ground to lead the Court to believe that the minor co-parceners' interest in the joint property would be seriously prejudiced if a partition were not forthwith decreed. The lower Court held that plaintiffs failed to show that defendant was guilty either of mismanagement or malversation, or that he had done anything which

(1) 12 M. 401.
(2) 3 M. H. C. R. 94.
(3) P. J. (1875), p. 261.
(4) 8 C. 537.
(5) 1 M. H. C. R. 105.
(6) 3 M. H. C. R. 69.

prejudiced, or was likely to prejudice, [103] the interests of the minor plaintiffs, and on this ground, plaintiffs' claim was dismissed with costs.

The chief point argued before us by the appellants' pleader related to this view of the lower Court that the manager of a joint Hindu family is the best person to be entrusted with the care of the interests of its minor members, and that partition should not be allowed unless this presumption was rebutted by strong evidence showing that the minors' interests could not be safely entrusted to the managing member. The lower Court appears to have assumed that the presumption mentioned above cannot be rebutted unless malversation is proved. In one place it is stated in the judgment that "there is nothing to show that defendant has made away with any of the moveable property, and *in the absence of such proof, the partition suit will not lie.*"

It appears to us that the lower Court has placed a too narrow construction on the rule of the Hindu law referred to by it. It is true some of the earlier decisions required proof of malversation or mismanagement; but the more recent decisions have laid down both a positive and a negative test, namely, that no suit by a minor co-parcener for partition should be allowed, unless his interests are either likely (1) to be advanced thereby, or (2) protected from danger. The decision in *Svamiyar Pillai* v. *Chokkalingam Pillai* (1) no doubt states malversation as the ground which should be proved before a minor's suit for partition can be allowed. In *Kamakshi Ammal* v. *Chidambara Reddi* (2), however, the Madras High Court took note of Sir T. Strange's dictum and the case in the first volume, and ruled that "there was no foundation in Hindu law for the position that an infant cannot claim partition except when" malversation is proved. The true doctrine laid down in that case was that an action will not lie "unless there is something clearly indicating that the interests of the infant will be advanced by partition." The test laid down is thus whether or not the suit was for the benefit of the minor. This view of the Madras High Court was re-affirmed by it in *Thangam Pillai* v. *Suppa Pillai* (3), and also by the Calcutta High Court in *Damoodur Misser* v. *Senabutty Misrain* (4) where it was held [104] that unless either malversation, or some other circumstances which made it for the minor's interest that his share should be set aside, are proved, a minor plaintiff cannot sue for partition. In West and Buhler (3rd Ed.), Vol. 2, Partition, p. 675, mention is made of a case in which the High Court of Bombay directed the District Judge to report after inquiry whether the minor would benefit by a suit for partition against his uncle, against whom no special instance of malversation had been alleged: see also *Govind Ramchandra* v. *Moro Raghunath* (5). Some of these cases are referred to in the judgment of the lower Court, but it does not appear to have correctly apprehended the true spirit of these decisions of the three High Courts on this point.

The lower Court, therefore, was bound to consider the question, not so much as though it had only a negative aspect, and rested upon proof of malversation, but also from the positive point of view, namely, whether or not the partition suit would benefit the minor's interests. In the cases quoted above, it has been held that when the defendant has taken up a hostile position to the minors' interests, and denied their rights,

(1) 1 M. H. C. R. 105. (2) 3 M H. C. R. 94. (3) 12 M. 401 (404).
(4) 8 C. 537. (5) P. J. (1875) p. 261.

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or sets up his own independent title, or where the minors live separately, and defendant does not support them, in all these cases it is in the interest of the minors that their share should be partitioned and set apart. If the minor's rights are not denied, or the property is not mismanaged, it would generally not be in the minor's interest to sue for partition. In the Bengal case, the existence of disputes and differences was held to be a sufficient ground to justify the partition suit. In the present case, the evidence shows that plaintiffs and their mother have been living separately from defendant for many years, and that there have been many disputes between plaintiffs' mother and defendant. Plaintiffs also allege, and defendant does not deny, that the defendant does not support the plaintiffs out of the family property. These facts appear to us to furnish sufficient grounds for holding that, as between plaintiffs and their step-brother, the defendant, the partition suit brought by plaintiffs would promote the interests of the minor plaintiffs, and that the partition of plaintiffs' two-third share would benefit them materially. Even though no [105] malversation was alleged or proved, the allegation in the plaint of disputes and separate residence, and defendant's failure to support the plaintiffs are, therefore, sufficient to justify the Court in permitting plaintiffs to maintain this suit. Under these circumstances, the decision of the lower Court must be set aside; and as it recorded findings without giving reasons on the issues laid down by it, we must reverse the decree, and remand the case for full inquiry and fresh decision on the merits. Costs to follow the final decree.

One of the minor plaintiffs has in the meanwhile become a major, and has applied to have his name inserted, and to be allowed to sue in his own right, as also guardian of his minor brother, in place of the next friend. This application has been granted by this Court.

Decree reversed.

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CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* GANPATRAO RAMCHANDRA.* [8th March, 1894.]

Penal Code (Act XLV of 1860), ss. 109, 115, 148, 302—Abetment—Abetment in British India of an offence committed in foreign territory—Not an offence under the Penal Code—Offence—Criminal Procedure Code (Act X of 1882), s. 188.

An abetment in British India by a British subject of an offence committed in foreign territory is not an offence punishable under the Indian Penal Code (XLV of 1860), and cannot, therefore, be tried by a Court in British India:

Regina v. *Elmstone* (1) *and Empress* v. *Moorga Chetty* (2) followed.

The accused, a Native Indian subject of Her Majesty, was committed to the Court of Sessions for abetting the commission of murder or of rioting under ss. 302 and 147 of the Indian Penal Code. The alleged abetment consisted of words spoken in British territory by the accused, inciting certain Portuguese subjects to kill one Bhana if he attempted to remove the produce of certain lands situate in the Portuguese territory of Daman. A disturbance afterwards occurred at Daman in connection with this matter, in which one man was killed and another wounded. Thereupon the Governor-General of Portuguese India moved the Government of

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* Criminal Revision No. 11 of 1894.

(1) 7 B. H.C.R. Cr. Ca. 89.

(2) 5 B. 338 (347).

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Bombay to bring the accused to justice as the instigator of the murder. The Government of Bombay being of opinion that s. 188 of the Code Criminal Procedure (Act X of [106] 1882) was applicable to the case, passed a Resolution in the Political Department directing the District Magistrate to take the necessary action in the matter. The District Magistrate thereupon committed the accused to the Court of Session on a charge of abetment of murder or of rioting.

Held, quashing the commitment, that the alleged abetment was not an offence punishable under the Indian Penal Code, and that, therefore, the Sessions Court had no jurisdiction to try the accused.

Held, also, that s. 188 of the Code of Criminal Procedure (Act X of 1882) had no application to the present case, the alleged offence of abetment not having been committed outside British India.

[R., 22 B. 54 (64); D., 24 B. 287 (291)=1 Bom. L. R. 678.]

THE accused Ganpatrao Ramchandra, a Native Indian subject of Her Majesty, was charged with having instigated at Tambudi, a village in the Surat district, certain Portuguese subjects of Daman to resist one Bhana to death, if he attempted to remove the produce of their fields in Daman. A riot afterwards occurred at Daman in Portuguese territory in connection with this matter in which a man was killed and another wounded. Thereupon the Governor General of Portuguese India wrote to the Government of Bombay, stating that the accused was the instigator of the murder, and asking that he should be punished.

The Government of Bombay, being of opinion that s. 118 of the Code of Criminal Procedure (Act X of 1882) was applicable to the case, passed a Resolution in the Political Department, directing the District Magistrate of Surat to take the necessary action in the matter.

The District Magistrate committed the accused for trial to the Sessions Court for abetting the commission of murder, or of rioting under ss. 302 and 147 of the Indian Penal Code. The Sessions Judge amended the charge by substituting s. 302 with s. 115, and s. 148 with s. 109 of the Indian Penal Code.

The accused's pleader objected at the trial, among other things, that the Court had no jurisdiction.

The Sessions Judge held that this objection was valid, and ordered the accused to be set at liberty. His reasons are set forth in the following extract from his judgment:—

"The question for consideration is whether the charge against accused is one which can be tried by a British Court. I am of opinion that it is not, because abetment means abetment of an offence, and offence as defined in the Penal Code means [107] an offence committed in British India. An offence committed in Portuguese India is not an offence punishable under the Indian Penal Code. Therefore, abetment of such an offence, even if it occurs in British India, is not an offence punishable under the Indian Penal Code. It is obvious that the proper Court to try the charge of abetment of murder is the Court which tries the charge of murder. Section 188, Criminal Procedure Code, of course contemplates Courts in British India only.

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"I find that this Court has no jurisdiction in this case, and, therefore order that the bail-bonds and recognizances be cancelled, and the accused set at liberty."

The High Court in the exercise of its revisional jurisdiction sent for the record and proceedings of this case, and ordered notice to issue to the District Magistrate, as well as to the accused, to show cause why the commitment for trial should not be quashed, on the ground that the

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facts disclosed no offence, the act which the accused was said to have abetted in British India having been committed in foreign territory.

The Government of Bombay also applied for a revision of the Sessions Judge's order.

Rao Saheb *Vasudeo J. Kirtikar*, Government Pleader, for the Crown:—Abetment is a substantive offence under the Indian Penal Code, and the trial on this charge is not dependent on the conviction of the principal offender. It is immaterial whether the principal offence takes place in a foreign country or within British India. The locality of the act abetted does not affect the liability of the abettor— *Reg.* v. *Maruti Dada* (1). Section 108, expl. 2, of the Penal Code shows that to constitute the offence of abetment, it is not necessary that the act abetted should be even committed. Abetment being thus a separate and distinct offence by itself would fall within the definition of the term "offence" as given by s. 40 of the Penal Code. It is the character of the act that determines whether it amounts to an "offence" within the meaning of s. 40 of the Penal Code. If the accused in the present case had gone to Daman, and instigated the murder or riot that took place there, he would have been amenable, under s. 188 of the Criminal Procedure Code, to the jurisdiction of the Courts in British India. *A fortiori* he ought to be amenable to our Courts when he instigated the self-same offence in British India [108]—*Regina* v. *Chill* (2); *Reg.* v. *Wallace* (3). In the latter case it was held that the Central Criminal Court in England had jurisdiction to try accessories before the fact to the felony of scuttling a ship on the high seas, though the principal felon was not amenable to justice. In England, Stat. 24 and 25 Vic., c. 100, gives jurisdiction to try accessories to homicides beyond the seas. Under the Portuguese treaty, Act IV of 1880, sch.) (*b*) and (*c*), no British subject can be delivered up to the authorities of Portuguese India for trial on a charge of murder or abetment of murder committed in Portuguese India. It follows, therefore, that in such a case our Courts alone have jurisdiction to try the offender. See also s. 3 of the Penal Code. Refers to Story on Conflict of Laws, s. 625; Clarke upon Extradition, p. 9; Wharton's International Law (3rd Ed., p. 735).

Govardhan M. Tripathi, for the accused, was not called upon.

JUDGMENT.

JARDINE, J.—Ganpatrao, a Native Indian subject of the Queen-Empress, was committed by a Magistrate of the Surat District to the Court of Session at Surat for abetting the commission of murder or of rioting, ss. 302 and 147 of the Indian Penal Code (XLV of 1860) being quoted in the charge, which the Sessions Judge amended by substituting s. 302 with s. 115, and s. 148 with s. 109. The alleged abetment consisted of words spoken in the British territory by the accused inciting certain cultivators, Portuguese subjects, to kill or resist to death one Bhana, a Portuguese subject, if he attempted to remove the produce of certain land situate in the Portuguese territory of Daman. A disturbance afterwards occurred in connection with this matter, in which one man was killed and another wounded in the Daman territory, these persons being Portuguese subjects. The Governor General of Portuguese India then moved the Government of Bombay to bring the accused to justice as the instigator of the murder.

(1) 1 B. 15. (2) 8 B.H.C.R.Cr. Ca. 92. (3) 2 Moody's Cr. Cases, 200.

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As appears from the Government Resolution No. 7379, dated the 23rd December, 1892, in the Political Department, the Government supposed s. 188 of the Code of Criminal Procedure to be applicable, and directed the District Magistrate to take the [109] necessary action, there being no Political Agent in the Portuguese territory where the crime was committed. Section 188 has, however, no application to the case, as the accused is not charged with committing any offence beyond the limits of British India. After the Magistrate had committed the accused for trial, the accused took objection to the jurisdiction of the Magistrate and the Court of Session. The Sessions Judge held that he had no jurisdiction, and, therefore, cancelled the bail-bonds and set the accused at liberty. "The question for consideration," he wrote, "is whether the charge against accused is one which can be tried by a British Court. I am of opinion that it is not, because abetment means abetment of an offence; and offence as defined in the Penal Code means an offence committed in British India. An offence committed in Portuguese India is not an offence punishable under the Indian Penal Code. Therefore, abetment of such an offence, even if it occurs in British India, is not an offence punishable under the Penal Code." As, however, the Judge did not take the requisite steps to get the proceedings terminated by the commitment being quashed by this Court under s. 215 of the Code of Criminal Procedure, we called for the case and issued notices to show cause. The Government of Bombay has since made an application to have the order of the Sessions Judge reversed, on the ground that the abetment is a substantive offence, punishable under the Indian Penal Code, and within the jurisdiction of the Court of Session. We have had the advantage of the full and learned argument of the Government Pleader on these propositions.

The question is whether the definition of abetment in the Indian Penal Code must be understood as containing a territorial term. On this question we are not without authority. In delivering the judgment of a Full Bench (Westropp, C. J., Bayley and Green, JJ.) in *Regina* v. *Elmstone* (1), Sir Michael Westropp said, p. 118: "Inasmuch as the crime here abetted was committed on the high seas, and not within the territories vested in Her Majesty by the Stat. 21 and 22 Victoria, c. 106, and, therefore, not an offence made punishable by the Penal Code, the abetment [110] thereof is not punishable under s. 109 of that Code, so far as the Code itself, standing alone and unaided by any other enactment, is concerned. The learned Chief Justice then points out the special provision in ss. 121, 125 and 236 of the Penal Code for the punishment of abetment in British India of criminal acts elsewhere. A similar question about the definition of the words "stolen property" in s. 410 was fully considered in *Empress* v. *Moorga Chetty* (2) by a Full Bench, where Sargent, C. J., says, p. 347: "The presumption in construing a Penal Code which by s. 2 is confined to acts and omissions within the territories of British India would rather be, that an offence such as receiving and retaining stolen property, which is in its very nature accessory to the principal act, should be confined to those acts which are made criminal by the Code itself." This reasoning is applicable to the present facts, the fact that the homicide or rioting was later in time than the accessory act of abetment being immaterial. It is clear from the report that the majority of the Bench (Sargent, C. J., and Melvill, J.) considered the definitions of offences in the Indian Penal Code to contain a limitation to locality in British India in their

(1) 7 B. H.C. R. Cr. Ca. 89.

(2) 5 B. 338.

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application to ordinary cases, we mean those to which special extra territorial provisions, like s. 188 of the Code of Criminal Procedure, do not apply and those where no special provision for punishment is made, such as we find in s. 236 of the Penal Code. The reasoning is not touched by *Regina* v. *Chill* (1) or *Regina* v. *Maruti* (2) which the learned Government Pleader has referred to. They are not interpretations of s. 40 of the Indian Penal Code, which defines the word "offence." The Government Pleader admits with learned candour that this Full Bench decision is against his contention. It meets the argument for the Crown that abetment consists in the intention of the abettor, and not in the personal legal capacity of the individual abetted. This argument, based on s. 108, explanations 2 and 3, is the same as the dissenting member of the Bench, West J., uses at p. 354 of the report. The views expressed by Sargent, C. J., and Melvill, J., may *a fortiori* be applied by us in the case before us, seeing that **[111]** although the Legislature has extended the definition of stolen property in s. 410 by adding the words "within or without British India" by Act VIII of 1882, s. 9, it has refrained from doing the same to the definition of "offence" and of "abetment," refrained from making the particular circumstances punishable, independent of locality. This is sufficient answer to the arguments from inconvenience and from the enlightened tendency of jurisprudence in England. To give effect to these, would, as Sir C. Sargent remarks, at p. 348 of the report of *Empress* v. *S. Moorga Chetty*, be to travel out of the legitimate province of judicial construction. The proper remedy is in fresh legislation.

In England the Stat. 24 and 25 Vict., c. 100, ss. 4 and 9, would give jurisdiction to try a case like the present But it does not extend to India and the Indian Legislature has not thought it necessary to pass such a law. Nor, except as regards murder and incitement to murder, has the criminal law of England gone so far as the contention of the Crown asks us to go. The case of *Regina* v. *Kohn* (3) seems to be one where the conspiracy "contemplates" the scuttling of the ship in territorial waters.

The questions raised in *Empress* v. *Moorga Chetty* and in the present case are like those raised in *Regina* v. *Bernard* (4). Bernard was tried at the Central Criminal Court in 1858 as an accessory before the fact to the murder in Paris, of several persons killed by a shell thrown by Orsini at the carriage of Louis Napoleon. Forsyth in his Cases and Opinions on Constitutional Law, p. 236, refers to this trial and to Chief Justice Best's remarks in *De Witz* v. *Hendrix* (5), in connection with plots in England against foreign sovereigns and States, which he thinks the common law punishes as misdemeanours.

Sir J. F. Stephen, in his History of the Criminal Law of England, Vol. 2, p. 13. makes the following remarks on Bernard's trial :—

"There were three Judges, and the case was left to the jury, but with an intimation that in the case of a conviction the question **[112]** whether the prisoner had committed a crime against English law would be stated for the Court for Crown Cases Reserved. The jury acquitted the prisoner.

"As regards the particular case of murder, an incitement to commit murder, the matter is now set at rest by 24 and 25 Vict., c. 100, ss. 4 and 9. These sections provide, in substance, that persons who conspire in England to murder foreigners abroad, or in England incite people to

(1) 8 B. H. C. R. Cr. Ca. 92.
(2) 1 B. 15.
(3) 4 F. and F. 68.
(4) 1 F. and F. 240.
(5) 2 Bing. 314.

commit murders abroad, or become in England accessories (either before or after the fact), to murder or manslaughter committed abroad, shall be in the same position in every respect as if the crime committed abroad had been committed in England. The question, however, still remains unsettled as regards all offences except murder. I do not think it proper to give a decided opinion upon this subject, because it is by no means unlikely to be raised judicially; but I will make one or two observations upon it. One strong argument against the criminality of such acts is that the law of England does not deal with crimes committed abroad at all. The law of England does not forbid a Frenchman in France to rob another Frenchman in France. This being so, it seems difficult to say that it forbids an English man to incite in England a Frenchman to commit a robbery in France. The argument on the other side is that in all common cases it would be highly expedient that all civilized countries should recognise offences committed in each other's territories as offences for the purpose in question. But to this it may be replied that this is an argument for Legislature and not for the Judges.

"The law as to conspiracies to commit crimes abroad stands on a footing rather different from the question as to accessories. A crime committed abroad is morally as bad as a crime committed in England, and there is authority for saying that any agreement to do an act of that nature is indictable. Whatever may be the merits of the case legally, it seems to me clear that the Legislature ought to remove all doubt about it by putting crimes committed abroad on the same footing as crimes committed in England, as regards incitement, conspiracy, and accessories in England. Exceptions might be made as to political offences, though I should be sorry if they were made wide."

[113] These observations of a great authority on the Law of Crimes are such as may fitly be considered by the Legislature, while they show the present undetermined state of the law of England on questions of abetments there of criminal acts in foreign States.

We may express a hope that our judgment following the principles of two judgments of Full Benches (about which we may add we have consulted our learned Chief Justice) will help to make clear the law of British India. The subject is, in our opinion, one of interest to the Government, which, if it took the matter into consideration, would be able, among other matters of expediency, to form an opinion as to the means possessed by our Courts of obtaining evidence of acts done in territories outside of British India, and of finding out the position, character and motives of witnesses.

For the above reasons the Court quashes the commitment to the Court of Session under s. 215 of the Code of Criminal Procedure.

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APPEL-
LATE
CIVIL.

19 B. 113.

19 B. 113.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BADARICHARIA (*Original Plaintiff*), *Applicant v.* RAMCHANDRA GOPAL SAVANT AND OTHERS (*Original Defendants*), *Opponents.**

[23rd January, 1893.]

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 73, 74—Review of first Court's order—Finding that a party to a suit is an agriculturist—District Judge—Assistant Judge.

An Assistant Judge having found that the defendants in a suit pending before him were not agriculturists, the defendants presented a petition of review of that finding, and in review the Assistant Judge came to a contrary conclusion.

Held, that as s. 74† of the Dekkhan Agriculturists' Relief Act (XVII of 1879) only makes the Civil Procedure Code (Act XIV of 1882) applicable to suits before the Subordinate Judge, the conduct of proceedings before a District or Assistant Judge when sitting in revision under s. 53 of Act XVII of 1879 is within his own discretion, and the granting of a review on the ground of mistake as to the nature of a defendant's income is a reasonable exercise of such discretion.

[**F.**, 20 B. 281; **Rel.**, 30 C. 619; **Appr.**, 19 B. 116; **R.**, 34 C. 677=6 C.L.J. 84=11 C.W.N. 803; 2 C.L.J. 306; 26 Ind. Cas. 46=27 M L.J. 605; **D.**, 33 M. 65=3 Ind. Cas. 463=19 M.L.J. 725=6 M.L.T. 177.]

[114] THIS was an application under the extraordinary jurisdiction (s. 623 of the Civil Procedure Code, Act XIV of 1882) against an order in review passed by J. Fitzmaurice, Acting Assistant Judge of Satara.

The plaintiff brought this suit in the Court of the Assistant Judge of Satara to recover Rs. 824-8-7. Two of the defendants were minors and were represented by their guardian the Collector of Satara; The defendants claimed the benefit of the Dekkhan Agriculturists' Relief Act (XVII of 1879), alleging that they were agriculturists.

The Assistant Judge (T. Walker) held that they were not agriculturists, on the ground that the income derived by them by agriculture was less than the income they derived by other sources.

The defendants applied for a review of the said finding, and the then Acting Assistant Judge decided that they were agriculturists within the meaning of the Act.

The plaintiff then applied to the High Court in its extraordinary jurisdiction and obtained a rule *nisi*, calling on the defendants to show cause why the above order of the Assistant Judge made in review should not be set aside.

Rao Saheb *Vasudeo Jagannath Kritikar* (Government Pleader) for the defendants showed cause:—The Collector being a party to the present suit in his capacity as guardian of the minor defendants, the suit was filed in the District Court at Satara as the Court of first instance, and under s. 73 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) its decision on the question whether the defendants are agriculturists or not, is final. There is no appeal, and, therefore, the Judge was right in allowing

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* Application No. 130 of 1892 under Extraordinary Jurisdiction.

† Sections 73 and 74 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

73. The decision of any Court of first instance that any person is or is not an agriculturist shall for the purposes of this Act be final.

74. Except in so far as it is inconsistent with this Act, the Code of Civil Procedure shall apply in all suits and proceedings before Subordinate Judges under this Act.

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the application for a review of the order which was first made. Section 74 of the Act is applicable to a case tried by a Subordinate Judge's Court as the Court of first instance. Similarly, it would apply to the District Court trying a case as the Court of first instance. The expression "Subordinate Judges" in s. 74 of the Act indicates Courts of first instance. Therefore, the provisions of the Civil Procedure Code are applicable to cases tried by the District Court as the Court of first instance, and the granting of review is within its jurisdiction.

[115] *Mahadev Chimnaji Apte*, for the applicant (plaintiff) in support of the rule.—All the provisions of the Civil Procedure Code are not applicable to cases governed by the Dekkhan Agriculturists' Relief Act. Section 74 lays down that certain provisions of the Code are applicable to cases tried by Subordinate Judges. Therefore a suit brought in the District Court is excluded from the Code. A Court has the inherent power of reviewing its judgment, provided the rules of the Code are applicable to the case and not otherwise. Under the Dekkhan Agriculturists' Relief Act the jurisdiction of the District Judge is co-extensive with that of the Special Judge appointed under the Act, and it has been held that the proceedings before the Special Judge are not governed by the provisions of the Civil Procedure Code — *Babajj bin Patloji* v. *Babaji bin Mahadu* (1); *Vishvanath* v. *Aba* (2). Section 73 of the Act makes the decision final, and, therefore, there can be no review of such decision. The power of review is specially granted by the Civil Procedure Code. There are English cases which have laid down that a Court cannot review its own decision.

JUDGMENT.

SARGENT, C. J.—The only question in this case calling for decision in the exercise of the Court's extraordinary jurisdiction is whether the Assistant Judge could grant a review of his decision that the defendants were not agriculturists. This Court has already in the case of *Vishvanath* v. *Aba* (2) held that as s. 74 of the Dekkhan Agriculturists' Relief Act only makes the Civil Procedure Code applicable to suits before the Subordinate Judge, the conduct of the proceedings before the Special Judge must be deemed to be in his own discretion. Having regard to the language of s. 74, the same ruling must, we think, also apply to the District or Assistant Judge when sitting in revision. The granting a review in the present case on the ground of mistake, as to the nature of the defendant's income from the *inam*, was a most reasonable exercise of such discretion.

We must, therefore, discharge the rule with costs on the applicants.

(1) 15 B. 650.

(2) P. J. (1886), 11.

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FULL BENCH.

19 B. 116 (F.B.).

19 B. 116 (F.B.).

[116] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Parsons and Mr. Justice Fulton.

RAMSING (*Original Plaintiff*), *Applicant v.* BABU KISANSING AND ANOTHER (*Original Defendants*), *Opponents.**

[22nd November, 1893.]

Dekkhan Agriculturists' Relief Act (XVII *of* 1879), *s.* 74†—*Special Judge—Review—Power of Special Judge to review his own decree—Application of Civil Procedure Code (XIV of* 1882*) to proceedings of Special Judge—Civil Procedure Code (Act XIV of* 1882), *s.* 622.

The Special Judge appointed under the Dekkhan Agriculturists' Relief Act (XVII of 1879) (the defendants not appearing) reversed, in revision under s. 53 of that Act, the decree of a Subordinate Judge and passed a decree for the plaintiff. One of the defendants, who, it appeared, had not been served with notice of the previous application for review, subsequently applied to the Special Judge to review his decree, and that application was granted on the ground that the applicant had not had notice of the former review. On this subsequent review the Special Judge discovered that he had made a mistake with reference to the date of certain documents, and that this mistake had led him to a wrong conclusion upon the merits of the case. He consequently reversed his former order and dismissed the suit, confirming the original decree of the Subordinate Judge. The plaintiff then applied to the High Court under its extraordinary jurisdiction (s. 622 of the Civil Procedure Code (Act XIV of 1882)).

Held, that in granting a rehearing the Special Judge had exercised a reasonable discretion with which the High Court could not interfere in its extraordinary jurisdiction.

The Civil Procedure Code (Act XIV of 1882) is not applicable to proceedings before the Special Judge, and the conduct of such proceedings rests within his discretion.

Badaricharya Ramchandra (1) approved.

PARSON, J.—The Special Judge cannot under the Dekkhan Agriculturists' Relief Act (XVII of 1879) review his decree and order a new trial on the ground of discovery of fresh evidence, but he has discretional power to review his decree in order to correct a mistake into which he has fallen.

[F., 20 B. 281; Rel., 30 C. 619; R., 2 C.L.J. 306; 26 Ind. Cas. 46=27 M.L.J. 605; D., 33 M. 65=3 Ind. Cas. 463=19 M.L.J. 725=6 M.L.T. 177.]

[117] THIS was an application under extraordinary jurisdiction—s. 622 of the Civil Procedure Code (Act XIV of 1882)—against the decision of Rao Bahadur Mahadeo Govind Ranade, Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The suit was brought by the plaintiff against the defendants in the Court of the First Class Subordinate Judge of Ahmednagar to recover Rs. 325 alleged to have been lent for the marriage expenses of the first defendant. The plaintiff also claimed Rs. 92 as interest.

Defendants denied the loan of Rs. 325, and as to Rs. 225 lent for marriage expenses they pleaded that it had been repaid by postal money orders. They denied their liability for interest, there having been no agreement to pay interest.

The First Class Subordinate Judge found that the plaintiff had not proved the alleged loan of Rs. 325, that the defendants had proved payment

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* Application No. 4 of 1893 under extraordinary jurisdiction.

† Section 74 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

74. Except so far as is inconsistent with this Act, the Code of Civil Procedure shall apply in all suits and proceedings before Subordinate Judges under this Act.

(1) See 19 B. 113.

of Rs. 225 as alleged by them, and that nothing was due to the plaintiff. He, therefore, dismissed the suit.

The plaintiff thereupon applied to the Special Judge under s. 53 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) for revision of the decree. Notices of the application were issued to the defendants, but neither of them appeared on the day of the hearing.

The Special Judge found (*inter alia*) that two money orders, dated respectively 30th November, 1888, and 29th April, 1889, and aggregating Rs. 225, had been sent by defendants to plaintiff; but that the defendants had subsequently written a series of letters asking for more time for repayment of the loan, these letters being dated 5th August, 9th October, 19th October, 29th October, and 8th November, 1889, respectively. He, therefore, found that the defendants owned money to the plaintiff long after the sum of Rs. 225 had been paid off, and accordingly reversed the decree of the lower Court, and decreed Rs. 325 to plaintiff with costs.

The second defendant, who had not been served with the notice issued as above mentioned on plaintiff's application for revision of the decree of the Subordinate Judge, then applied to the [118] Special Judge for a review of the decree passed by himself. His application was granted, and on review and on reconsideration of the evidence the Special Judge found that the letters sent by defendants to plaintiff were not, as he had supposed, dated 1889, and, therefore, not subsequent to the dates of the money orders aggregating Rs. 225, but had been written in 1888, and were, therefore, prior to the despatch of the money orders. On review, he confirmed the decree of the Subordinate Judge.

The plaintiff then applied to the High Court under its extraordinary jurisdiction, contending (*inter alia*) that the Special Judge had no jurisdiction to review his own order, and a rule *nisi* was granted calling upon the defendant to show cause why the order of the Special Judge should not be set aside.

Daji Abaji Khare, (for the plaintiff) in support of the rule.

Balaji Abaji Bhagvat, (for the defendants) showed cause.

The rule came on for hearing before Sargent, C. J., and Telang, J., who ordered it to be argued before a Full Bench.

Daji Abaji Khare, for the plaintiff, in support of the rule.—The Special Judge had no jurisdiction to review his own decision—*Babaji Patloji* v. *Babaji Mahadu* (1). Section 74 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) makes the provisions of the Civil Procedure Code applicable only to proceedings before the Subordinate Judge, and not to those before the Special Judge. Therefore the Special Judge cannot grant a review—*Vishvanath* v. *Aba* (2); *Badaricharya* v. *Ramchandra* (3). Admitting, however, that the Special Judge had jurisdiction to review his own decision, we submit that in the present case a review was granted on insufficient grounds, namely, that the second defendant who applied for it had no notice of the first application for revision. There is no inherent power in a Court to grant a review of its own decision. It must be given by statute—*Sivu* v. *Chenamma* (4); *Reasut Hassein* v. *Hadjee Abdoollah* (5).

[SARGENT, C. J.—In the case of an *ex parte* decree the Court has the power to review the former proceedings—*Manku* v. *Sitaram* (6).]

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(1) 15 B. 650.
(2) P. J. (1886) 11.
(3) See 19 B. 113.
(4) 5 M. H.C.R. 417.
(5) 2 C. 131.
(6) 18 B. 142.

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19 B. 116 (F.B.).

[119] The fact that the Civil Procedure Code gives a power to review, justifies the inference that the Courts have no inherent power to review. If they had such a power, the Code would not have made special provision for it. Further, ss. 53 and 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) lay down the procedure to be adopted by the Special Judge, and they do not make any provisions for review.

The whole decree ought not to have been set aside because the review was granted at the instance of one of the defendants only. With respect to the defendant who had not so applied, the decree ought to stand—*Manaku* v. *Sitaram* (1).

Balaji Abaji Bhagvat, for the opponents (original defendants) showed cause.—The Special Judge granted the review because, as he says in his judgment, on the previous occasion he had made a mistake as to dates. Under these circumstances he was right in granting a review—*Badaricharya* v. *Ramchandra* (2). He was also right in setting aside the whole decree. On review the Court reconsiders the whole case—*In re Swire* (3).

JUDGMENT.

SARGENT, C. J.—It is not quite clear whether the Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879) reheard the case on the ground that notices had not been served on the second defendant or on the ground of mistake as to the dates of certain important documents in the case. In *Badaricharya* v. *Ramchandra* (2), it was held that the Civil Procedure Code was not applicable to proceedings before the Special Judge, and that the conduct of such proceedings was within his discretion. That is, I think, a correct view of s. 74 of the Dekkhan Relief Act.

Here whatever was the cause of this rehearing, the exercise of the discretion was, in my opinion, a reasonable one and cannot be interfered with in any view of our extraordinary jurisdiction. It is not necessary for me to express an opinion whether a rehearing could be granted on the ground of new evidence, which was the question in *Babaji bin Patloji* v. *Babaji bin Mahadu* (4). The rule must, therefore, be discharged and the decree of the Special Judge confirmed with costs.

[120] FULTON, J.—I concur.

PARSONS, J.—As one of the Judges who decided the case of *Babaji bin Patloji* v. *Babaji bin Mahadu* (4), I wish to say that I adhere to that decision and consider it to be correct, *viz.*, that a Special Judge cannot under the Dekkhan Agriculturists' Relief Act review his decree and order a new trial on the ground of discovery of fresh evidence. But that is a very different thing from saying that he cannot review his decree at all. In the present case the Special Judge, on the application of the plaintiff and after issuing notices to the defendants, reversed the decree of the Subordinate Judge. He was led to do so by the date of certain exhibits which he considered was the year 1889. At the time he was under the impression that notices had been duly served on all the defendants. As a fact, however, the second defendant had not been served, and on his application the Special Judge granted a review of judgment. At the rehearing the Special Judge found that he had been mistaken in supposing that the above-mentioned exhibits were passed in 1889, and that they were really passed in 1888.

(1) 18 B. 142.
(2) See 19 B. 113.
(3) 30 Ch. D. 244 (247).
(4) 15 B. 650.

His original decree, therefore, being founded on a mistake, he reversed it, and thus left the original decree of the Subordinate Judge to stand. I think that the Special Judge had under these circumstances a discretional power to review his decree in order to correct the mistake into which he had fallen. To adopt the language used in *Badaricharya* v. *Ramchandra* (1), "the granting a review in the present case on the ground of mistake was a most reasonable exercise of such discretion."

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FULL BENCH.
19 B. 116 (F.B.).

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19 B. 121.

[121] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BALDEV DHANRUP MARVADI (*Original Plaintiff*), *Appellant v* RAMCHANDRA BALVANT KULKARNI AND OTHERS (*Original Defendants*), *Respondents.** [29th November, 1893.]

Decree—Attachment—Execution—Mortgage-debt—Sale of mortgage-debt in execution of a decree against mortgagee—Sale carrying with it security without attaching mortgaged property—S. 274 of the Civil Procedure Code (Act XIV of 1882).

The sale of a mortgage-debt described as such in execution of a decree carries with it the security without attaching the mortgaged property under s. 274 of the Civil Procedure Code (XIV of 1882).

[F., 1 Ind. Cas. 450=18 P.R. 1909=22 P.W.R. 1909; 13 Ind. Cas. 91=22 M.L.J. 105=10 M.L.T. 503=(1911) 2 M.W.N. 590; R., 26 B. 305; 14 C.P.L.R. 5; D., 35 B. 288=13 Bom. L.R. 223=10 Ind. Cas. 812.]

SECOND appeal from the decision of L. G. Fernandez, First Class Subordinate Judge of Nasik with appellate powers.

The first and second defendants by two mortgage-deeds, each for Rs. 400, mortgaged certain lands to one Pandu Babshet Vani, who was one of the proprietors of a firm known by the name of Yado Bayaji Shet. The deeds were dated 8th June, 1882, and purported to be mortgaged with possession, but the property was allowed to remain with the mortgagors.

Subsequently to the mortgage one Veni Madhav obtained a decree against the proprietors of the mortgagee firm and attached the debt due by the mortgagors. The debt was sold at a Court sale held on the 15th March, 1889, and was purchased by plaintiff. The Court sale was duly confirmed.

Subsequently to the attachment of the property by Veni one Ganpatrao Damodar obtained a decree against three of the proprietors of the mortgagee firm and attached the same mortgage-debt, and although it had been already sold to the plaintiff sold it again to Hari Kashinath, defendant No. 3.

The plaintiff, therefore, brought the present suit against defendants Nos. 1, 2 and 3 (the last being joined to avoid disputes in future) to recover Rs. 987-8 for principal and interest due under the two mortgage-deeds by the sale of the mortgaged property.

[122] The Subordinate Judge of Satara held (*inter alia*) that the plaintiff's right could not be considered as superior to that of defendant No. 3; and that the plaintiff was not entitled to the relief sought.

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* Second Appeal, No. 291 of 1892.

(1) See 19 B. 113.

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19 B. 121.

On appeal the First Class Subordinate Judge, A. P., confirmed the decree of the lower Court with costs, observing in his judgment:—

"In the attachment proceedings under which the plaintiff made his purchase, the debt sold was described as follows:—'Defendants' joint moveable property about Rs. 1, 500 due on mortgaged property' * * * * *. In this case there is no deed of assignment or certificate of sale: hence one cannot precisely say what was sold. The karkun's record of the sale or the proclamation for sale does not refer in terms to the security. On the other hand, it is distinctly stated that what was sold was a debt, and in order that there should be no doubt on the point, the meaning of the word 'debt' is further restricted by the words 'immoveable property.' A lien on immoveable property cannot be considered as moveable property. The case at Indian Law Reports, 10 Madras, 169, shows that where a lien on immoveable property is intended to be passed by a sale, the attachment should be made under s. 274 of the Civil Procedure Code, and a certificate of sale should be obtained, which, if the lien is for above Rs. 100, is compulsorily registrable. To hold otherwise would have the effect of defeating the wholesome provisions of the registration laws."

Plaintiff preferred a second appeal.

Jardine (with *Mahadeo C. Apte*), for the appellant (plaintiff).—The only question in the case is, who bought the debt first; and the Judge has not determined that question. If we bought it first, then it could not be sold over again, and defendant No. 3 by his purchase got nothing. The Judge seems to think that what was sold was moveable property. This is an erroneous view. A debt secured on immoveable property is immoveable property—*Debendra Kumar* v. *Rup Lall* (1).

Daji Abaji Khare for the respondents (defendants).—The whole question is, what was attached; whether the property that was attached was moveable property or immoveable property. The conduct of the plaintiff shows that what was attached was the debt as moveable property. For the purpose of attaching a mortgage-debt as immoveable property, the procedure laid down by s. 274 of the Civil Procedure Code [123] (XIV of 1882) should be followed—*Appasami* v. *Scott* (2). In such a case there ought to be a certificate of sale—*Hurjivan* v. *Jamsetji* (3).

JUDGMENT.

SARGENT, C. J.—We agree with the judgment in *Debendra Kumar* v. *Rup Lall* (1) and the remarks of Turner, C. J., in *Appasami* v. *Scott* (2) in holding that the sale of a mortgage-debt described as such in execution of a decree carries with it the security without attaching the mortgaged property under s. 274 of the Civil Procedure Code (XIV of 1882). An objection was taken that there should be a certificate of sale, and *Hurjivan* v. *Jamsetji* (3) was referred to; but there a decree was attached and sold, and it was held that what was really attached and sold was not the piece of paper on which the decree was written, but the interest in immoveable property recoverable under the decree. We must, therefore, reverse the decree and send back the case for a decision on the merits. Costs to abide the result.

Decree reversed.

(1) 12 C. 546. (2) 9 M. 5 (7). (3) 9 B. 64.

19 B. 123.

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APPELLATE CIVIL.

APPELLATE CIVIL.

19 B. 123.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

MOTIBAI, WIDOW OF GOVINDJI PREMJI (*Original Opponent*), *Appellant v.* KARSANDAS NARAYANDAS AND ANOTHER (*Original Applicants*), *Respondents.**

[20th December, 1893.]

Executor—Section 18 of Act V of 1881 - Hindu Wills Act—Indian Succession Act—Acceptance or renunciation of executorship—Probate—Letters of Administration with will annexed.

An executrix after being cited as provided by s. 16 of Act V of 1881 to accept or renounce her executorship, stated that she was administering the estate, but having applied for a certificate under Act VII of 1889 did not consider it necessary to take out probate.

Held that this was not such an acceptance as is contemplated by s. 18 of Act V of 1881, the language of which is the same as that of s. 195 of the Indian Succession Act (X of 1865), and that on the executrix declining to prove the will the District Judge was right in granting letters of administration with the will annexed to the sole residuary legatee.

[124] THIS was a first appeal from the decision of C.E.G. Crawford, District Judge of Thana.

One Govindji Premji, a resident of Thana, died on the 20th of December, 1890, leaving him surviving his widow Motibai (the appellant) his nephew Karsandas (a deceased brother's son), his brother Ratansi Premji, his mother Puribai, &c. The testator left a will, dated the 13th December, 1890, in which he appointed his widow Motibai (the appellant) his executrix, and his nephew Karsandas (who was a minor) his sole residuary legatee. The will remained in Motibai's possession, but she did not apply for probate, and accordingly Karsandas, represented by his uncle Ratansi Premji, and Ratansi Premji himself applied to the District Court at Thana for letters of administration with the will annexed.

Motibai was duly served with a citation, under s. 16 of the Probate and Administration Act (V of 1881), to produce the will, and was required to say whether she would take probate or not. In answer she stated the will was in the custody of the Court in connection with the proceedings which were then pending at her instance under the Succession Certificate Act (VII of 1889).

In answer to a subsequent citation calling upon her either to accept or renounce her executorship on or before the 30th September, 1890, and in the latter case to show cause on that day why petitioner No. 2, Ratansi Premji, should not be granted letters of administration with the will annexed, she said she did not renounce her executorship, that she was already acting as executrix and administering the estate, and that she did not consider it necessary at that stage to take out probate, having applied for a certificate under the Succession Certificate Act (VII of 1889).

The Judge was of opinion that though the above answer was not a renunciation of executorship, still it was not such an acceptance as was contemplated by the Probate and Administration Act (V of 1881), and that

* Appeal, No. 101 of 1893.

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under the Act an acceptance must be an expression of the executor's willingness to accept probate.

Motibai having declined to prove the will, the Judge allowed the petitioners to do so, and passed the following order:—

[125] "I direct that letters of administration with will annexed be granted to Ratansi Premji as guardian of the minor, the sole residuary legatee. Costs on opponent."

The opponent Motibai appealed.

P. M. Mehta (with *Jamietram Nanabhai* and *Chimanlal Setalvad*) appeared for appellant (original opponent).—We accepted the executorship, but declined to take probate which the Judge asked us to do. We have not renounced the executorship. The Judge cited us to produce the will and take probate. This was the first citation. There was also a second citation, and it asked us either to accept or renounce executorship. We answered that we did not renounce executorship, and that we were acting as executrix. Under s. 16 of the Act it is not necessary for us to say that we accept the executorship; what was necessary for us to say was that we do not renounce it.

The Judge says that, in order to satisfy the provisions of the Act, the executor must express his willingness to take probate. That is the rule of English law; but, according to the law applicable to the Hindus in the mofussil, it is not necessary for the acceptance of the office of executor that he should express his willingness to take probate. Under the provisions of the Probate Act (V of 1881) what is necessary is to express his willingness to accept the office of executor; it is not necessary to take probate—*Shaik Moosa* v. *Shaik Essa* (1). The parties to this case were Mahomedans, but the law is the same for Hindus as well as Mahomedans. Section 19 of the Act strengthens our contention. In India it is open to a person to act as executor without proving a will.

Branson (with *Shivram V. Bhandarkar*) appeared for the respondents (original applicants).—*Shaik Moosa* v. *Shaik Essa* (1) lays down that it is not necessary to take out probate with respect to the debtors of the deceased, and nothing more. But when there is a contest between executors appointed under a will and a residuary legatee under the will, it is necessary that the executors should take out probate—*Krishna Kinkur Roy* v. *Rai Mohun Roy* (2). Sections 16 to 19 of the Probate Act are taken from the Indian Succession Act (X of 1865)—see ss. 193, &c.—which [126] shows that the Legislature intended to make the rule of English law applicable to Hindus. Browne's Practice, pp. 147 and 350, shows what is the English law on the point. The law relating to wills in India is introduced by English law, and, therefore, the law in India must be governed by the rule of English law—*Mordaunt* v. *Clarke* (3).

JUDGMENT.

SARGENT, C. J.—The question in this case is, whether the District Judge was right in granting letters of administration with the will annexed to the applicants, the opponent having stated, after being cited as provided by s. 16 of Act V of 1881, that she was administering the estate, but did not consider it necessary to take out probate, having applied for a certificate under Act VII of 1889.

Section 18 of the Act of 1881 provides that letters of administration with the will annexed may be granted if the executor "renounces or fails

(1) 8 B. 241 (253). (2) 14 C. 37. (3) L. R. 1 Pro. and Div. 592.

to accept the executorship within the time limited for the acceptance or refusal thereof." It was contended for the appellant that she did not "renounce or fail to accept the executorship" by the mere circumstance of her declining to take out probate. The citation issued under similar circumstances by the English Probate Court calls on the executor "to accept or refuse the probate and executorship of the will."

The language of s. 18 of Act V of 1881 is the same as that of s. 195 of the Indian Succession Act, which provides for granting letters of administration with the will annexed and which was made applicable to Hindu wills under the Hindu Wills Act, and where it cannot be doubted, from the general provisions of the Act, that the language was intended to mean what is more distinctly expressed in the English form of citation.

But it was contended for the opponent that that construction, if applied to s. 18 of the Act of 1881, would be inconsistent with the decision in *Shaik Moosa* v. *Shaik Essa* (1). The result of that decision is that a Hindu or Mahomedan executor named in a will can sue to recover the estate of the testator without taking probate; but here the question is an entirely different one, *viz.*, whether administration with the will annexed [127] will be granted, although executors have been named in the will. We see, therefore, no reason for putting a different meaning on the language of s. 18 of the Act V of 1881 from what it cannot be doubted is the meaning of the same language in the Succession Act; and the District Judge was, therefore, right in granting letters of administration with the will annexed to the respondents.

Order confirmed.

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19 B. 127.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

TURMUKLAL HARKISANRAI (*Original Applicant*), *Applicant v.* KALYANDAS KHUSHAL (*Original Opponent*), *Opponent.**

[9th January, 1894.]

Civil Procedure Code (XIV of 1882), s. 285—Small Cause Court—First Class Subordinate Judge's Court—Grade—Small Cause Court inferior in grade to First Class Subordinate Judge's Court—Decree—Execution—Attachment and proclamation of sale in execution of decree of Small Cause Court—Subsequent application for execution of decree of First Class Subordinate Judge—Validity of sale by Small Cause Court.

Gumna obtained a decree against Maneklal in the Small Cause Court of Surat and in execution he attached a debt due to Maneklal, and a proclamation of sale was duly issued. Before the sale took place, however, one Kalyandas applied to the First Class Subordinate Judge for execution of a decree which he had obtained against Maneklal in that Judge's Court, and the same debt was then attached. The proceedings, however, under the Small Cause Court decree were continued, and the debt was sold in execution and was purchased by the applicant.

Held, following *Patel Naranji* v. *Haridas* (2), that the sale by the Small Cause Court was not rendered invalid by the subsequent proceedings in the First Class Subordinate Judge's Court.

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* Application No. 93 of 1893 under the extraordinary jurisdiction.

(1) 8 B. 241 (253).

(2) P.J. (1893), 314 = 18 B. 458.

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The term "grade" in s. 285 of the Civil Procedure Code (Act XIV of 1882) has the same meaning as it had in s. 5 of the Code (Act VIII of 1859),—that is, it depends upon "the pecuniary or other limitations" of the jurisdiction of the particular Court, and, therefore, as s. 285 is applicable to Small Cause Courts, the Small Cause Court is inferior in grade to the Court of the First Class Subordinate Judge.

[F., 22 B. 88 ; R., 18 A. 348 ; 13 C. P. L. R. 145.]

THIS was an application under the High Court's extraordinary jurisdiction against the order of Khan Bahadur M. N. Nanavati, [128] First Class Subordinate Judge of Surat, in a proceeding in execution of a decree.

One Gumna Purshottam obtained a decree in the Court of Small Causes at Surat against his debtor Manaklal Nandlal and in execution attached a certain debt due to Maneklal by the Jaffaralli Spinning and Weaving Company. After the levy of attachment an order under s. 301 of the Civil Procedure Code (XIV of 1882) was duly served on the company, and a proclamation of sale having been issued on the 27th January, 1893, the debt was sold by auction and was purchased by the applicant Turmuklal Harkisanrai.

Subsequently to the above attachment and proclamation of sale by the Small Cause Court, but before the actual sale by that Court, the same debt was attached on the 8th February, 1893, in execution of a decree passed by the Court of the First Class Subordinate Judge of Surat against the said Maneklal Nandlal at the instance of one Kalyandas Khushal (the opponent). The applicant thereupon presented an application to the First Class Subordinate Judge, contending that under the circumstances mentioned above it was not competent to that Court to put up the said debt again to sale.

In answer to the above application the opponent Kalyandas Khushal replied that as the sale by the Small Cause Court had taken place pending the attachment levied by the Court of the First Class Subordinate Judge, it was null and void under s. 285 of the Civil Procedure Code (XIV of 1882), and that as the applicant bought the debt with notice of the attachment, his application should be dismissed.

The applicant admitted that the sale had taken place pending the attachment by the Court of the First Class Subordinate Judge, but contended that as the attachment levied by the Small Cause Court was prior in date, the sale by that Court was valid.

The Subordinate Judge rejected the application. The applicant, therefore, presented a petition to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling on the opponent to show cause why the order of the Subordinate Judge should not be set aside.

[129] *Chimanlal H. Setalvad* for the applicant in support of the rule.—The sale by the Small Cause Court was valid. That Court was the first to attach the debt, and was, therefore, the Court to carry out the execution. Section 285 of the Civil Procedure Code (XIV of 1882) does not apply, as the Small Cause Court is not inferior in grade to the Court of the Subordinate Judge. This is clear from cl. 2 of s. 2 of the Civil Procedure Code, which shows that the two Courts belong to different classes—*Muttukaruppan* v. *Mutturamlinga*(1) ; *Chunni Lal* v. *Debi Prasad*(2); *Aghore Nath* v. *Shama Sundari*(3); *Kashy Nath Roy* v. *Surbanand Shaha*(4); *Bykant Nath Shaha* v. *Rajendro Narain Rai*(5) ; *Patel Naranji* v. *Haridas*(6).

(1) 7 M. 47.
(2) 3 A. 356.
(3) 5 A. 615.
(4) 12 C. 317.
(5) 12 C. 333.
(6) P. J. (1893), 314=18 B. 458.

Motilal Mugatlal Munshi, for the opponent, showed cause.—The word "grade" has reference to the extent of jurisdiction. Compare s. 285 of the present Civil Procedure Code (Act XIV of 1882) with s. 5 of the former Code (Act VIII of 1859). The Court of the First Class Subordinate Judge being a Court of higher jurisdiction than the Small Cause Court, the proceedings in that Court must prevail.

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JUDGMENT.

SARGENT, C.J.— We think that the term "grade" in s. 285, Civil Procedure Code, has the same meaning as it has in s. 5 of Act VIII of 1859,— that is to say, that it depends upon "the pecuniary or other limitations" of the jurisdiction of the particular Court, and, therefore, as s. 285 is applicable to Small Cause Courts, the Small Cause Court must be held to be of inferior grade to the Court of the First Class Subordinate Judge. But, inasmuch as it appears that the Small Cause Court had issued the proclamation for sale on 27th January, 1893, before application for execution was made in the First Class Subordinate Judge's Court on 8th February, 1893, we must hold, on the authority of *Patel Naranji* v. *Haridas* (1), that the sale by the Small Cause Court was not rendered invalid by the subsequent proceedings in the First Class Subordinate Judge's Court.

[130] We must, therefore, make the rule absolute, but we think, under the circumstances, without costs, as the precise point now taken was not raised before the First Class Subordinate Judge, nor made a distinct ground in the application for the rule.

Rule made absolute.

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19 B. 130 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine and Mr. Justice Candy.

IN RE MARINE INSURANCE CERTIFICATE.* [15th January, 1894.]

Stamp—Stamp Act (I of 1879), s. 3, cl. 15—Policy of insurance or memorandum of proposed insurance—Document on the face of it not contemplating necessity of any other formal document.

A document not being a mere "slip" or memorandum of a proposed insurance, and mentioning the sum for which the assurer declares the name of the ship, the voyage and the premium, and providing for the losses being paid on its production, in conformity with certain conditions in the possession of the assurers, and, lastly, expressly guaranteeing payment of losses and claims settled under it, and which on the face of it does not contemplate the necessity of any other document of a more formal character being passed to the assured, requires to be stamped as a policy under cl. 15, s. 3 of the Stamp Act (I of 1879).

THIS was a reference by J. M. Campbell, Collector and Superintendent of Stamps at Bombay, under s. 46 of the Indian Stamp Act (I of 1879).

The reference was made in the following terms:—

"By a certificate of insurance of the Underwriting and Agency Association, Limited, dated at Karachi 14th January, 1893, and signed

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* Civil Reference, No. 8 of 1893.

(1) P.J. (1893), 314=18 B. 458.

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by the agents of the Association * *, it is certified that insurances having been effected, the conditions of which are in the assurer's possession, the assurers declare under such insurances the sum of Rs. 800 on certain goods shipped at and from Karachi to Bombay, and note appears at the foot of the certificate.

"That on application at the head office in London the certificate may be exchanged for a stamped policy, and that losses and claims shall be payable in conformity with the conditions of the **[131]** insurances, on surrender of the certificate to the agents of the Association at Karachi.

"No policy of insurance stamped under the law in force in India appears to have existed in respect of the insurance at the date of the certificate."

The Collector and Superintendent of Stamps was of opinion that having regard to s. 3 (cl. 15) of the Stamp Act (I of 1879) the certificate should be regarded as a policy of insurance, and as such required to be stamped under art. 49 (*a*), sch. I of the Act.

He, therefore, submitted the following question :—

"Whether the above-mentioned certificate requires any and what stamp ?"

The certificate of insurance referred to above was as follows :—

Certificate of Insurance of the Underwriting and Agency Association, Limited, 20 Bucklersbury, London, E.C.

No. IV 8

C [R] K

2 packages piece-goods.
Payable in Karachi.

Sum insured Rs. 800.

Premium, including guarantee and Agency commission, $\frac{1}{8}$ per cent.

Rs. 800 Agent's No. 2.
Marine Insurance Certificate of the Underwriting and Agency Association, Limited, 20 Bucklersbury, London, C.E.

Dated at Karachi, 14th January 1893.

This is to certify that insurances having been effected, the conditions of which are in our possession and open to the inspection of the assured, and that we hereby declare under such insurances the sum of Rupees eight hundred only on goods as p. margin F.S.A.p. clause in policy valued at Rupees eight hundred only, shipped per B.I.S.N.Co.(Ld).S.S."Karagola" V. 55 G. at and from Karachi to Bombay.

On application at the head office in London this certificate may be exchanged for a stamped policy. Losses or claims shall be payable in conformity with the conditions of the said insurances to the order of Messrs. Ritchie, Stewart and Co. on surrender of this certificate to the Underwriting and Agency Association, Limited, Agents to the Association at Karachi. The consideration paid hereon is not necessarily the same as that paid on the original insurance, any difference being the consideration as between the Association and the assured for the guarantee of the Association and in lieu of Agency expenses. The Underwriting and Agency Association, Limited, hereby guarantees the payment of losses or claims settled under this certificate or under policies against which this certificate is issued.

(Signed) MCLEAR MACKENZIE,
Agents.

Certificate of Insurance of the Underwriting and Agency Association, Limited, 20 Bucklersbury, London, E.C.

[132] *Anderson* (with *Lang*, Advocate General) for the Collector and Superintendent of Stamps.—The document is a policy of insurance under

cl. 15, s. 3 of the Stamp Act. The mere production of the document itself would entitle the holder to get himself reimbursed for loss, because the document itself guarantees such payment. It refers to some other document in England, but the reference is merely colourable. The stamped policy in England would not make the present document the less a policy.

Ghanasham N. Nadkarni (*amicus curiæ*), contra:—The document is nothing but a certificate or a declaration that certain conditions have been accepted subject to the execution of a formal policy. It, therefore, falls under cl. 14, sch. II of the Stamp Act. It merely states that a contract has been entered into, and that the document evidencing the contract is to be made hereafter. In order to save misunderstanding it merely mentions the terms which are to be embodied in the formal document. Such a document as the present is not valid in law and cannot be made the basis of a suit. An action can lie only on a policy and not a slip like the present.

Anderson, in reply:—The description of a slip is given by Arnould at p. 194. It is merely a piece of paper which a broker takes round for the initials of the underwriter. There are no conditions mentioned in it.

ORDER.

SARGENT, C.J.—We think the document requires to be stamped as a policy. It is not a mere "slip" or memorandum of a proposed insurance, the effect of which is discussed in *Xenos* v. *Wickham* (1). It mentions the sum for which the assurer declares the name of the ship, the voyage and the premium, and provides for the losses being paid on its production in conformity with certain conditions in the possession of the assurers, and, lastly, it expressly guarantees the payment of losses and claims settled under it. The document on the face of it does not contemplate the necessity of any other document of a more formal character being passed to the assured, and read with the conditions to which it refers, is clearly the instrument upon which the assured is intended to enforce his claim. It is, therefore, **[133]** a document by which the parties executing it engage to indemnify against losses arising from an unknown or contingent event, and falls under cl. 15 of s. 3 of the Stamp Act, I of 1879.

Order accordingly.

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19 B. 133.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

PATEL KILABHAI LALLUBHAI (*Original Plaintiff*), *Applicant v.* HARGOVAN MANSUKH AND OTHERS (*Original Defendants*), *Opponents.**

[17th January, 1894.]

Landlord and tenant—Lease—Ejectment—Title—Tenant cannot dispute landlord's title.

The plaintiff sued for possession of a certain house, alleging the expiry of the lease (*kabulayat*) on which the defendants held it as tenants. The Mamlatdar dismissed the suit, being of opinion that the plaintiff had no title to the house when he granted the lease, and that the house belonged to the defendants when they passed the lease.

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* Application No. 134 of 1893 under extraordinary jurisdiction.

(1) 14 C.B. Rep. N.S. 452.

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Held, reversing the decree, that the defendants (tenants) having executed the *kabulayat* could not deny the plaintiff's title as a ground for refusing to give up possession, and the Mamlatdar himself, therefore, could not go into the question.

Parbhudas v. *Fulba* (1) distinguished.

[R., 4 Bom. L.R. 964.]

APPLICATION under the extraordinary jurisdiction—s. 622 of the Civil Procedure Code (Act XIV of 1882)—against the decision of the Mamlatdar of Daskroi, in the Ahmedabad District.

The plaintiff sued under the Mamlatdars' Act (Bom. Act III of 1876) to recover possession of a house from the defendants, alleging that they were his tenants under a lease which he had granted to them, and that although the term of lease had expired they refused to vacate.

[134] The defendants admitted the execution of the lease, but disputed the plaintiff's title, and claimed the house as their own.

The Mamlatdar dismissed the suit, holding that the plaintiff had no title, his predecessor having purchased the house at a Court sale without the permission of the Court, in contravention of s. 294 of the Civil Procedure Code (Act XIV of 1882), and the purchase was, therefore invalid. He also found that the plaintiff had not taken possession before granting the lease.

The plaintiff applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling upon the defendants to show cause why the decision of the Mamlatdar should not be set aside.

Chimanlal H. Setalvad, in support of the rule, for the applicant (plaintiff).

Sitanath Gopinath Ajinkya, for the opponents (defendants) showed cause:—Though the Mamlatdar found that the lease was proved, still he did not give effect to it, because he considered it to be a merely nominal transaction. The principal issue in the case was whether we were in possession of the house through the plaintiff. The Mamlatdar found that we were in possession in our own right, and, therefore, he dismissed the suit. There being a conflict of title between the parties, the Mamlatdar could not award the claim—*Parbhudas* v. *Fulba* (1).

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19 B. 133 N. = Unrep. P.J. B.H.C. (1892—94) 122.

(1) P.J. 1892, p. 406. The case of *Parbhudas Lakshmidas* v. *Fulba* above referred o, was an application, No. 141 of 1892, under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) to reverse the decision of the Mamlatdar of Nadiad in the Ahmedabad District.

The plaintiff Parbhudas Lakshmidas sued the defendant Fulba, widow of Vansang Navalsang, for possession of a house, alleging that she was his tenant and that her term of tenancy had expired. In proof of her holding as his tenant he produced a rent-note signed by her.

The defendant admitted execution of the rent-note, but denied that it had been acted upon, or that she was the plaintiff's tenant.

The Mamlatdar rejected the plaintiff's claim, finding that the rent-note had never been given effect to; that the defendant was not in possession of the house as the plaintiff's tenant, and that, therefore, he (the Mamlatdar) had no jurisdiction to give a decree against the defendant.

The plaintiff thereupon applied, as above, to the High Court.

SARGENT, C. J.—We think the Mamlatdar's conclusion on the evidence, although it is not stated as clearly as might be desired, was that the rent note was not intended to be acted on, but only to be used to resist a possible claim by the husband's relations. We think it was within his jurisdiction to come to that conclusion, and to hold that no tenancy was created.

Rule discharged with costs.

[D. 19 B. 133.]

JUDGMENT.

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[135] SARGENT, C. J.—The Mamlatdar has found that the defendants are not "in possession under a right derived from the plaintiff," because he considers the lease to be a nominal one. He has come to that conclusion, because he is of opinion, on the evidence, that the property belonged to the defendants when it was passed by them. But the defendants, having passed the *kabulayat* to the plaintiff, could not be heard to deny the latter's title as a ground for refusing to give up possession, and the Mamlatdar himself, therefore, could not go into the question. The decision in *Parbhudas* v. *Fulba* (1) referred to did not turn upon a conflict of title between the parties, but upon whether the lease was intended to be acted on.

We ought, therefore, under these circumstances, to exercise our extraordinary jurisdiction and make absolute the rule, and reverse the order of the Mamlatdar, and direct possession to be given to the plaintiff. Applicant to have his costs.

Rule made absolute.

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19 B. 135.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

KIRPARAM JHUMEKRAM MODIA, *insane*, BY HIS GUARDIAN HIS WIFE BAI NATHI (*Original Plaintiff No.* 2), *Appellant v.* MODIA DAYALJI JHUMEKRAM AND OTHERS (*Original Defendants*), *Respondents.**

[18th January, 1894.]

Practice—Procedure—Lunatic—Limitation— Striking out lunatic plaintiff's name—Restoration of name—Suit by person not adjudged to be of unsound mind under Act XXXV of 1858.

A plaint as originally framed contained the name of Kirparam, stated to be of unsound mind, as first plaintiff and of his wife Nathi as his guardian and second plaintiff. When the plaint was actually filed, Kirparam's name was struck out by the pleader and Nathi. Subsequently his name was restored on his own application, but the period of limitation prescribed for the suit had then elapsed. The first Court held that under s. 7 of the Limitation Act the plaintiff's claim was not barred. On appeal, the Judge dismissed the suit, holding that the order of the first Court restoring Kirparam's name was bad, and that the suit was time-barred at the date of that order. On second appeal,

Held, reversing the decree, that the pleader and Nathi acted beyond their authority in striking out Kirparam's name, and that, therefore, the restoration of his name must relate back to the filing of the suit, which was, therefore, not barred.

[136] *Quære*—Whether a person of unsound mind, but not adjudged to be so under Act XXXV of 1858, can in this country sue by his next friend.

[F., 33 C. 1094=4 C.L.J. 306=10 C.W.N. 719]

SECOND APPEAL from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

This was an action filed in the year 1890 for the recovery of Rs. 825 under two bonds dated the 6th June, 1886, and payable on the 25th April,

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* Second Appeal, No. 564 of 1892.

(1) 19 B. 133, N.

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1887. The plaint as originally framed contained the names of Kirparam Jhumekram, insane, by his guardian his wife Bai Nathi as first plaintiff, and Bai Nathi herself as plaintiff No. 2. The plaint was verified by Kirparam himself, and the *vakalatnama* (pleader's warrant) was signed by both Kirparam and Bai Nathi. Subsequently, when the plaint was actually filed in Court, Bai Nathi and the plaintiff's pleader struck out Kirparam's name from the title without making any other alteration in the body of the plaint. The suit was proceeded with at the instance of Bai Nathi alone. The defendants (*inter alia*) denied Bai Nathi's right to maintain the suit. On the 19th March, 1891, Kirparam presented an application to the Court asking to have his name restored to the plaint, and the application having been granted, the defendants contended that his claim was barred by limitation.

The Subordinate Judge found (*inter alia*) that the claim was proved, and that the plaintiff Kirparam being of unsound mind the suit was not time-barred under s. 7 of the Limitation Act (XV of 1877). He, therefore, allowed the claim.

On appeal by the defendants the Judge reversed the decree. The following is an extract from his judgment :—

" Assuming for the moment that Kirparm was of unsound mind at the moment of the institution of the suit, it is clear that he could neither institute it himself, nor could his wife, without a certificate under Act XXXV of 1858, do so on his behalf—*Tukaram Anant Joshi, by his next friend Bhikaji Ramchandra Nimkar* v. *Vithal Joshi*, I.L.R. 13 B. 656 *et seq.* Nor can the want of certificate be now cured. If Kirparam was not of unsound mind at the date of the institution of the suit, then his wife had even less reason to appear as his guardian. However, the name of Kirparam disappeared from the record in the first instance; he made no complaint in that respect in Ex. 18 on 19th March, 1891, when he asked to have his name restored to the plaint. The erasure appears to have been made with the cognizance of the pleader, as he has initialled it. The order of the Subordinate Judge restoring Kirparam's name appears to be bad. By withdrawing his name from the plaint, Kirparam, if sane, must be held as withdrawing from the suit, and on the 19th March, 1891, the [137] claim had become time-barred * * * Whether Kirparam is of sound or unsound mind, the suit in the present form is not maintainable."

Bai Nathi as the guardian of her husband preferred a second appeal.

Govardhanram M. Tripathi, for the appellant (plaintiff) :—It was not necessary to mention Bai Nathi as plaintiff in the plaint. The plaint as it was originally framed with her name as the guardian of her husband was sufficient for our purpose.

[SARGENT, C. J.—But, if Kirparam is of unsound mind, how could his wife bring a suit without a certificate under Act XXXV of 1858?]

A lunatic may sue either by himself or through a next friend—*Venkatramana Rambhat* v. *Timappa Devappa* (1).

[SARGENT, C.J.—That decision applies to a defendant.]

We submit that the same principle applies to a plaintiff. The practice in the Courts of Chancery is also to the same effect—*Jones* v. *Lloyd* (2).

There was no appearance for the respondents (defendants).

(1) 16 B. 132.

(2) L. R. 18 Eq. 265.

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SARGENT, C.J.—The plaint was originally framed with Kirparam himself as first plaintiff and his wife as his guardian as the second plaintiff; and the plaint was verified by Kirparam himself. When the plaint was actually filed, Kirparam's name had been struck out from the heading of the suit, as the Subordinate Judge says, by the pleader and second plaintiff. This was clearly beyond their authority, and, therefore, when the name was restored on Kirparam's application in person on 19th March, 1891, the restoration must relate back to the filing of the suit; in which case the suit would be in time and maintainable in plaintiff's name, whether of sound or unsound mind, and it is, therefore, unnecessary to determine whether, as has been contended before us, there may be cases in which a person of unsound mind, not adjudged to be so under Act XXXV of 1858, can sue by his next friend, as it would appear may be done in England under certain circumstances—*Jones* v. *Lloyd*(1).

We must, therefore, reverse the decree, and send back the case for a decision on the merits. Costs to abide the result.

Decree reversed and case sent back.

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19 B. 138.

[138] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

VINAYAK JANARDAN (*Original Plaintiff*), *Appellant v.* MAINAI AND OTHERS (*Original Defendants*), *Respondents.**

[18th January, 1894.]

Landlord and tenant—Mirasi *tenure*—*Ejectment*—*Trespasser*—*Suit by an inamdar to recover possession*—Mirasi *tenure existing*—*Right of inamdar against trespasser.*

An inamdar sued to eject the defendants from certain lands, alleging them to be trespassers. The Courts found that the lands were mirasi lands, and that one Ganu was mirasdar. The defendants had redeemed a mortgage effected by Ganu and claimed to hold possession as against the plaintiff.

Held, that as the land was found to belong to Ganu as mirasdar and as his *mirasi* tenure was still subsisting, the plaintiff as inamdar was not entitled to eject the defendants, whether or not they had any rights as against the mortgagee.

[R., 27 B. 43; 21 M. 153=8 M.L.J. 92; 5 Bom. L.R. 186.]

THIS was a second appeal from the decision of J.W. Walker, District Judge of Satara.

Suit to recover possession of land and arrears of rent.

This action was instituted by plaintiff, an inamdar, to recover possession of a certain field together with three years' rent. He alleged that he had leased it to defendant No. 1; that the other defendants were trespassers, and that defendants Nos. 2—4 held it in collusion with defendant No. 1.

Defendant No. 1 admitted the claim.

Defendants Nos. 2, 3 and 4 pleaded that their family held the land as mirasdar; that their uncle Ganu had mortgaged it to one Kondi, the

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* Second Appeal, No. 574 of 1892.

(1) L. R. 18 Eq. 265.

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husband of defendant No. 1; that they had redeemed the mortgage; that they were the heirs of Ganu, and they claimed to hold the land as mirasdars. They alleged that defendant No. 1 was colluding with the plaintiff.

The lower Courts held that the plaintiff was not entitled to recover as against defendants Nos. 2, 3 and 4, who had redeemed the mortgage. They found that Ganu was mirasdar of the lands, and that defendants Nos. 2, 3 and 4, were not mirasdars.

The plaintiff preferred a second appeal to the High Court.

[139] *Vasudeo Ramchandra Joglekar*, for the appellant (original plaintiff):—The defendants are held not to be mirasdars, but are mere trespassers as against the plaintiff, and he is entitled to eject them. The fact that they have paid off Ganu's mortgage cannot give them a right against Ganu's landlord.

Mahadeo Bhaskar Chavbal, for the respondents (original defendants):—The plaintiff sues us as trespassers. But he cannot do so unless he is entitled to immediate possession. He is not entitled to this, as the lower Courts have found that Ganu is mirasdar and his tenure still exists. As Ganu's heirs we have redeemed the mortgage and are now in possession—*Womesh Chunder* v. *Raj Narain*(1). A trespass during the continuance of the tenancy is no invasion of the landlord's title. Unless the plaintiff shows that he has the right of ejectment against Ganu, the original mirasdar, he is not entitled to evict us—Cole on Ejectment, pp. 287, 288. After we redeemed the land from Kondi we offered rent to the plaintiff, but he declined to take it. Even a mortgagor is not entitled to eject a trespasser without payment of the redemption money—*Chinto* v. *Janki*(2).

JUDGMENT.

SARGENT, C. J.—The plaintiff, as inamdar, seeks to obtain possession of the land from defendants Nos. 2, 3 and 4. But as the Courts below have found that the land belonged to Ganu as mirasdar, and that the tenure has not come to an end, the plaintiff can have no right to claim possession from defendants Nos. 2, 3, 4, whether or no they were the heirs of Ganu and entitled to redeem and obtain possession of the land from Kondi, to whom the Court has found it had been mortgaged by Ganu. The judgment of Sir B. Peacock in *Womesh Chunder* v. *Raj Narain*(1) and of Mr. Justice Telang in *Chinto* v. *Janki*(2), shew that the inamdar will not be prejudiced by his not being able to do so by their possession as trespassers against the persons entitled under the mirasi tenure. We must, therefore, confirm the decree of the Court below, with costs on appellant.

Decree confirmed.

(1) 10 W. R. C. R. 15.

(2) P. J. (1892) 453; 18 B. 51.

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[140] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

PANDU (*Original Plaintiff*), *Appellant v.* VITHU (*Original Defendant No. 2*), *Respondent.**

[18th January, 1894.]

Limitation Act (*XV of* 1877), *art.* 134—*Limitation—Mortgage—Decree obtained by mortgagee for possession until payment of mortgage-debt—Possession taken by mortgageee under decree—Continuance after decree of relation of mortgagor and mortgagee—Sale by mortgagee—Vendor and purchaser—Subsequent suit for redemption by mortgagor against mortgagee and his vendee—Plea by vendee of purchase for value without notice*—Bona fides, *meaning of—Purchaser, meaning of, in art.* 134.

A decree on a mortgage having directed the mortgagor to give possession to the mortgagee until the payment of the mortgage-debt and costs found due, the mortgagee entered into possession and subsequently sold the property to a third party. More than twelve years after the sale, the mortgagor brought a redemption suit both as against the mortgagee and the purchaser.

Held, that the suit (as against the purchaser) was barred under art. 134, sch. II of the Limitation Act (XV of 1877), and that notwithstanding the decree for possession, the relationship of mortgagor and mortgagee continued whether under the original mortgage or the decree.

Absence of *bona fides* as distinguished from actual knowledge of the vendor's title does not prevent the purchaser from claiming the benefit of art. 134, sch. II of the Limitation Act (XV of 1877).

In order to give the purchaser the benefit of art. 134, the purchase need not be *bona fide* in the sense of being without "constructive notice" of the restricted nature of the vendor's title, but the term "purchaser" in that article is meant a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is an absolute title.

[F., 9 M. L. J. 93; R., 23 B. 614; 3 Bom. L. R. 152; 2 C. L. J. 546; 12 O. C. 84.]

SECOND APPEAL from the decision of A. S. Moriarty, Assistant Judge of Poona, confirming the decree of Rao Saheb N. V. Atre, Second Class Subordinate Judge of Baramati.

Suit for redemption. In or about the year 1862 A. D., one Pandu (the plaintiff's father) mortgaged the lands in question to the first defendant, and in 1864 the first defendant (the mortgagee) obtained a decree (No. 270 of 1864) on this mortgage against him directing him to hand over possession of the land to the first defendant (mortgagee) until payment of the mortgage-debt with costs. On the 27th July, 1864, the first defendant took possession, and on the 9th May, 1878, he sold the land to the second defendant. Pandu subsequently died, and on the 27th [141] August, 1891, his son Nana filed the present suit for redemption of the mortgage, alleging that the mortgage-debt had been satisfied out of of the rents and profits of the land.

The first defendant admitted the mortgage and alleged that he had sold the land to the second defendant with notice of the mortgage.

The second defendant pleaded that he was a purchaser for value without notice of the mortgage, and contended that the suit was barred by limitation (art. 134 of the Limitation Act), being brought after the expiration of twelve years from the date of his purchase.

The Subordinate Judge found that the second defendant was a *bona fide* purchaser of the property for valuable consideration, and held the

* Second Appeal, No. 374 of 1892.

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suit barred as to him by art. 134, sch. II of the Limitation Act (XV of 1877). He relied on the rulings in *Yesu Ramji Kalnath* v. *Balkrishna Lakshman*(1) and *Vishnu Chintaman* v. *Balaji bin Raghuji* (2).

On appeal by the plaintiff the Judge confirmed the decree. The following is an extract from his judgment:—

"I must agree with the lower Court and with the arguments of respondent's pleader. Section 18 of the (Limitation) Act cannot apply, because there was no fraudulent concealment of the plaintiff's right to sue or of some document necessary to establish that right. Time, therefore, runs from the period fixed by the Limitation Act, notwithstanding the fact that the plaintiff had not then knowledge of the invasion or curtailment of his right of redemption from a period of sixty years to twelve years, owing to the second defendant's purchase. That purchase is by a registered document, and the property is conveyed absolutely from the first defendant, the ostensible owner, to the second defendant for a valuable consideration. Under these circumstances it seems clear that the ruling in I. L. R., 9 Bom. 475, should be followed. A reference, however, should be made to *Bhagwan Sahai* v *Bhagwan Din*, I. L. R., 9 All., 97, alluded to in one of the cases quoted by the Subordinate Judge (I. L. R., 15 Bom., 585). In that case the circumstances under which the mortgagee sold his interest were found to be such that the purchaser was not allowed to take advantage of the provisions of art. 134 in question. It was there found that the purchaser had not "reasonable ground for believing and did believe" that his vendor had the power to convey an absolute interest. No such presumption can be drawn from the facts of the present case. The sale here was a private transaction, and if defendant No. 1 had already bought the land when it was sold for arrears of revenue (see defendant No. 2's written statement), defendant No. 2 would certainly hold him to be the ostensible owner. In the case above mentioned (I. L. R., 9 All., 97), the property was purchased at a formal auction-[142] sale, and the circumstances were such that the Court drew inferences that the purchaser must have known of the existence of incumbrances."

The plaintiff preferred a second appeal.

Daji Abaji Khare, for the appellant (plaintiff).—Article 134 does not apply, for the relation of mortgagor and mortgagee ceased when the first defendant got his decree against Pandu in 1864. The mortgage was then merged in the decree. The second defendant did not, therefore, purchase from a mortgagee. And even if the relation of mortgagor and mortgagee did continue after the decree, the second defendant as purchaser from a decree-holder must be held to have had constructive notice of the mortgage on which the decree was based, and, therefore, he is not protected by art. 134 of the Limitation Act—*Navlu* v. *Raghu*(3); *Tani Bagavan* v. *Hari*(4); *Ramchandra Ballal* v. *Baba Esgonda*(5). He knew that he was only entitled to hold the land till the decretal amount was paid. Therefore his possession never became adverse to us. In fact, he has held the property merely as a trustee for us under the decree.

Manekshah J. Taleyarkhan, for the respondent (defendant No. 2).—The plaintiff cannot now contend that the relation of mortgagor and mortgagee does not exist. He sues for redemption, and his plaint alleges that we hold as mortgagee. The plaintiff in his plaint stated that we held the property as a mortgagee. He, therefore, cannot now be allowed to say

(1) 15 B. 583.
(2) 12 B. 352.
(3) 8 B. 303 (306).
(4) 16 B. 659 N.
(5) 12 B. H. C. R. 163.

that we purchased the property from a decree-holder. If, however, the mortgage merged in the decree (as is now argued), then the plaintiff must seek his remedy in execution of that decree. He cannot bring a new suit on the mortgage—*Rambhat* v. *Ragho Krishna* (1). We have purchased the property for valuable consideration without notice of the mortgage, and, therefore, we are entitled to resist the claim under art. 134, sch. II of the Limitation Act—*Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (2).

JUDGMENT.

SARGENT, C. J.—The plaintiff in this suit seeks to redeem certain property which he alleges to have been mortgaged to [143] the first defendant in Shake 1784. The second defendant resists on the ground that he purchased the property from defendant No. 1 in 1878, and also that plaintiff's claim is barred. The lower appeal Court has held it to be barred under art. 134 of Act XV of 1877.

An objection was taken by Mr. Daji, for the plaintiff, that the article did not apply, as the first defendant was no longer a mortgagee, but only a decree-holder after the decree was passed in suit No. 270 of 1894, in his favour directing the mortgagor to give possession to him until payment of the mortgage-debt and costs found due. But if that be so, the objection is also fatal to the plaintiff's present suit, which is based on the existence of that relationship.

Moreover, it is to be observed that the decisions of this High Court in *Ramchandra Ballal* v. *Baba Esgonda* (3), *Navlu* v. *Raghu* (4), *Tani Bagavan* v. *Hari* (5), and of the Madras High Court in *Periandi* v. *Angappa* (6), and of the Privy Council in *Hari Ravji Chiplunkar* v. *Shapurji Hormusji* (7), to which reference has been made, whilst they leave it in doubt, it must be admitted, what are the precise rights of the mortgagor after a decree had been passed in favour of a mortgagee, all treat the relationship of mortgagor and mortgagee as continuing between the parties, whether it be under the original mortgage or the decree.

Passing, then, to the consideration of art. 134 of the Statute (Act XV) of 1877, we think that the view expressed by this High Court in *Bava Khan Daudkhan* v. *Bhiku Sazba* (8) and *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (2) is the correct one, and that the absence of "*bona fides*" as distinguished from actual knowledge of the vendor's title does not prevent the purchaser from claiming the benefit of the article, in that respect differing from the effect of s. 5 of Act XIV of 1859, which is discussed by Lord Cairns in *Radanath Doss* v. *Gisborne and* [144] *Co.* (9). There are doubtless remarks of the learned Chief Justice of the Allahabad High Court in *Bhagwan Sahai* v. *Bhagwan Din* (10) which are perhaps scarcely reconcileable with the above view of the article, but it was sufficient for the decision in that case, as pointed out by the Chief Justice himself at p. 103 of the report, to remark that the article does not apply to purchases at auction-sale in execution of the mortgagor's interest, as decided by the Privy Council in *Kali Das Mulik* v. *Kanhya Lal Pandit* (11).

But although the article does not, in our opinion, require the purchase to be "*bona fide*" in the sense of being made without "constructive notice" of the restricted nature of the vendor's title, we agree with what is said in *Bhagwan Sahai* v. *Bhagwan Din* (10) as to the remark of Lord Cairns in construing s. 5, Act XIV of 1859, in *Radanath Doss* v. *Gisborne and Co.* (9)

(1) 16 B. 656. (2) 15 B. 583. (3) 12 B.H.C.R. 163.
(4) 8 B. 303. (5) P. J. (1887) p. 315. (6) 7 M. 423.
(7) 13 I.A. 66. (8) 9 B. 475 (477). (9) 14 M. I. A. 121.
(10) 9 A. 97. (11) 11 I.A. 218 (229).

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being equally applicable to the article under consideration, *viz.*, that by a purchaser must be meant a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is an absolute title—a requisite, which, it is to be observed, Lord Cairns treats (see 14 Moore's I. A. p. 20) as quite distinct from what he mentions to be the second requisite to enable s. 5 to be applied, *viz.*, that the purchase should be "*bona fide*."

In this case the Assistant Judge has found that "no presumption can be drawn from the fact of the case that the purchaser did not believe when he purchased that his vendor had not power to convey an absolute interest," and we must, therefore, confirm the decree with costs.

Decree confirmed.

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19 B. 145.

[145] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

ANNAPURNABAI, WIDOW OF BALAVANTRAO BHIKAJI VAKHARKAR (*Original Opponent*), *Applicant v.* LAKSHMAN BHIKAJI VAKHARKAR (*Original Applicant*), *Opponent.** [23rd January, 1894.]

Succession Certificate Act, VII of 1889, *ss.* 17 *and* 20—*Certificate of heirship—Hindu family—Political Agent—Grant of certificate by Political Agent—Irregularities in making grant—Stamp on certificate—Court-Fees' Act, VII of* 1870, *s.* 26—*Notification of Governor General.*

A District Judge cannot treat a certificate of heirship granted by the Political Agent in a Native State as invalid because the applicant had not given to him the requisite information as to the other members of the family and no notices had been issued to them. These irregularities of procedure may be a reason for the Political Agent to cancel the grant, but they do not enable the District Court to treat it as a nullity.

A certificate having been granted on an ordinary stamp of requisite value, it was contended that it was not properly stamped in accordance with the Court-Fees' Act (VII of 1870) as required by s. 17 of the Succession Certificate Act (VII of 1889), because it did not bear upon it the words "Court-Fees" as directed in the notification of the Governor General, No. 361, dated 18th April, 1883.

Held, that though s. 26 of the Court Fees' Act (VII of 1870) provides that the stamp used to denote the fee chargeable under the Act shall be of such particular kind as the Governor-General in India in Council may by notification from time to time direct, and that though the Governor-General had issued such notification, still the direction in the notification, that the stamp should bear the words "Court-fees" was not a matter on which he had authority to give any direction under the terms of s. 26 of the Court-fees Act, and, therefore, could only be regarded as a departmental order, the non-observance of which could not invalidate the stamp for the purpose of the Act.

A certificate of heirship stamped with the proper stamp, and granted by the Political Agent of a Native State, must be recognized by the Civil Courts in British India "as having the same effect in British India as a certificate granted under this Act" as provided by s. 17 of Act VII of 1889, and under s. 20 precludes the granting of a certificate by a Civil Court.

THIS was an application under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code Act XIV of 1882) against the order of A. Steward, District Judge of [146] Khandesh, in the matter of an application for a certificate to collect debts under the Succession Certificate Act (VII of 1889).

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* Application No. 123 of 1893 under extraordinary jurisdiction.

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One Balvant Bhikaji Vakharkar, the Head Master of the High School at Kolhapur, but whose family resided at Dhulia in the Khandesh District, died at Kolhapur on the 22nd December, 1889, leaving a widow, a mother and two brothers. The property of the deceased consisted of a deposit of about Rs. 3,200 in the Savings Bank at Kolhapur standing in his own name and a sum of Rs. 2,000 secured on the mortgage of a house at Kolhapur. After his death his widow Annapurnabai applied for a certificate of heirship, and without furnishing any information as to the relatives of the deceased obtained a certificate from the Court of the Sar Nyayadhish (Chief Judge) of Kolhapur, which is the principal Court of original jurisdiction in that territory

Subsequently she applied to the Political Agent of Kolhapur and Southern Maratha Country to countersign the certificate, but he refused to countersign it on the ground that it was not on a British stamp, and could not, therefore, be countersigned by a British officer. The widow, thereupon, produced an ordinary stamp paper and not a Court-fee stamp as contemplated by the Court-fees' Act (VII of 1870), and upon it obtained the Political Agent's certificate under the Succession Certificate Act (VII of 1889).

Subsequently Lakshman Bhikaji Vakharkar (the opponent), claiming to be an undivided brother of the deceased, applied to the Joint Subordinate Judge of Dhulia for a certificate under the said Act to enable him to recover the debts due to the deceased. His application was opposed by Annapurnabai, who contended (*inter alia*) that until the certificate granted to her by the Political Agent was cancelled, no other certificate could be granted.

The Joint Subordinate Judge of Doulia, however, granted Lakshman a certificate with reference to the Savings Bank deposit of the deceased, but he held that he had no jurisdiction to grant one as to the debt secured in the house at Kolhapur.

On apppeal the Judge amended the order of the lower Court and directed that a certificate should be issued to Lakshman with **[147]** respect to both the debts, for the following (among other) reasons :—

"The certificate granted by the Political Agent is invalid, because it is stamped with a general stamp only, whereas under the provisions of s. 17 of Act VII of 1889, it should have been stamped with Court-fee stamp.

"The certificate from the Sar Nyayadhish was obtained by misrepresentation and deceit. If Annapurnabai shows any intention of acting on the certificate so obtained, the applicant Lakshman Bhikaji will have to sue for an injunction preventing her from dealing in any way with the property of the deceased in the Kolhapur Court.

"With regard to the mortgage secured by immoveable property in the city of Kolhapur, I do not see that there is any objection to my including this in the certificate granted to Lakshman Bhikaji. Section 17 gives a certificate from a Political Agent, if duly stamped, in force in British India the same force as a certificate granted under the Act. I do not see why this arrangement should not be reciprocal, and it may be so in the Kolhapur State. All that the certificate from this Court gives is the right to recover that debt. Whether he succeeds in recovering it or not, is another matter."

Annapurnabai applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling upon the opponent Lakshman Bhikaji Vakharkar to show cause why the order should not be set aside.

Maneksha J. Taleyarkhan, appeared for the applicant Annapurnabai in support of the rule:—The certificate which was granted to us by the

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Political Agent was in the form prescribed under s. 17 of the Succession Certificate Act (VII of 1889). We obtained a certificate from the Political Agent of Kolhapur, because we lived with the deceased at Kolhapur. The fact that the certificate granted by the Political Agent is not engrossed on a Court-fee stamp, but on an ordinary commercial stamp, is of no consequence. The proper stamp duty of Rs. 65 has been paid. Government issues different kinds of stamps merely for the purpose of keeping separate accounts. The certificate granted to us by the Political Agent is valid, and if so, then the certificate granted to Lakshman by the Judge is invalid under s. 20 of the Succession Certificate Act (VII of 1889). Even acccrding to s. 28 of the Court-fees' Act, the certificate of the Political Agent would not be invalid, it being properly stamped.

Shamrao Vitthal, for the opponent Lakshman Bhikaji showed cause. —First we contend that the applicant has no right at all to **[148]** a certificate. The deceased was a member of an undivided family, and we are entitled to his property by survivorship even without a certificate under the Succession Certificate Act—*Ganesh* v. *Bhima* (1). The certificate of the applicant is invalid. It was granted without any inquiry as to whether other relatives of the deceased were entitled to his property. Annapurnabai did not inform the Court of the Sar Nyayadhish or the Political Agent of Kolhapur of the existence of the other relatives of the deceased, and fraudulently obtained the certificate. We also contend that the certificate of the Political Agent is invalid, because it is not properly stamped. Section 26 of the Court-fees' Act enacts that the Court-fee stamps shall either be impressed or adhesive according to the direction of the Governor-General in Council; and there is a Government Resolution (No. 361, dated the 18th April, 1883) which lays down that when a Court-fees stamp up to rupees ten is required, then the stamp should be adhesive, and when the fee is higher than rupees ten, then an impressed stamp should be used. Further, it provides that the stamps, whether adhesive or impressed, should have the words "Court-fees" on it. The certificate of the Political Agent is not on such a stamp, and, therefore, it is invalid.

JUDGMENT.

SARGENT, C.J.—The District Judge has confirmed the grant of a certificate by the Subordinate Judge, on the ground that the certificate granted by the Political Agent was invalid, because the applicant had not given the Political Agent the requisite information as to the other relatives of the family, and no notices had been issued to them. These irregularities of procedure, if true, might possibly be reasons for the opponent asking the Political Agent to cancel the grant, but they do not enable the District Court to treat it as a nullity.

As to the certificate not being properly stamped in accordance with the Court Fees' Act of 1870, as required by s. 17 of Act VII of 1889, because it does not bear upon it the words "Court Fees," it is true that s. 26 of Court Fees' Act VII of 1870 provides that the stamp used to denote the fee chargeable under the Act "shall be impressed or adhesive or **[149]** partly impressed or adhesive as the Governor-General in India in Council may by notification in the *Gazette of India* from time to time direct," and that by notification of the Governor-General, (No. 361, dated 18th April, 1883), it was provided that in case the fee chargeable

(1) P. J. (1891), p. 228.

should be under Rs. 10, an adhesive stamp should be used, and when the fee should exceed Rs. 10, an impressed stamp, and that in both cases the stamp should bear the words "Court Fees;" but as to the direction that the stamp should bear the word "Court Fees" it is to be remarked that it is not a matter on which by the terms of s. 26 of the Court Fees' Act the Governor-General in Council had authority to give any direction, and it can, therefore, only be regarded as a departmental order, the non-observance of which cannot invalidate the stamp for the purpose of the Act. As Rs. 65, the amount of the stamp impressed on the certificate granted by the Political Agent, was admittedly the correct amount, the stamp was, in our opinion, in accordance with the provisions of the Court Fees' Act.

Under these circumstances the District Court ought to have recognized the certificate of the Political Agent as "having the same effect in British India as a certificate granted under this Act" as provided by s. 17, and which, therefore, by s. 20 would preclude the granting of a certificate by the District Court. The District Court has, therefore, acted without jurisdiction in making the grant, and we must make the rule absolute and cancel the grant, with costs.

Rule made absolute.

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[150] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BALKRISHNA VAMANAJI GAVANKAR *(Original Plaintiff), Appellant* v. JASHA FARSI SHIREL AND OTHERS *(Original Defendants), Respondents.** [25th January, 1894.]

Landlord and tenant—Ejectment—Notice to quit—Agricultural land—Tenancy-at-will—Yearly tenancy—Rent not payable until the end of the year—Construction—Land Revenue Code (Bom. Act V of 1879), s. 84.†

Where, in the case of an agricultural land, the tenant entered into an agreement with the landlord that he would pay the amount of the annual rent every year as long as the landlord would keep the *wadi* (cart) with him, and would give back the same when the landlord would demand it.

Held, that the contract between the parties took the case out of s. 84 of the Land Revenue Code (Bombay Act V of 1879), and that as the rent would not be payable until the end of the year, the landlord might put an end to the tenancy and demand the land at the end of any year without giving any previous notice of any particular period, but he could not demand immediate possession in the middle of a year.

APPEAL under the Letters Patent from the order of Fulton, J., dismissing, under s. 551 (1) of the Civil Procedure Code (Act XIV of 1882), second appeal No. 655 of 1893 from the decision of Rao Bahadur

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* Appeal No. 31 of 1893 under the Letters Patent.

† Section 84 of the Land Revenue Code (Bombay Act V of 1879):—

84. An annual tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March.

An annual tenancy shall require for its termination a notice given in writing by the landlord to the tenant, or by the tenant to the landlord, at least three months before the end of the year of tenancy, at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of sch. E or to the like effect.

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Lalshankar Umiashankar, Joint First Class Subordinate Judge with Appellate Powers at Thana.

Ejectment. The plaintiff sued to recover possession of certain land from the first defendant. The other defendants were subsequently made parties.

All the defendants pleaded that they had no knowledge of the plaintiff's title, and that they had received no notice to quit.

[151] The following is the translation of the material portion of the rent-note relied on by the plaintiff :—

"I pass an agreement in writing as follows :—*Wadi* (oart) Wadbhat and *wadi* (oart) Bilbhat (situate at) tarf Agar Bassein together with the trees standing thereon and land I have taken in my possession from you on an agreement to pay *hasil* (annual rent), and I have been cultivating them from before. I have argeed to pay the Government assessment on the said *wadis* (oarts) and to pay you rupees 16, in letters sixteen, of the Company's currency on account of the *hasil* (annual rent) for one year. Accordingly I shall pay you the amount of the *hasil* (annual rent) every year as long as you shall keep the said *wadis* (oarts) with me, and will give back the same when you may demand the same. I have no claim to the *wadis* (oarts). The *wadis* (oarts) are in my possession."

The Subordinate Judge passed a decree for the plaintiff, holding that no notice to quit was necessary, as the defendants had denied the plaintiff's title.

On appeal by the defendants the Judge reversed the decree, holding that a notice to quit was necessary, and that the service of notice to quit had not been proved.

The plaintiff preferred a second appeal, No. 655 of 1893, which was dismissed under s. 551 (1) of the Civil Procedure Code (Act XIV of 1882).

The plaintiff thereupon preferred an appeal under the Letters Patent.

Ganesh Krishna Deshamukh, for the appellant (plaintiff).

JUDGMENT.

SARGENT, C. J.—The question for determination in this case is, whether the agreement created a tenancy-at-will or a yearly tenancy. The agreement provides for a yearly rent being paid, and the question is, whether the words which follow show a clear intention that the landlord might give a notice to quit within the year.

In *Khuda Bakhsh* v. *Sheo Din* (1), where the agreement was held to create a tenancy-at-will, the language of the agreement showed, as Mahmood, J., points out, an intention that the landlord might turn out his tenant at any time on giving fifteen days' notice. Moreover, the land was not let for agricultural purposes, but was only a piece of land on which the tenant was to live and tether his cattle. In *Jivraj* v. *Atmaram* (2) the lease was of a house on **[152]** which an annual rent was reserved, but the tenant agreed "to vacate when asked to do so by the landlord."

In the present case the land is found by the District Court to be agricultural land, and very clear language should, we think, be required to show an intention that the landlord should be able to turn his tenant out at any moment during the year. The tenant says: "I shall pay you the amount of the annual rent every year as long as you shall keep the said *wadi* with me, and will give back the same when you may demand the same." As the rent would not be payable until the end of the year, this

(1) 8 A. 405 (408).

(2) 14 B. 319.

language would seem to imply that the landlord might put an end to the tenancy and demand the land at the end of any year and without giving previous notice of any particular period. The contract between the parties would take the case out of s. 84 of Bombay Act V of 1879. Here the suit demands immediate possession in the middle of the current year. We must, therefore, dismiss the appeal.

Appeal dismissed.

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19 B. 152.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

THE ADVOCATE GENERAL OF BOMBAY (*Plaintiff*) *v.* GANGJI AKHAI (*Defendant*).* [26th July, 1894.]

Contempt of Court—Punishment by imprisonment—Practice.

On 1st September, 1890, in an administration suit in which Gangji Akhai as executor of a will was defendant, a receiver was appointed, and Gangji Akhai was ordered to deliver to the receiver certain Government promissory notes of the value of Rs. 45,000 belonging to the estate, which was the subject-matter of the suit. He did not obey the order and absconded from Bombay, and on 16th March, 1891, in his absence, a rule for his attachment for contempt was made absolute. It was afterwards ascertained that he had used the notes for his own purposes. A warrant was issued for his arrest, and he was apprehended, and on 23rd April, 1891, he was convicted of criminal breach of trust and sentenced to eighteen months' imprisonment. Previously to his trial (*viz.*, on the 9th April, 1891) he had been committed to jail for contempt of the order of September, 1890, so that after his conviction he was in jail both under his sentence and under the order for contempt. On the 4th October, 1892, the Court passed a money decree in the administration suit against the defendant for Rs. 80,000 **[153]** and costs. The sentence passed upon the defendant for the criminal offence expired on the 22nd October, 1892. Applications for his release from imprisonment under the order for contempt were made in December, 1892, and 10th April, 1893, but were refused. Counsel now moved again for his release.

Held, that the defendant should be released from imprisonment. The right of the plaintiff to demand the promissory notes from him was merged in the money decree. The right to demand the notes was gone, and the order that he should deliver them up to the receiver had ceased to be operative. The commitment, in so far as it was intended to enforce obedience to the order of the 1st September, 1890, could no longer be continued on that ground. It was the decree now and not the order which constituted the measure of the obligation between the parties. That was a simple money decree, and it was contrary to the expressly declared will of the Legislature and to all modern principle and precedent to keep a defendant under commitment for contempt to compel him to pay a money decree. If the attachment order was regarded as a punishment for the defendant's offence in not having delivered up the notes, the punishment should be commensurate with the offence. Imprisonment under it could not be indefinite. By s. 493 of the Code of Civil Procedure (Act XIV of 1882) the Legislature indicated that such imprisonment should not extend beyond six months. The defendant had, however, been in jail for more than twenty months. For the criminal offence he had suffered the punishment to which he was sentenced, and the Court would not be justified in indirectly adding to its duration.

APPLICATION by defendant for release from imprisonment for contempt.

This was an administration suit, and on the 1st September, 1890, the Court made an order appointing a receiver and restraining the defendant Gangji Akhai, who was the testator's executor, from dealing with the

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* Suit No. 212 of 1889.

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testator's estate, and ordering him to deliver over to the receiver certain Government promissory notes of the value of Rs. 45,000 mentioned in his inventory as belonging to the estate.

The defendant did not obey this order, and on the 16th March, 1891, a rule for his attachment for contempt was made absolute. This order was made in his absence, as he had then absconded from Bombay.

It was subsequently ascertained that Gangji Akhai had used the Government promissory notes in question for his own purposes, and an information was accordingly laid against him by the receiver charging him with criminal breach of trust. A warrant was issued for his arrest, under which he was apprehended and brought to Bombay, and on the 23rd April, 1891, he was [154] convicted of the above offence and sentenced to eighteen months' rigorous imprisonment.

Previously to his trial (*viz.*, on the 9th April, 1891), he had been committed to jail for contempt of the order of September, 1890, so that after his conviction at the Criminal Sessions he was in jail both under his sentence and under the order for contempt.

On the 15th December, 1892, an application was made to the Court for his release, and refused. A second application was made on the 10th April, 1893, but was also refused.

Counsel now moved in accordance with notice of motion, dated 9th July, 1894, for the release and discharge of the defendant Gangji Akhai from jail in which he was confined under the Court's order of 16th March, 1891.

In his affidavit the applicant stated (*inter alia*) as follows:—

"I have been in jail for contempt ever since the 8th October, 1892, on which day the sentence of eighteen months inflicted on me expired. I say that I have already severely suffered for what I have done, and repent for the same. I have no means whatever to repay to the estate what I have misappropriated, and for which I have been severely punished both criminally and civilly. I have lost in trade all that I had withdrawn from the estate, and have not in my possession any portion thereof, nor am I contumaciously keeping back any of the said property. My further detention in jail will do no good to the estate of the testator, but it will bring an end to my life. I am an old man fifty-six years of age. I have suffered heavily for my faults. I admit that I was wrong in applying the property of the estate, to my own business, but I have been punished heavily for the same. I do not ask for any release from my liability to the estate, but only the discharge of my person from jail. I am willing to make every restitution in my power to the estate. If I am discharged I shall be able to do some business, and from the income or profits to make good the loss to the estate. I am in an extremely feeble state of health. About six weeks ago I lost my son, who was eighteen years of age, and this fresh calamity has considerably added to my already severe afflictions and has crushed me and my family. Owing to my incarceration in jail my family were left in destitute circumstances, but this condition is now rendered helpless owing to the death of my son.

"Under these circumstances I pray that this Court will have pity upon my unfortunate condition and order my discharge."

Scott, for the applicant:—He relied on the affidavits and referred to ss. 492 and 499 of the Civil Procedure Code (Act XIV of 1882); the Debtors Act, 1869, s. 4 (Stat. 32 and 33 Vic., 62); *In re Davies* (1).

(1) 21 Q. B. D. 236.

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[155] *Lang* (Advocate General) and *Inverarity* for different parties to the suit opposed the application.

JUDGMENT.

FARRAN, J.—My thanks are due to Mr. Scott for his temperate and concise argument in this matter. It is an application on the part of the defendant Gangji Akhai to be released from custody. The suit was an administration suit to administer an estate which was in the hands of Gangji Akhai as executor of the testator, and in it on the 1st September, 1890, an order was made appointing a receiver and restraining Gangji Akhai from further intermeddling with the estate. This order directed that Gangji Akhai should (*inter alia*) deliver to the receiver the Government promissory notes mentioned in his inventory, which were of the nominal value of Rs. 45,000. My recollection of the circumstances under which that order was made is that Gangji Akhai endeavoured to show that Nenbai and not he had the notes in question in her possession, and did not suggest that the notes had been then parted with. I was convinced upon the affidavits, that Gangji Akhai had the notes and not the lady. He did not deliver the notes to the receiver, and on the 16th March, 1891, I made absolute a rule that a writ of attachment should issue against him, he not obeying the order in that particular. Gangji Akhai did not appear on that occasion though he had been personally served with the rule *nisi*, and the rule was made absolute in his absence.

The ground for making the order was that Gangji Akhai was contumaciously refusing to obey the order to hand over the notes. This order issued in the usual form, and I am not prepared to say that it issued in a wrong form, or that the imprisonment under it should have been directed for a particular period. Where the act of contempt is done, and cannot be undone, I agree that the more modern and probably the more correct course is to direct the imprisonment to continue for a definite period only —*In re Davies* (1). But where the object of the confinement is to enforce compliance with an order in the future, I think that it might frequently defeat the purpose of the order to limit it to a definite period. In many cases the litigant **[156]** in contempt might elect to undergo the term of imprisonment in preference to obeying the order. The defendant, when the commitment is for the purpose of enforcing an order in the future, on obeying the order would be entitled to his discharge at once, or rather would obtain it as of course, subject to any order as to costs which the Judge might think fit to make.

After this order was made, the receiver discovered that Gangji Akhai had between June and December, 1889, deposited Government promissory notes for Rs. 45,000—no doubt the notes in question—with the Bank of Bombay to secure advances made to him, and that the Bank had sold them in June, 1890, to liquidate the debt. Had Gangji Akhai stated that fact when the receiver order was made in September, 1890, that order would have been couched in different terms. But his statement would have rendered him liable to a criminal prosecution. To avoid this he endeavoured to shift the possession of the notes on Nenbai, and did not even suggest that they were no longer available. The Court was, therefore, led by his false and misleading affidavits to make the order in the form which it assumed.

(1) 21 Q.B.D. 236.

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Before the contempt order was made absolute, Gangji Akhai had absconded. The receiver on learning what Gangji Akhai had done with the notes laid an information under which he was arrested and brought to Bombay; and on or about the 23rd of April, 1891, he was convicted of criminal breach of trust of the notes in question, and sentenced to eighteen months' rigorous imprisonment. On the 9th of the same month he had been committed to jail for contempt of the Court's order of the 16th March, 1891. He was, therefore, in jail under his sentence and the commitment order at the same time. Previous to this, on the 15th January, 1891, the suit had been referred to the Commissioner to take the accounts of the administration of the estate of the testator from the defendant Gangji Akhai, the order for the receiver so far as it related to Gangji Akhai being continued.

The Commissioner made his report, which was not excepted to, and was confirmed by the Court. It found the sum of Rs. 80,000 due to the estate from Gangji Akhai, and in pursuance of its terms the Court on the 4th October, 1892, passed [157] a decree against Gangji Akhai in favour of the plaintiff for that sum and costs. It did not decree, as in fact under the circumstances it could not, the specific return of the Rs. 45,000 Government promissory notes, but was a simple money decree for Rs. 80,000. Under it the receiver's appointment was continued. The sentence passed on Gangji Akhai expired on the 23rd October, 1892.

On the 15th December, 1892, Gangji Akhai by counsel moved before Starling, J., for his release. His affidavit expressed contrition for his conduct, and stated that with certain exceptions he had no property. This application was refused apparently on the ground that the Court was not satisfied that Gangji was not concealing property, part of the proceeds of the Government promissory notes for Rs. 45,000, or that it was satisfied that he was concealing such property. A similar application made before the same learned Judge on the 10th August, 1893, upon the same grounds shared the same fate. The ground upon which I conclude that the learned Judge proceeded, was that Gangji Akhai had not under these circumstances sufficiently purged his contempt.

On Monday last, counsel for Gangji Akhai again before me applied for his release. I took time to consider the application, as it was opposed by the Advocate General as well as by Nenbai's counsel, and because I considered it to be a case of grave importance upon which another Judge had already expressed his opinion in a sense contrary to my own.

Upon the facts which I have stated, I consider that Gangji Akhai is entitled to his release. The right of the plaintiff to demand the promissory notes from Gangji Akhai is now merged in the money decree. The right to demand the notes is gone, and the order, therefore, that Gangji Akhai do deliver the notes to the receiver has ceased to be operative. The commitment in so far as it was intended to enforce obedience to the order of 1st September, 1890, can no longer be continued on that ground. Even if the order to deliver the notes could be treated as an order to replace the proceeds or value of the notes with the [158] estate—and I do not think that it can be so treated—still it is the decree now, and not the order, which constitutes the measure of the obligation between the parties. That is a simple money decree, and it appears to me to be contrary to the expressly declared will of the Legislature and to all modern principle and precedent to keep a defendant under commitment for contempt to compel him to pay a money decree. It does not, I think, alter the case that the Court is led to infer that the defendant has concealed property in his possession. Neither by torture nor by dread of

perpetual imprisonment, which is torture, ought the Court to enforce its decree. The modes in which a decree can be enforced are pointed out in the Civil Procedure Code, and this is not one of them.

If the attachment order is regarded as a punishment for the offence of the defendant Gangji Akhai in not having delivered up the Government promissory notes or (to read the order in a very extended sense) their value, the punishment should be commensurate with the offence. Imprisonment under it cannot be indefinite—*In re Davies*,(1). The Civil Procedure Code (XIV of 1882) s. 493, is an indication by the Legislature of the length to which such imprisonment should extend, *viz.*, six months. Here Gangji Akhai has been in jail under the commitment order for more than twenty months. His offence, however, in this particular case really consisted in his criminal breach of trust. For that he has suffered the punishment to which he was sentenced. I should not be justified in indirectly adding to its duration.

I have not entered upon a consideration of the question which determined Mr. Justice Starling in refusing to release the applicant—the question whether or not Gangji Akhai is concealing property. Upon such a question all Courts are necessarily liable to error. If I had the power to continue the imprisonment because I consider that the applicant is concealing property, which I have held that I have not, I should hesitate to exercise it in the face of the inference to be drawn from the want of the effect of the imprisonment already undergone by the applicant in inducing him directly or indirectly to produce the concealed property—an imprisonment which the orders already [159] made in this matter must have led the applicant to fear might be perpetual.

There must be for these reasons an order for the release of the applicant.

Application granted.

Attorneys for plaintiff.—Messrs. *Maneklal and Damodar.*

Attorneys for the defendant.—Messrs. *Crawford, Burder & Co., and* Messrs. *Tyabji and Dayabhai.*

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19 B. 159=Chitty's S.C. C.R. 422.

SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Farran.

BALARAM HARICHAND AND OTHERS *(Plaintiffs)* v. THE SOUTHERN MAHRATA RAILWAY COMPANY, LIMITED *(Defendants)*.*

[1st September, 1894.]

Railway Company- Liability for loss of goods—Railways Act, IX of 1890, *s* 75.

(1) The words "loss, destruction or deterioration" in s. 75 (2) of the Indian Railways Act, IX of 1890, include loss caused by the criminal misappropriation of the parcel by a servant of the railway administration in charge thereof.

[160] (2) Under s. 75 of that Act it is necessary that both value and contents of a parcel (if over Rs. 100 in value) should be declared before the railway administration can be held liable in respect thereof.

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* Suit No. 4019 of 1894.

(1) 21 Q. B. D. 236.

(2) Section 75 of the Indian Railways Act, IX of 1890 :—

"75. (1) When any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway, and

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(3) The payment by a consignor of silver coin of the specie rate required by the general regulations of a Railway Company to be paid for the carriage of such goods is not such a payment as satisfies the requirements of s. 75 of the Indian Railways Act, IX of 1890.

[R., 30 C. 257 ; 4 Ind. Cas. 907 = 113 P. R. 1908 = 15 P.L.R. 1909 ; 17 Ind. Cas. 37 = 6 S.L.R. 103 ; 14 M.L.J. 396 ; 2 N.L.R. 125 ; D., 19 B. 165.]

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge.—

"1. This was a suit brought by the plaintiffs to recover from the defendant company a sum of Rs. 672-14-6, being the value of a parcel of Rs. 700 in cash, consigned by the plaintiffs from Sangli to Bombay, which the defendant company failed to deliver, less a sum of Rs. 27-1-6 paid to the plaintiff in respect thereof by the Police Superintendent of the defendant company.

"2. The facts of the case together with the reasons for my decision are fully set out in my judgment delivered on the 4th July, 1894, of which a copy is hereto annexed, and to which for brevity's sake I crave leave to refer.

"3. The questions of law which I beg to submit for their Lordships' consideration are as follows :—

"(i) Whether the words 'loss, deterioration or destruction of the parcel' contained in s. 75 of the Indian Railways Act, 1890, include loss caused by the criminal misappropriation of the parcel by a servant of the railway administration in charge thereof ?

"(ii) Whether under s. 75 it is necessary that both value and contents of a parcel (if over Rs. 100 in value) should be declared before the railway administration can be held liable in respect thereof ?

"(iii) Whether the plaintiffs have satisfied the requirements of s. 75 by paying for the parcel in question the special rate required by cl. 50 of the defendant company's rules (p. 47 of Ex. I) to be paid for the carriage of treasure, &c. ?

"(iv) Whether the percentage on the value, mentioned in s. 75 which the consignor is, if required by the administration, [161] to pay or engage to pay by way of compensation for increased risk, is equivalent to insurance as prescribed by the company's bye-laws and rules ?

"4. The suit was dismissed by me subject to the opinion of their Lordships on the above questions. The plaintiff has deposited in Court the professional costs Rs. 51 awarded against him together with Rs. 50 to meet the costs of reference."

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the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package, unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.

"(2) When any parcel or package of which the value has been declared under sub-s. (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioation shall not exceed the value so declared, and the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, lie on the person claiming the compensation.

"(3) A railway administration may make it a condition of carrying a parcel declared to contain any article mentioned in the second schedule that a railway servant authorized in this behalf has been satisfied, by examination or otherwise, that the parcel actually contains the article declared to be therein."

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Clause 50 referred to in the third question was as follows. It was contained in the company's book of rates, and laid down the following regulation with regard to the carriage of specie :—

"50. *Specie.*—(*a*) Treasure including specie, bullion, gold and silver coin, jewellery, trinkets, plate, &c., shall be carried at the following rates, *viz.* :—

	Pies per maund per mile.
Up to 27 maunds	$2\frac{1}{2}$
Above 27 and up to 81 maunds	2
81 do. 270 "	$1\frac{1}{2}$
Over 270 maunds	1

Provided that the charge for any quantity shall not be less than that for a smaller quantity according to the above scale.

"*Insurance Rates.*

"54. *Goods or Parcels.* (*a*) The rates for insurance of goods, parcels, &c., shall be as follows :—

"Gold and silver and other excepted articles—2 annas per 100 miles or fraction of 100 miles.

"Subject to a maximum of one per cent.

"(*b*) The insurance shall in no case be less than two rupees for the whole distance."

The judgment of the Chief Judge of the Small Cause Court dismissing the suit was as follows :—

JUDGMENT.—This is a suit brought by the plaintiffs to recover from the defendant company a sum of Rs. 672-14-6, the value of a parcel containing Rs. 700 consigned from Sangli to Bombay by the last plaintiff Ramchandra Dayaram, which parcel the defendant company failed to deliver, but on account of which they have paid to the plaintiffs Rs. 27-1-6.

This is a case of some importance so far as it deals with the responsibility of a railway administration under the Indian Railways Act, 1890.

The facts, except as to what took place with regard to the declaration of the parcel, are not in dispute. On the 9th June, 1891, the plaintiff Ramchandra Dayaram wished to consign a parcel of Rs. 700 from Sangli (where his firm is carried on in the name of Raghunath Ramchandra) to Bombay. He accordingly sent the box containing the rupees by his man Ganu Rendala to one Ramchandra Ganesh at Sangli Station. It [162] appears that Ramchandra Ganesh is a mukadam and does consignment business at Sangli for various merchants. Ramchandra Ganesh tendered the parcel to the assistant station master, who asked him what it contained, to which he replied rupees in cash. Ramchandra Ganesh also stated before me that he had told the station master the amount. This was not till he had been recalled and the question put to him by the Court. On consideration of the whole evidence I am inclined to think that nothing at all was said as to the value of the parcel ; that no question was put by the assistant station master as to that, but that he merely enquired the contents and made out the various documents as for a parcel of silver coin weighing 10 seers. The charge made was fifteen annas, in accordance with the rates prescribed for treasure, which charge was paid by Ramchandra Ganesh. The assistant station master, it is true, states that he asked Ramchandra what was the value of the parcel and that Ramchandra

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replied that he did not know. I do not feel disposed to accept this statement as accurate. It is improbable that the assistant station master would recollect exactly what was said more than three years ago. I think it more probable that it never occurred to either the assistant station master or Ramchandra to think of the value, and that the parcel was despatched in what appears to have been the usual way, namely, on payment of the higher rates required for treasure, but without insurance. The parcel was duly handed to the guard of the train by name Belcher. On the arrival of the train at Poona no such parcel was delivered by the guard, and of course it never reached its destination at Bombay. Some days later, in consequence of its non-arrival, enquiries were made, and it ultimately appeared that the parcel had been stolen by Belcher. He was subsequently put on his trial in respect of the theft, to which he pleaded guilty, and was sentenced to a term of imprisonment which he is still undergoing. The Police Superintendent of the defendant company was returned to the plaintiffs a sum of Rs. 27-1-6 the proceeds of sale of Belcher's effects. It was admitted by the plaintiff's pleader that the plaintiff considered that he had no remedy against the defendant company, but in consequence of the decision of Starling, J., reported at I. L. R., 17 B. 723, he was induced to file this suit.

The defendant company raised three defences; (i) that the goods not having been properly declared, the company are not liable under s. 75 of the Indian Railways Act, 1890; (ii) that if the goods were so declared, the company took such care of the same as was required by ss. 151 and 152 of the Indian Contract Act; (iii) that the parcel did not contain Rs. 700.

As to the third defence, the statement of Ramchandra Dayaram, that he saw the Rs. 700 put into the box and sent to the station, stands uncontradicted, and I see no reason for supposing that the parcel did not contain the number of rupees alleged.

As to the second defence, I think that there can be no doubt whatever that the defendant company have not discharged the *onus* which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in s. 151 of the Indian Contract Act. So far from proving that they have, by the admissions of their own witness Mr. Lindsay, who gave his evidence most fairly and candidly, shown that they acted in this matter as, in my opinion, no prudent man could possibly have acted. In the first place, they engaged this guard Belcher and put him in a position of trust without making any enquiries as to his character and antecedents. **[163]** Inquiries were then instituted, and although they almost immediately found therefrom that he had been dismissed from the employ of the Indian Midland Railway Company for criminal breach of trust, for which he had suffered six months imprisonment; though they found that subsequently he had left his employment under the Bengal-Nagpur Railway Company under circumstances which, to say the least, imputed to him serious neglect of duty, they nevertheless kept him on and allowed him to remain in a position where the highest integrity was necessary. The only reason for so doing seems to be that they were much in need of guards, and thought that Belcher might be able to clear his character. As these facts were known to the defendant company in May, 1891, and the theft occurred in June, I am strongly of opinion that in this case the defendant company cannot shelter themselves under the provisions of the Indian Contract Act by saying that they have acted in this case as a prudent man would have acted.

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I now come to the consideration of the first issue. This turns upon the interpretation of s. 75 of the Indian Railways Act, 1890. I may, however, first deal with the argument of the plaintiffs' pleader that that section cannot absolve the defendant company where the loss, deterioration or destruction has been caused by the criminal act of one of its own servants. It is certainly noteworthy that the words "in any case" which occurred in the corresponding section of the Act of 1854, and which were the subject of judicial interpretation in I. L. R. 5 Mad. 208 (*Venkatachala* v. *Southern India Railway Company*) do not occur in this section, but then again there seems to be nothing in the Act as it at present stands to except the case of the loss, &c., occurring in consequence of negligence or misconduct of the company's servants, and to say that in such cases responsibility shall attach. I think, therefore, the section must be taken to cover all cases of losses, destruction, deterioration of parcels under whatever circumstances. Nor, I think, can much importance be attached to the argument of Mr. Manchashankar that there was no loss of the parcel in this case. It was lost to the defendant company and to the plaintiffs, and I do not think it can be said not to be so loss because an employe of the company made away with it.

Then I come to the final question whether these goods were properly declared. Having regard to the evidence, I am unable—and I regret that I am unable—to find that they were so declared. The section distinctly stated that the person delivering the package to the administration must cause the "*value and contents*" to be declared, or declare them. Now here no value was declared. The declaration of the value has become a far more important incident under this new Act, inasmuch as the consignor must give the administration the opportunity of claiming a percentage on the value declared by way of compensation for increased risk. Unless the value be declared, the percentage cannot be ascertained or asked for. I think, therefore, that the declaration of the value must be regarded as a condition precedent to the attaching of the responsibility of the defendant company. I do not think it would be obligatory on the defendant company to enquire what the value was. This must, it appears, be declared by the sender. In this respect the wording of the Act has been changed; and it seems to me that this case is so far distinguishable from that decided by Starling, J. I do not think that under this section it is enough to declare the contents and pay the higher rates as laid down [164] for treasure. The administration must also have the opportunity of demanding a percentage. It is not for me here to rule on the rights of the defendant company to fix the rates or make byelaws, but I may mention that byelaw 26, which purports to be an abstract of the Indian Railways Act, 1890, s. 75, gives anything but a correct view of the provisions of that section, and the degree of responsibility or exemption from responsibility attaching to the company under it.

As I said, I regret to come to this conclusion, as it seems to me to be a case where the defendant company ought, if possible, to be made responsible. As both parties wish the case to go to the High Court, I make my judgment contingent on the opinion of their Lordships. That judgment is that the suit be dismissed, and Rs. 51 certified as costs of the defendant company.

Lang (Advocate General) for the plaintiffs:—He referred to Act IX of 1890, s. 72; *Hearn* v. *London and South-Western Railway Company*(1);

(1) 10 Ex. 793; 24 L. J. Ex. 180.

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Skipwith v. *The Great Western Railway Company* (1); Act XVIII of 1854, s. 10; *Secretary of State for India* v. *Budhu Nath*(2); *Venkatachala* v. *South Indian Railway Company*(3); *Raisett* v. *G. I. P. Railway Company*(4).

Inverarity for defendants:— He referred to the Indian Carrier's Act III of 1865; Russell and Bayley on Railways at p. 233; *Robinson* v. *The South-Western Railway Company* (5); *Venkatachala* v. *South Indian Railway Company*(3); *Illoor Kristniah* v. *The G. I. P. Railway Company*(6).

19 B. 159 = Chitty's S. C. C. R. 422.

FINDING.

At the conclusion of the argument the Court found as follows:—

In the affirmative on the first and second questions referred by the Small Cause Court. In the negative on the third question. No answer was given to the fourth question.

Attorneys for the plaintiffs:— Messrs. *Matubhai and Jamitram.*

Attorneys for the defendants:— Messrs. *Crawford, Burder and Co.*

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[165] ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Farran.

GREAT INDIAN PENINSULA RAILWAY COMPANY (*Original Defendants*), *Appellants v.* RAISETT CHANDMULL, AND ANOTHER, (*Original Plaintiffs*), *Respondents.** [28th September, 1894 and 1st March, 1895.]

Railway Company—Indian Railway Act (IV of 1879), s. 11—Loss of goods—Liability of Company—Declaration of value and nature of goods and payment of increased charge—Limitation Act (XV of 1877), sch. II, art. 30.

In January, 1890, a box containing rupees was delivered by the plaintiffs to the defendant company in Bombay to be carried to Saugor. From the evidence it appeared that the plaintiffs did not intend to insure the box. The box was taken to the booking office at the station, and the parcel clerk asked what it contained, and was told that it contained coin, and he learnt casually that the amount was Rs. 6,000. The clerk charged Rs. 18 1-0 for the box, which was the "treasure rate" for carriage. This sum was paid and the box was duly despatched, but was lost or stolen in the course of transit. The plaintiffs sued to recover the Rs. 6,000. The defendants contended that, having regard to the provisions of s. 11 of Act IV of 1879, they were not liable, inasmuch as (1) the contents of the box had not been duly disclosed, nor (2) had an increased charge been paid. The plaintiffs obtained a decree in the lower Court. On appeal,

Held (reversing the decree) that the defendant company was not liable—

(1) Because there was no sufficient declaration of the value of the contents of the box.

(2) Because the sum paid by the plaintiffs for the carriage of the box was the ordinary charge for treasure, and was not the increased charge which under s. 11 of Act IV of 1879 should have paid in order to make the company liable.

(3) *Per* BAYLEY., J.—That the claim of the plaintiffs was one against the defendants for compensation for losing goods, and fell within art. 30 of sch. II of the Limitation Act (XV of 1877) and that as this suit was not brought until after the expiration of two years from the date of the loss it was barred by limitation.

[F., 108 P.R. 1906=2 P.L.R. 1907=33 P.W R 1907; 24 Ind. Cas. 676; **Appl.**, 26 B. 562; D., 7 A.L.J. 606=6 Ind. Cas. 333.]

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* Suit No. 636 of 1892; Appeal No. 806.

(1) 4 Times Law R. 529. (2) 19 C. 538. (3) 5 M. 208.
(4) 17 B. 723. (5) 34 L.J. (C.P.), 234. (6) 2 M. 310.

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APPEAL by the defendants from a decree passed by Starling, J. (1).

The plaintiffs filed this suit in December 1892, to recover Rs. 6,000 from the defendants, being the value of a box delivered to them at Bombay to be carried by them to Saugor, but which had been lost.

The plaintiffs alleged that the box in question contained Rs. 6,000, and that on the 3rd January. 1890, they delivered it to the defendants, consigned to Raghunathdas Hamirmull at Saugor.

[166] The box weighed over two maunds, and was duly sealed and addressed both in English and Marathi.

Saugor is a station on the Indian Midland Railway, about 654 miles from Bombay, and is the terminus of a branch line running from Bina junction on the main line of the said railway midway between Bhopal and Jhansi.

The question raised in this appeal was whether, having regard to the provisions of s. 11 of Act IV of 1879(2), the defendants were liable for the loss of the box. The defendants contended that they were not liable, inasmuch as (1) the contents of the box had not been duly declared, nor (2) had an increased charge been paid.

A book setting forth the rates charged for different classes of goods was put in evidence. These rates were stated under different headings. The following passages from this book were referred to in argument :—

"18. *Parcels*.—The rates for parcels are :—" (Then followed a table setting forth the rates.)

"Fish, fruit, vegetables, bazar baskets, meat in small quantities (not more than 20 seers) are charged at half parcels rates at owner's risk, subject to a minimum of two annas, &c., &c.

"20. *Carriages*" (rates set forth).

"23 *Dogs*" (rates set forth).

"34 *Eggs*.—Baskets of eggs are charged at ordinary parcels rate on actual weight.

[167] "35. *Butter*.—In baskets booked to Byculla by passenger train from all stations are charged at 3rd class goods rate at owner's risk.

"*Opium*.—(*a*) When more than one ton is sent as one consignment, the whole consignment should be charged for at the parcels rates upon the total aggregate weight and upon each package. These charges are at the owner's risk in each case. For the insurance charges, see cl. (*c*) of this paragraph.

* * * * * *

(1) 17 B. 723.

(2) Indian Railways Act, IV of 1879, ss. 10 and 11 :—

10. Every agreement purporting to limit the obligation or responsibility imposed on a carrier by railway by the Indian Contract Act, 1872, ss. 151 and 161, in the case of loss, destruction or deterioration of, or damage to, property shall, in so far as it purports to limit such obligation or responsibility, be void unless —

(*a*) it is in writing signed by, or on behalf of, the person sending or delivering such property, and

(*b*) is otherwise in a form approved by the Governor General in Council.

11. When any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction or deterioration of, or damage to, such property, unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf.

When any property, of which the value and nature have been declared under this section, has been lost, destroyed or damaged, or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared.

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"(c) Upon opium . . . . which is carried at the company's risk at parcels' rate by passenger or mixed train the following charge is to be made for insurance in addition to the charge for conveyance, namely:—" (then follow the charges).

"39. *Treasure, plate, &c.*—The charges and arrangements for the conveyance, over the G. I. P. Railway, of treasure, that is, specie, bullion, gold and silver, whether coined or uncoined, and copper coins (whether belonging to the public or to Government), and of plate, jewellery, trinkets, &c., are the following, namely—

"(2) First—For all treasure (except copper coin) the charges, per maund, per mile, are at the following scale, namely:—

Up to 27 maunds at	...	...	...	...	2½	pies
Above 27 do.	and up to 81	...	...	...	2	,,
Above 81 do.	do. 270	...	...	...	1½	,,
Over 270 do.	...	...	...	...	1	,,

* * * * * *

"(5) Treasure which is not insured, whether it is in owner's charge or not, is always carried at owner's risk, and the company are relieved by s. 11, chap. 3, of the Indian Railways Act, 1879, from all responsibility or risk in regard to such treasure . . . . . .

"40. *Insurance charges.*—The following are the rates and rules for the insurance of goods, live-stock, parcels, treasure, &c.

"(2) Insurance charges are made in addition to the ordinary charges for the conveyance of treasure, parcels, goods, horses, &c., and must always be prepaid. The contents of packages which are insured must always be examined.

"(3) The Railway Company is not responsible, whether they are insured or not, for damage to horses arising from fright or restiveness, nor for damage to horses or other articles of any kind which may be caused by delays to trains.

"(4) Station Masters are authorized to insure both locally, and through with other railways, articles and animals of any kind (opium and horses only excepted) up to the value of five hundred rupees. Applications for the insurance of articles and animals (except opium and horses) valued at more than five hundred rupees, should be referred to the District Traffic Superintendents at Bombay, Sholapur, **[168]** Bhusawal, Jabalpur and Nagpur, and Assistant District Traffic Superintendent, Manmar, the Goods Traffic Inspector, Wari Bandar, the Goods Superintendent, the Passenger Superintendent or to the General Traffic Manager, Victoria Terminus.

* * * * *

"Subject to the condition that when the insurance charge for an article valued at more than five thousand rupees comes to less than the charge for five thousand rupees (that is 50 Rs.), the latter charge is made. For instance, for an article valued at six thousand rupees the charge for insurance will be fifty, not thirty rupees."

The evidence given at the hearing as to the despatch of the plaintiff's box of specie from the Byculla Station at Bombay was as follows:—The manager (Motilal Panalal) of the plaintiff's firm said:—

"Another man Buria came and packed them in a box in my presence. The bags were each tied up with string when I received them from the currency office, and were not opened on the road to the shop. Each of the bags was weighed before I received them. The bags were not opened before they were packed. When they were packed, the lid of the box was

nailed down, and the box was covered with gunny cloth sewn up; and seals were placed along the seams, and the box addressed to the consignee at Saugor. Then it was taken in a carriage by me and Buria to Byculla Station. On the road to the station the box was not interfered with in any way. We arrived at Byculla Station about 7 P.M., and the box was taken to the booking office, and Buria told the parcel clerk that the box contained three bags containing Rs. 2,000 each. It was weighed, and showed 2 maunds and 5 seers. Then I asked the clerk to take the money for carriage and give me a bill. I paid him what he asked, and he gave me a receipt. This is it.

"I paid Rs. 18-1-0, which was the amount he asked for. That was all that took place. The box was addressed to Raghunathdas Hamirmul, Saugor. It was written on the gunny with ink."

Buria, who was also examined, said:—

"I and Motilal took the box in a carriage to the Byculla Station where I placed it on the scale in the parcel's office. The box and its contents were then in the same condition as when it left the shop. I told the clerk the box contained three bags, each containing Rs. 2,000. This is the man (Fonseca). I told him the box was to go to Saugor, and that he should charge what he pleased. The clerk then asked me to shake the box, which I did, and the rupees jingled. Afterwards Motilal paid the money and we got a receipt, and then returned home." . . . .

"When we arrived at the station, the clerk asked what was in the box. I did not say the box contained silver (*chandi*). The clerk did not ask if we wished to insure. We had Rs. 20 or 25 with us to pay for the carriage of the box. I do not remember whether it was more than Rs. 25, as Motilal had the money."

For the defendants the assistant parcel clerk (C. M. Fonseca) at the Byculla Station was examined. He said:—

[169] "I recollect the parcel being brought. There were three persons who brought it, Motilal and Buria being two of them. When they brought it, I asked them what it contained and they said '*chandi rokra.*' They then said they wanted it despatched to Saugor. I then wrote the receipt, charging the carriage at treasure rate. They gave me some money. I gave them the change and they went away. The parcel was put into the brake by the mukadam, with the label on it. It went by the mail train. We do not get a receipt from the mukadam. This is the counterfoil. I had often specie before from these very persons; they never had insured their specie."

The defendants' traffic manager (H. Conder) gave evidence as follows:—

"There is an ordinary rate for parcels and an ordinary rate for carrying treasure apart from insurance; the insurance is extra.

"We have a working agreement with the Indian Midland Railway Company, and we had it in January, 1890. The conversation I had with these people was in English; one could speak English, and the other I think could not. My impression is that we spoke of silver all the time, not specie. A larger rate is charged for carriage of treasure at owner's risk than for ordinary parcels at company's risk. We charge it because it is more valuable, and there are many other articles of a valuable nature for which we charge higher than ordinary rates, some being carried at company's risk and some at owner's. Everything that goes by a passenger train is given into charge of the guard.

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"We do not accept treasure at all at any rate lower than the rate charged in this case."

The Traffic Inspector (C. Bedford) stated as follows :—

"I have checked the charge of Rs. 18-1-0 in all on this parcel with the weight as described on the counterfoil of the weigh bill. It is $2\frac{1}{2}$ pies per maund per mile multiplied by 651 miles, the distance from Byculla to Saugor, and multiplied by $2\frac{1}{8}$ maunds, the weight of the parcel. That calculation is in accordance with Rule 39 at p. 66 of No. 10 (coaching tariff book.) The insurance which would have been payable, assuming the box to contain Rs. 6,000, would amount to Rs. 52-8-0 according to the rule on p. 68. The ordinary parcel rate for such a box if it did not contain treasure would have been Rs. 9. If the clerk had been told that the box contained Rs. 6,000 he would not have been at liberty to insure it, but would have had to apply to the station master, and he would have had to apply to the District Traffic Superintendent, as provided by Rule 4 at p. 68. Uninsured treasure is at owner's risk—Rule 5, p. 67.

"The extra rate is not charged that extra care may be taken. The Railway Company do nothing for it but carry."

Starling, J., held that the company were liable, and gave judgment for the plaintiffs (see I. L. R., 17 Bom. 723).

The defendants appealed.

[170] *Lang* (Advocate General) and *Kirkpatrick*, for the appellants (defendants) :—The company have power within certain limits to prescribe the rates at which they will carry goods on the railway. (See *Government Gazette*, 30th April, 1868.) They have accordingly within those limits fixed certain ordinary rates which vary for different kinds of goods, *e.g.*, there is an ordinary charge for parcels generally, an ordinary charge for opium, and an ordinary charge for treasure, &c. But where only this ordinary charge is paid for treasure, &c., the company is expressly exempted from liability by s. 11 of Act IV of 1879. That section fixes the company with liability only where an "increased charge" is paid. The question here, therefore, is whether the payment made for the plaintiffs' box was the "ordinary charge" or the "increased charge." We contend that it was the former and not the latter, and that, therefore, the company is not liable. Section 11 empowers the company to make an "increased charge," and the company by its rules has declared that the increased charge shall be the "insurance charge." There is nothing in the Act to prevent the company from doing this so long as the charge is within the prescribed limits. The "increased charge" means not an increase upon the ordinary charge for *parcels* generally, but an increase upon the ordinary charge for *treasure*. The fact that this latter charge for treasure is higher than the charge for parcels, does not make it an "increased charge." The *parcels* rate is not the standard by which all other charges are measured. The ordinary "treasure charge" has no relation to the charge for "parcels," and the "increase" spoken of in the section means an increase upon the ordinary treasure charge, and not (as contended by the plaintiffs) a higher rate than the charge for parcels. The Court below has erred in assuming that the rate prescribed for "parcels" is the standard by which all the other rates are to be measured. The plaintiffs' goods were not insured. There was no application to the officer authorized to insure, and no proper declaration. The suit, moreover, is barred by limitation. The following authorities were cited :—Act IV of 1879; Act XVIII of 1854, s. 10; Indian Contract Act IX of 1872, s. 151; Stat. 11 Geo. IV and 1 Will. IV, c. 68; *Secretary*

of State for India v. *Budhu Nath* (1); *Behrens* [171] v. *Great Northern Railway Co.* (2); *Venkatachala* v. *South Indian Railway Co.* (3); *Robinson* v. *The South-Western Railway Co.* (4); *Great Western Railway Company* v. *McCarthy* (5); *Irrawady Flotilla Co.* v. *Bugwandass* (6). As to limitation, the Limitation Act (XV of 1877), sch. II, arts. 30 and 115; *Mohansing* v. *Henry Conder* (7); *British India Steam Navigation Co.* v. *Hajee Mahomed Esack and Co.* (8); *Danmull* v. *British India Steam Navigation Co.* (9).

Inverarity and *Scott*, for the respondents (plaintiffs):—The Court below was right in holding the defendants liable as bailees. We adopt the argument in the judgment, which was this:—Act IV of 1879, s. 10, imposes upon a railway company the liability of a bailee upon all articles carried. But by s. 11 in the case of silver, &c., that liability does not attach unless an "increased charge" is paid. Upon such payment being made, that liability (*i. e.* of a bailee) attaches. That increased charge is plainly not an insurance charge, but merely the further charge necessary to impose the ordinary liability of a bailee upon the company for excepted articles which would rest upon it for other goods without any such increased charge. The company cannot decline all responsibility for treasure, &c., unless it is insured. But it is contended that they have done this by their rules. They contend that in order to make them liable for treasure, it must be insured, that is to say, that they have power to require two increased charges, *viz.*, first an higher charge for carriage only, the payment of which, however, imposes no liability at all upon them, and secondly, a further higher charge which imposes upon them the liability of insurers. The Act does not sanction this. It contemplates that without insuring they must carry treasure and other excepted articles as bailees with the liability of bailees just as they carry ordinary goods, but for the excepted articles they may under s. 11 make a further or "increased" charge. We rely on *Chogemul* v. *Commissioner, &c., of the Port of Calcutta* (10). As to limitation, this suit is not barred. All the authorities will be found in *Kalu Ram* v. *The Madras* [172] *Railway Company* (11) and *Hassaji* v. *The East Indian Railway Company* (12). As to the declaration of these goods, we rely on *Bradbury* v. *Sutton* (13).

JUDGMENT.

BAYLEY, C.J. (ACTING):—The plaintiffs, who carry on business in Bombay as shroffs and commission agents, state in their plaint that on or about the 3rd January, 1890, they delivered to the defendants at their station at Byculla a box containing Rs. 6,000 to be carried to Saugor, a station on the Indian Midland Railway. The box was consigned to one Raghunathdas Hamirmull at Saugor and weighed 2 maunds and 5 seers, and was sealed with the plaintiffs' seal and addressed to the consignee in the English and Marwadi languages, and that on the delivery of the box the plaintiffs were handed the railway receipt dated 3rd January, 1890.

The plaint then states that at the time of the delivery of the box to defendants' servant at Byculla the nature and value thereof were duly declared and an increased charge over and above the charges for ordinary parcels was paid to the defendants for the carriage thereof, and the defendants agreed to carry the same to Saugor. The plaintiffs say that the defendants were bound to take such care of the box and its contents as a

(1) 19 C. 538. (2) 6 H. & N. 366; 7 H. & N. 950.
(3) 5 M. 208. (4) 34 L. J. (C. P.) 234. (5) 12 Ap. Ca. 218.
(6) 18 I. A. 121. (7) 7 B. 478. (8) 3 M. 107.
(9) 12 C. 477. (10) 18 C. 427. (11) 3 M. 240.
(12) 5 M. 388. (13) 19 W. R. 800=21 W. R. 128.

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prudent man would have taken of his own goods of similar nature and value; that the box was not delivered to the consignee at Saugor, but a box weighing 33 to 36 seers only was tendered to him there, the box being in a broken and damaged condition, and the consignee refused to accept the same. And the plaintiffs say that the non-delivery of the box was a breach of their contract on the part of the defendants; that correspondence thereupon ensued, and on the 8th May, 1890, the defendants' traffic manager wrote to the plaintiffs (Ex. 9) stating that no trace could be discovered of the box containing Rs. 6,000 either on the defendants' or on the Indian Midland Railway.

With regard to the contentions raised by the defendants' manager in his letters, *viz.*, that the defendants are not liable as the box and its contents were not insured, the plaintiffs say that an increased charge for the carriage of the box [173] and its contents on and above the charges for their carriage of ordinary parcels was paid to them; that no intimation was given to them that such increased charge was not for the insurance of the box and its contents; that they were always ready and willing and would have paid any further sum had they been informed that such further sum was required for the insurance of the box and its contents, and that the contention so raised by the defendants' manager is unsustainable.

The plaint then alleges that all conditions have been fulfilled and all things been done to entitle plaintiffs to recover the value of the box and its contents from the defendants and interest on the said sum of Rs. 6,000, and the plaintiffs pray that the defendants may be ordered to pay as compensation for the said breach of contract Rs. 6,010, being Rs. 6,000 the contents of the box delivered by the plaintiffs to defendants to be carried to Saugor and Rs. 10 the value of the box but which have been wholly lost to the plaintiffs, and which were not carried and delivered by the defendants in accordance with their contract with the plaintiffs. There is a prayer also for interest on Rs 6,000 at 6 per cent. from the 3rd January, 1890, to judgment together with the costs of the suit and interest on the judgment at 6 per cent., and for such further and other relief as the nature of the case may require.

The defendants in their written statement admit that a parcel which was stated by the consignor to contain specie was delivered to the defendants on the 3rd January, 1890, at their Byculla Station to be carried to Saugor. They deny that at the time of the delivery of the parcel the value thereof was declared, or that an increased charge was paid for the carriage thereof, and allege that only the ordinary rate for carriage of treasure at owner's risk calculated on the weight of the parcel was charged, and an increased charge for the safe conveyance of the parcel was not charged or paid, nor was any engagement to pay such increased charge entered into with the defendants, and they submit that under the provisions of s. 11 of Act IV of 1879 they are not liable to the plaintiffs in respect of the loss of the contents of the parcel.

[174] The defendants then say that if the parcel when delivered to them in fact contained specie, the parcel was lost or stolen while in course of transit to Saugor or at the Saugor Station, or its contents were stolen in such transit or at the Saugor Station, and earth and iron sledge hammer heads were placed in it instead of the specie. That a parcel afterwards found to contain earth and iron sledge hammer heads addressed to Raghunathdas Hamirmull arrived at Saugor on or about the 5th January, 1890, but the consignee refused to accept it. Diligent search was made for the said specie, but no portion thereof had been found, nor had any

parcel, except that containing earth and hammer heads, been found. The defendants submit that they are in no way liable to the plaintiffs for the loss of the said specie, and they further submit that the plaintiffs' claim is barred by limitation, and that the suit should be dismissed with costs.

The following issues were framed at the hearing :—

1. Whether the parcel delivered to the defendants contained specie to the extent alleged in the plaint?

2. Whether at the time of the delivery to the defendants of the parcel referred to in para. 1 of the plaint the value thereof was declared?

3. Whether the charge paid to the defendants for the carriage of the said parcel was not the ordinary rate for the carriage of uninsured treasure?

4. Whether the said parcel was not carried by the defendants at the owner's risk?

5. Whether the said parcel was not lost or stolen in the course of transit as alleged in para. 4 of the written statement?

6. Whether this suit is barred by limitation?

7. Whether the plaintiffs are entitled to recover from the defendants the sum claimed, or any and what part thereof?

The learned Judge in the Court below held that the suit was not barred by limitation, and that the defendants were liable to the plaintiffs, and he passed a decree for the plaintiffs for Rs. 6,000 and by way of damages for the non-delivery of the parcel, [175] and awarded the plaintiffs interest at 6 per cent. on such amount from the 6th January, 1890, until judgment (7th August, 1893), together with the costs of suit and interest on the judgment at 6 per cent. The defendants appealed against such decree, and the appeal was argued before us on the 20th, 21st and 28th September last, when the Court reserved its judgment.

The principal questions argued before us were whether the requirements imposed by s. 11 of Act IV of 1879 upon consignors of treasure and other valuable articles had been complied with by the plaintiffs; whether the defendants upon the facts disclosed by the evidence were exempted from all liability in regard to the Rs. 6,000 which were proved to have been in the parcel when it was delivered to their servants at the Byculla Station; and whether the suit was barred by limitation.

I will first consider whether the value and nature of the property contained in the parcel were duly declared at the Byculla Station as required by s. 11 of "The Indian Railway Act of 1879" (Act IV 1879), which was the Act in force in January, 1890.

Section 11 of that Act enacts that "when any property mentioned in the second schedule hereto annexed is contained in any parcel or package delivered to a carrier by railway, the carrier shall not be liable for loss, destruction or deterioration of or damage to such property unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same, or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf.

"When any property, of which the value and nature have been declared under this section, has been lost, destroyed or damaged or has deteriorated, the compensation recoverable for such loss, destruction, damage or deterioration shall not exceed the value so declared." That section is based upon and in part copied from s. 10 of the Indian Railway Act XVIII of 1854.

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The English Carrier's Act 11 Geo. IV and 1 Will. IV, c. 68, s. 1, provided that mail contractors, stage-coach proprietors [176] or other common carriers by land for hire should not be liable for the loss of certain specified goods above the value of £ 10, unless at the time of the delivery thereof the value and nature of such article or property shall have been declared by the person sending or delivering the same, and such increased charge as thereinafter (*i.e.*, in s. 2) mentioned or an engagement to pay the same be accepted by the person receiving such parcel or package; and in s. 2 such increased charge is stated to be "required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles." Section 3 of the Act states that carriers are, if thereto required, to give receipts acknowledging that the increased rate of charge has been paid, and "sign a receipt for the package or parcel acknowledging the same to have been insured," and if such receipt be not given when required, the carrier "shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

In *Baxendale* v. *Hart* (1), which was a decision of the Court of Exchequer Chamber upon s. 1 of the English Carrier's Act just cited, it was held that the person who sends or delivers the parcel containing any of the valuable articles mentioned in that section must take the first step by giving that information as to its contents to the carrier which he alone can give, and if he does not take that first step he could not maintain an action, as s. 1 of that Act said that the carrier shall not be liable unless the declaration is made.

The words "increased charge for the safe conveyance of the same" which occur in s. 10 of Act XVIII of 1854 and in s. 11 of Act IV of 1879 were apparently adopted from the passage I have quoted from s. 2 of the English Carrier's Act 11 Geo. IV and 1 Will. IV, c. 68, the words in that section (2 of 11 Geo. IV and 1 Will. IV, c. 68) "as a compensation for the greater risk and care to be taken" being omitted, I presume because the framers of the two Indian Railway Acts, [177] XVIII of 1854 and IV of 1879, considered that they were unnecessary, and that the words they used were sufficiently explicit without them. In my opinion, the three sections are substantially the same, and must be regarded as having the same meaning. It will be noticed that in s. 3 of 11 Geo. IV and 1 Will. IV, c. 68, the receipt to be given for the increased rate of charge for the specified articles is to acknowledge the same to have been insured—the increased rate being in fact for the insurance.

Was there, then, a sufficient declaration of the value and nature of the contents of the parcel in the present case?

Motilal, the Bombay manager of the plaintiffs' firm, said that he arrived at the Byculla Station about 7 P. M., and the box was taken to the booking office; and Buria, who was with him, told the parcel clerk that the box contained three bags containing Rs. 2,000 each, that it was then weighed and showed 2 maunds and 5 seers. Then he said he asked the clerk to take the money for carriage and give him a bill. He paid him what he asked, *viz.*, Rs. 18-1-0, and the clerk gave a receipt.

The receipt was printed so as to show three kinds of charges, *viz.*, "Charges for carriage," "Insurance charge," "Delivery charges."

(1) 6 Ex. 769.

The Rs. 18-1-0 were entered as paid for charges for carriage. Nothing was entered as paid for insurance charge or delivery charges.

Buria in his evidence said that he told the clerk the box contained three bags each containing Rs. 2,000, that the box was to go to Saugor, and that he should charge what he pleased. The clerk then asked him to shake the box, which he did, and the rupees jingled. Afterwards Motilal paid the money, and having got a receipt they returned home.

In cross-examination he stated that he did not say the box contained silver (*chandi*), and that the clerk did not ask if they wished to ensure. They had Rs. 20 or Rs. 25 with them.

That neither Motilal nor Buria intended or asked that the box should be insured, is clear. Motilal said that before 1890 the [178] plaintiffs' firm were sending specie up country two or four times a month. He did not insure the box, but simply asked the clerk (Fonseca) to charge what was right, and whatever he asked for he paid. He did not know what insurance of goods by the railway company was. That he did not then (on the 3rd January, 1890) know that insurance meant the payment of an extra charge. He had since come to know what insurance was, and when he afterwards asked a European police officer what it was, and on being told by him, he said the box was not insured.

Fonseca, who in January, 1890, was assistant booking clerk at the Byculla Station, said he recollected the parcel being brought by three persons, Motilal and Buria being two of them. When they brought it he asked them what it contained, and they said "*chandi rokra*," and that they wanted it despatched to Saugor. He then wrote the receipt charging the carriage at treasure rate. They gave him some money, he gave them the change, and they went away. He had had often before specie from these very persons and they had never insured it. He knew that *chandi rokra* meant rupees. This was a heavy parcel, and he knew it contained a large quantity of rupees. Nobody told him. He did not ask how much there was in it. *He heard them talking about Rs. 6,000 in the box. They did not say anything to him, and they never told him there were Rs. 6,000 in the box.* One of them asked him to take from him whatever money he required for the box.

There is thus a conflict of evidence between Motilal and Buria on the one hand and Fonseca on the other as to what was said by the former at the time the box was delivered to Fonseca, and having regard to the previous practice of the plaintiffs of not insuring when conveying specie to be carried by the defendants and to the probabilities of the case, I think that Fonseca's account of what passed is most likely to be the correct one.

Mr. Conder, Traffic Manager of the G. I. P. Railway, said that there was an ordinary rate for parcels and an ordinary rate for carrying treasure apart from insurance, the insurance being extra, a larger rate being charged for carriage of treasure at owner's risk than of ordinary parcels at the company's risk. They charge it because it is more valuable, and that the company do not [179] in consideration of the larger payment engage to look more carefully after a parcel for which it is paid than for any other, unless it is insured. The company do not accept treasure at all at any rate lower than the rate charged in this case.

In the notification published in the *Bombay Government Gazette* of 30th April 1888 (Ex. No. 8) certain maximum rates for goods for the Bombay railways sanctioned by Government were published for general information. Among them the maximum rate for parcels for every 50 miles

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beyond the first 50 is stated to be 3 pies per seer; and for insurance rates the maximum rate for most precious articles is to be 3 per cent.

Mr. Bedford, Traffic Inspector of the Great Indian Peninsula Railway Company, stated that he had checked the charge of Rs. 18-1-0 on the parcel in question with the weight as described in the counterfoil of the weigh bill, and it came to $2\frac{1}{2}$ pies per maund per mile, multiplied by 651 miles the distance from Byculla to Saugor, and multiplied by $2\frac{1}{8}$ maunds the weight of the parcel; that such calculation was in accordance with Rule 39 at p. 66 of Ex. No. 10, being the Great Indian Peninsula Railway Time and Fare Tables and Coaching Tariff. He said that the ordinary parcel rate for such a box if it did not contain treasure would have been Rs. 9, and that the insurance which would have been payable, assuming the box to contain Rs. 6.000, would amount to Rs. 52-8-0 according to the rule on p. 68 of Ex. No. 10. He further stated that if the clerk had been told that the box contained Rs. 6,000 he would not have been at liberty to insure it, but would have had to apply to the station master, and he would have had to apply to the District Traffic Superintendent as provided by Rule 4 at p. 68 of Ex. No. 10, and that uninsured treasure was carried at owner's risk —Rule 5, p. 67, which rule states that "treasure which is not insured, whether it is in owner's charge or not, is always carried at owner's risk, and the company are relieved by s. 11, chap. III of the Indian Railway Act, 1879, from all responsibility or risk in regard to such treasure."

Two cases relied upon by the learned Advocate General on behalf of the defendants may here be referred to. In *Robinson* **[180]** v. *The South-Western Railway Company* (1) decided in 1865 upon s. 7 of the Railway and Canal Traffic Act, 1854, (17 and 18 Vict., c. 31), Erle, C. J., said: "A declaration would be within the statute if so made as to create a liability on the part of the company to pay the higher value, as well as a liability on the part of the sender to pay the insurance thereon, but here the sender says he does not intend to insure, but he mentions the value of the horse, and he calls upon the company to take the animal. I cannot find in that a declaration within the statute" (p. 238).

Byles, J., said: "The declaration must come from the sender, and must be so expressed as to be understood by the carrier as such, and, as I think, understood also as the foundation of a contract." Smith, J., said: "I agree with the rest of the Court that the declaration to be within the statute must be made with the intention that it should so operate as to entitle the company to charge the higher rate."

In *Venkatachala* v. *South Indian Railway Company* (2) it was held by Turner, C. J., and Kindersley, J., that the conditions of s. 10 of the Indian Railway Act XVIII of 1854 are not fulfilled by the sender merely giving an account of the quantity and description of the goods delivered for carriage when required to do so by the booking clerk. In that case a box containing seven bars of silver valued at Rs. 4,296-10-9 had been delivered to the Railway Company at Trichinopoly Station for carriage to Bombay. And it was held that to establish the liability of the Railway Company in the case of excepted articles the declaration required by s. 10 must be made in such a manner as to intimate that the sender invites the railway company to undertake the special risk and is willing to pay the increased charge.

In the present case the plaintiffs' man Buria says that he told Fonseca that the box contained three bags each containing Rs. 2,000 (a

(1) 34 L. J. (C. P.) 234.

(2) 5 M. 208.

statement which Fonseca positively denies); that the box was to go to Saugor, and that he should charge what he pleased. Motilal, too, says that he simply asked the clerk to charge what was right, and that Fonseca did not ask him whether he wished [181] to insure; that he (Motilal) did not insure the box in question, and in fact did not then know what insurance of goods by the Railway Company was. I am, therefore, of opinion, that there was no sufficient declaration of the value and nature of the contents of the parcel belonging to the plaintiffs, and that the defendants are consequently protected by the provisions of s. 11 of the Indian Railway Act No. IV of 1879.

It was contended before us that the "increased charge for the safe conveyance" mentioned in that section had been paid, and, moreover, that the Railway Company were liable either as common carriers or as bailees under the Indian Contract Act (No. IX of 1872). I think, however, that the additional rate charged and paid for the plaintiffs' box *viz.* Rs. 18-1-0, and not the ordinary parcel rate of Rs. 9, was not "an increased charge for the safe conveyance of the same" within the meaning of s. 11 of Act IV of 1879, but only the ordinary charge for treasure. As already pointed out, the sum charged was within the maximum rate for parcels sanctioned by Government, and Mr. Conder stated the Railway Company do not accept treasure at all at any rate lower than the rate charged in this case.

It may be useful, having regard to the conflicting decisions of the High Courts of Calcutta and Bombay, as to the responsibility of carriers by railways in India reported in I. L. R.. 3 Bom., 109 (*Kaverji* v. *G. I. P. Railway Co.*), and I. L. R., 10 Calc., 166 (*Moothora Kant* v. *The India General Steam Navigation Co.*), and to the question raised by the 6th issue in the Court below, as to whether the suit is barred by the law of limitation, to make a few remarks here upon the nature of the obligation of common carriers to carry goods with safety.

In *Riley* v. *Horne* (1), Best, C. J., in delivering the judgment of the Court elaborately examined the policy and foundation of the rule, and said: "To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer the carrier is only [182] relieved by two things * * *viz.*, the act of God and the king's enemies."

Fifty years after that decision, *viz.*, in 1878, the case of *Bergheim* v. *The Great Eastern Railway Company* (2) was decided by the Court of appeal (Bramwell, Brett and Cotton, L.JJ.) and the Court expressed itself thus:—"He "(the common carrier)" is considered as having contracted to insure the safe delivery of, that is to say, as having contracted to carry and deliver safely and securely (the act of God and of the Queen's enemies alone excepted) the goods of which he as common carrier is bailee. The reason why the law implied that this is his contract, was that the carrier had by himself or his servants during the bailment at times and in places where he could not even be supervised, the exclusive control and care of the goods intrusted to him by the owner, and consequently, to prevent fraud, the law imposed on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety." The Court then quote a passage from Lord Chief Justice Holt's judgment in *Coggs* v. *Bernard* (3) in which it is said:

(1) 5 Bingh. 217.
(2) 3 C. P. D. 221.
(3) Lord Raymond 918, and 1 Smith's L.C. 8th Ed. p. 199.

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"And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons that they may be safe in their ways of dealings." Later on the Court calls it "a contract of insurance, which the law had originally implied, because the carrier had the exclusive, or, at least, absolute control and care of the goods."

The same view was taken by the High Court in Calcutta in a case which came before a Full Bench of five Judges in 1883 (*Moothora Kant* v. *The India General Steam Navigation Co.* (1)) when the Bombay decision *Kuverji* v. *G. I. P. Railway Co.* (2) was carefully considered and dissented from. Garth, C. J. whilst discussing the duties and responsibilities of common carriers by the law of England said (p. 182): "And it is important to note that this duty was imposed upon him irrespective of any contract. It was imposed upon him by the custom of the realm, for the [183] benefit of the public, by reason of the important trust which he undertook. (See the observations of Lord Holt in *Coggs* v. *Bernard*, 1 Smith's L. C., 199, 8th edition)."

Mr. Scott in the course of his argument before us on behalf of the plaintiffs cited a passage from Bullen and Leake's work on Pleading with the object of showing that actions against common carriers were founded on contract, or, as they were formerly called, actions *ex contractu*, and were not actions founded on tort. But Sir Richard Garth, C. J., in his judgment already cited says (p. 186):—

"It must be borne in mind that the law and liabilities of common carriers are, as I said before, founded on custom, irrespective of contract. A common carrier is and always has been liable to be sued for any breach of this common law duty in an action of tort * * * The Bombay High Court, while fully admitting that the English law on this subject prevails in the Indian Mofussil, seems to have lost sight of the fact that this law is founded upon a common law duty apart from contract. It is true that when the employment of a common carrier has commenced, the law implies a contract on his part to perform the duty imposed upon him; and consequently he is liable to be sued in an action either of tort or contract, according to the convenience or advantage of the plaintiff in each suit. (See Bullen and Leake on Pleading, pp. 101 and 243.)"

In the well-known treatise by the late Mr. Selwyn on the "Law of Nisi Prius," first published in the years 1806, 1807 and 1808, (I cite from the 13th edition, 1869), under the title "Carriers," it is stated that "Formerly the declaration in actions against common carriers stated their employment as common carriers, their liability by the custom of the realm, and delivery to and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods, but it afterwards became usual to declare in *assumpsit*, and not to state either the employment of the defendants as common carriers, or the custom of the realm as to their liability. This form of declaration has prevailed since the decision of *Dale* v. *Hall*, Michaelmas Term, 1750, in which it was settled, that it did [184] not make any difference whether the plaintiff declared on the custom, or more generally in *assumpsit*; for by stating that the defendant carried for hire it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract"—Selwyn's Nisi Prius (13th Ed.), Vol. I, pp. 362-363.

(1) 10 C. 166.

(2) 3 B. 109.

I may here remark that in the case I have first cited on this point, *Riley* v. *Horne* (1), the action was an action on the case against the defendants as common carriers for negligence in losing goods entrusted to them to be safely carried by them, an action *in delicto*.

In 1891, in the case of the *Irrawady Flotilla Company* v. *Bugwandass* (2), where the Judicial Committee of the Privy Council decided in favour of the view of the High Court of Calcutta, *viz.*, that the liability of common carriers in India was not affected by the Indian Contract Act, 1872 (I.L.R. 10 Calc. 166) and against that of the High Court of Bombay (I.L.R. 3 Bom. 109), their Lordships stated the nature of the obligation in the same way that Garth, C. J., had done, and said: "The written law is untouched by the Act of 1872" (the Indian Contract Act, 1872). "The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward." "A breach of this duty," says Dallas, C. J., in *Bretherton* v. *Wood* (3), "is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it."

At the end of their judgment, their Lordships say that they are led to the conclusion that the Indian Contract Act of 1872 was not intended to deal with the law relating to common carriers, and that notwithstanding the generality of some expressions in the chapter on bailments they think that common carriers are not within the Act (p. 131).

[185] I think that the plaintiffs' contentions above referred to are unfounded, as I consider that the liability of the Railway Company as common carriers was taken away by the provisions of s. 11 of the Railway Act IV of 1879, the plaintiffs at the time of delivery of the very valuable property to the defendants' booking clerk not having declared the value and nature thereof as required by that section; and that the Railway Company cannot be held to be liable as bailees under the Indian Contract Act— the Judicial Committee of the Privy Council in the *Irrawady Flotilla Company* v. *Bugwandass* (2) having held, as had (as I have pointed out) previously been decided in several cases in England, that the obligation imposed by law on common carriers has nothing to do with contract in its origin, it being a duty cast upon them by reason of their exercising a public employment for reward, and, consequently, that the liability of Indian Railway Companies as common carriers was not affected by the Indian Contract Act, 1872. As their Lordships say (p. 129): "There are several considerations, not all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872," (the Indian Contract Act), "was not intended to alter the law applicable to common carriers."

Lastly, as to the question of limitation. The learned Judge in the Division Court said that there are a number of cases cited at p. 132 of Starling's Limitation Act, 1877, which show that art. 30 in the 2nd schedule of that Act does not apply to a case like the present, and that this suit having been brought within three years is in time. Article 30 is in these words: "Against a carrier for compensation for losing or injuring goods; two years from the date when loss or injury occurs."

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(1) 5 Bingh 217. (2) 18 I. A. 121. (3) 3 B. & B. 62.

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Article 115, which gives a limit of three years, applies to suits "for compensation for the breach of any contract, express or implied, not in writing registered, *and not herein specially provided for.*"

The only Bombay decision referred to at p. 132 of the work just cited is *Mohansing* v. *Henry Conder* (1), as to which the learned author says that, if the defendant wishes to avail himself of the benefit of art. 30 on the ground that goods **[186]** have been lost, it is incumbent on him to prove the loss. In that case the G. I. P. Railway Company did not, so far as the evidence showed, announce their inability to deliver the missing bags of wheat on account of having lost them either in transit or by misdelivery to some one not entitled. On the other hand, they took from plaintiff's agent receipts for the full number of bags as arrived at their destination and gave gate passes for delivery at Sholapur, the place to which they were to be carried.

In the present case the defendants' traffic manager by his letter of 8th May, 1890, to plaintiffs' solicitors (Ex. G) intimates the loss of the parcel, and that although diligent inquiries have been made by the defendant's officers and by the police, no trace of the parcel can be found, and that a like result has followed the inquiries made on the Indian Midland Railway. That decision does not appear to me to be any authority for holding that art. 30 is not applicable to the present case.

The other cases cited at p. 132 in Starling on Limitation to the effect that where there is a contract between the plaintiff and the carrier, art. 30 does not apply, were decided in Calcutta and Madras, and, therefore, have no binding effect in this Court. They are doubtless entitled to respectful consideration, but no further. Each of the four High Courts in India frequently dissents from the views taken by one or more of the other High Courts, as they are perfectly justified in doing.

One of the Madras cases cited at p. 132 of the work on Limitation, *Kalu Ram* v. *The Madras Railway Co.*(2), seems rather to favour the view that art. 30 applies in a case like the present. There Mr. Justice Kindersley, who tried the case, said: "As it has not been shown that there was any contract between the plaintiff and defendants I must hold, following the decision in this Court in *British India Steam Navigation Company* v. *Haji Mahomed Isack* (3), that the suit, so far as it is founded, not on contract but upon the alleged negligence or want of proper care on the part of the defendants, is barred by the Limitation Act, art. 30 of sch. II."

[187] There being, in my opinion, no decision of the Bombay High Court applicable to the present case, and having regard to the real nature of the suit, and the evidence given in the Court below, I am of opinion that the claim of the plaintiffs is one against the defendants as carriers for compensation for losing goods, and falls within art. 30, and consequently that as the present suit was not brought until December, 1892, two years, and eleven months after the loss, it is barred by limitation.

For these reasons I am of opinion that the appeal must be allowed, and the decree reversed. The plaintiffs (respondents) to pay the defendants (appellants) their costs suit of throughout, and also pay the appellants their costs of the appeal.

FARRAN, J.—The learned Judge of the Division Court has held that the suit is not barred by limitation, applying to the plaintiffs' claim the limitation prescribed by art. 115, and not that prescribed by art. 30 of

(1) 7 B. 478. (2) 3 M. 240. (3) 3 M. 107.

the Limitation Act. Had the question been *res integra* I should have felt much difficulty in concurring in that view. The authorities cited by the Chief Justice show that a common carrier, who failed to deliver a parcel committed to him for carriage, could be sued either in tort for negligence in carrying out his common law duty, or in contract for breach of his contract, express or implied, to deliver in accordance with his instructions. I refer particularly to *Bretherton* v. *Wood* (1), cited in *Irrawady Flotilla Company* v. *Bagwandass* (2). The Legislature must be credited with this knowledge when framing the Limitation Act, and must, I incline to think, have intended when in general terms limiting, the responsibility of carriers to make compensation for loss of goods to two years after the loss, to make that time the outside period within which they could be sued, whether the claim was laid in tort or as arising out of contract. Otherwise they would have used less broad and comprehensive words to express their meaning, and would hardly have employed language which indisputably is wide enough to cover a claim for compensation for loss of goods based on the breach of an express or implied contract of the carrier to carry safely.

[188] I incline to think that the Courts would have better fulfilled the intention of the Legislature by treating all claims against a carrier which could fairly be deemed to arise out of the loss of, or injury to, goods (and, liberally interpreted, almost all claims against a carrier, unless he were actually in possession of the goods uninjured, would be embraced within one or other of these two categories) as coming within the purview of arts. 30 and 31 than by confining the general words of the former article to a claim for compensation for loss of goods arising otherwise than out of contract. The position of the article in the schedule is to my mind a most fallacious guide. In Part IV of the schedule claims arising out of contract and claims arising out of tort are mixed together, and certainly a claim under art. 31 is much more naturally based upon contract than upon tort.

Having regard, however, to the current of decisions in the other High Courts I feel constrained to say that the learned Judge below could not have decided differently upon this branch of the case, and I think that now it is rather the part of the Legislature to make its meaning more clear if it has been misinterpreted, than for us to run counter to the authorities in the other High Courts, upon the strength of which parties may have forborne to sue within the two years' limit, even though we may not be convinced of the reasoning upon which these authorities are based. However, it is not necessary for me to express a final opinion upon this point, as I agree with the Chief Justice on the other branch of the case.

Turning to the merits I proceed to consider whether the Division Court is correct in holding that the plaintiffs have paid an "increased charge" for the same conveyance of their box of specie within the meaning of s. 11 of the Indian Railway Act of 1879. In my opinion they have not.

In the Small Cause Court reference in *Balaram* v. *S. M. Railway Company* (3) we have already held that a consignee, who pays the treasure rate charged by the railway administration for the conveyance of treasure, does not in doing so pay "a percentage on the value" within the meaning of the Indian Railways Act, 1890, s. 75, "by way of compensation for [189] increased risk." The wording of that section is different from that of s. 11 of the Act which we are now considering, and that ruling does

(1) 3 B. & B. 62. (2) 18 I. A. 121 (129). (3) 19 B. 159.

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not, therefore, decide the present case. Now the Act, beyond providing that a copy of the tariff of charges shall be exhibited at each station (s. 9), does not deal with the charges which the defendant company may levy. That subject is otherwise provided for. The agreement of the 17th August, 1849, between the defendant company and the East India Company provides that the defendants shall (*inter alia*) be common carriers of goods and shall charge such fares for the carriage of goods as shall be approved by the East India Company (Ex. 4). The power to give the requisite approval is now vested in the Government of Bombay (Ex. 6). Government regulate the charge by fixing a maximum rate for the carriage of parcels (*inter alia*) and a maximum insurance rate. So long as the company keep within these maxima they are at liberty to fix the rate for carriage and insurance. The company acting on the liberty thus afforded to them have not fixed one uniform rate for all parcels, but have adopted a classification of parcels under which they are charged for according to their contents. Thus there is a charge for bread, for ice, leaves, opium, treasure, and various other articles specially laid down, and in addition there is a comprehensive charge which includes all articles not specifically provided for. Some of these special charges are above and some below the comprehensive charge for ordinary parcels, but all are within the maximum charge allowed by Government, and are, therefore, charges which the company may legitimately levy for the mere carriage of parcels. In determining these classified charges the company no doubt take various circumstances into consideration, fixing the rate low in some instances in order to foster the traffic, and high in other instances where they are sure of the traffic and where they feel the traffic is able to bear such high rate without diminishing its volume. In this way the company has fixed a low rate for leaves and a high rate for treasure, but each rate alike is the ordinary rate for the carriage of goods of that particular class. This is certainly, as I have shown, within their powers. I fail, therefore entirely to see how in paying this ordinary rate for treasure the **[190]** consignee pays "an increased charge for the safe conveyance of the same." He pays the ordinary charge for the carriage, and no more and no less.

In addition to this ordinary rate the company make an extra charge for what they call "insurance" in the case of the valuable articles specified in the schedule to s. 11 of the Act. About this there can be no mistake. In their tariff of charges they say in so many words (p. 67 of the Company's book of rates) referring to s. 11 of the Act that they are not responsible for loss * * * of gold, silver, &c., "unless an increased charge for the safe conveyance of the same is paid." This can mean nothing else than an increased charge over the ordinary charge for the carriage of the particular article specified in the tariff. Article 40, cl. 2, at p. 68 of the Company's book of rates is still more clear. "Insurance charges are in all cases made in addition to the ordinary charges for the conveyance of treasure * * * * and must always be prepaid. The contents of packages which are insured must always be examined."

Now this "increased charge" is not levied on the weight of the article carried, but on its value. In this case also the Government have given the company a free hand below a certain maximum. The maximum allowed by Government is 3 per cent. The company charge a percentage varying from ½ to 1 per cent. The confusion in the present case has probably arisen from the use of the word "insurance" in the tariff of

charges. The use of the word has arisen in this way. A common carrier in England is often spoken of as an "insurer," not because he "insures" in the ordinary acceptation of the word, but because he warrants or contracts that he will (with specified exceptions) carry and deliver the goods entrusted to him safely—*Bergheim* v. *The Great Eastern Railway Company* (1). In the case of articles of small bulk and great value (being above the value of 10£) the Carrier's Act (11 Geo. IV and 1 Will. IV, c. 68) enacted that a carrier should not be liable for their loss (not arising from the felonious act of his servant) unless an increased rate of charge was paid over and above the ordinary rate; and the third section of the Act referred to parcels upon which increased rate was paid as [191] "insured." Hence Judges in England have referred to the payment of such increased charge as an "insurance" (see for example the language of Channell and Wilde, B. B., in *Behrens* v. *Great Northern Railway Co.* (2), and the word thus became the usual term to denote goods upon which the increased rate was paid. In the present case the increased rate was not paid, and in my opinion the plaintiffs have not, therefore, paid "an increased charge" for the safe conveyance of their specie within the meaning of s. 11 of the Act.

The more difficult question hence arises, whether, inasmuch as the company did not call upon the plaintiffs to pay such increased charge (which I shall now refer to as "insurance"), they are liable as if the same had been paid. In order to decide that question it is in the first case necessary to determine what actually took place before and at the time when the box in question was received by the company for carriage from Byculla to Saugor. It appears from the plaintiffs' letter of the 27th May, 1890, that their practice (as well as that of other native merchants) was to send specie by railway uninsured. The plaintiff writes that the railway fare at the rate chargeable for silver was paid for the parcel, and adds: "Relying on the strict supervision and just dealings of the Railway authorities, valuable parcels without being insured are generally transmitted by railways, but hardly such a case as mine happens." A person who described himself as coming on behalf of the plaintiffs replied to Mr. Conder, in answer to the question why the plaintiffs had not insured: "It was not worth while. They are constantly sending parcels of large value all over the country and they never lost anything." C. M. Fonseca, the assistant parcel clerk, who booked the box in question, said that he had often specie from the servants of the plaintiffs who handed him the box, and that they never insured. Motilal Panalal says that Buria, who went with him with the box to the station, told the parcel clerk that it contained three bags of Rs. 2,000 each. It was weighed at ½ mans (maunds) and 5 seers, and he (Motilal) asked the clerk to take the money and give him the bill. He paid what he was asked (Rs. 18·1·0) and [192] received a receipt. The insurance would have been Rs. 50 extra. The man brought with him Rs. 20 or 30 only to pay the fare. He did not, he says, insure the box, nor did Fonseca ask him whether he wished to insure. Buria says pretty much the same, adding that he shook the box, and the rupees jingled. Fonseca says that he was told the box contained "*chandi rokra*" and did not ask and was not told its value, but admits that he heard the men say that there were Rs. 6,000 in the box.

From this evidence the only legitimate inference which can be drawn is, I think, that the men took the box to the station without the slightest

(1) 3 Q. P. D. 221.

(2) 6 H. & N. 366.

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intention of insuring it, and that, if the number of rupees which it contained was mentioned in the booking office, it was not so mentioned that the clerk might have the opportunity of charging insurance if he pleased, but only in the course of casual conversation.

Now the law in England under the Carriers' Act has been, since the decision in *Behrens* v. *Great Northern Railway Company* (1), well ascertained. It is this:—If the sender declares the nature and value of the articles, and the carrier has the proper notice affixed in his office, he may demand an extra charge according to such notice. If he neglects to demand it, the sender is not bound to tender it, and the carrier receiving the goods is liable for their safe conveyance. The provisions of the Carriers' Act are wrapped up in many words, and are very involved. The Exchequer Chamber in *Behrens* v. *Great Northern Railway Company* (1) had doubts as to their meaning, but by reading the first and the second sections together arrived at the true interpretation of the statute. (See the judgment of all the Judges in the Court of Exchequer (*supra*).)

The general law being thus settled, the question as to what is a sufficient declaration of the contents and value came to be considered, and it was decided that it need not be an express and formal declaration, and such statements as the following were held sufficient:—"Take care. These are pictures of the value of £100"—*Behrens* v. *Great Northern Railway Company* (*supra*). "There are about £100 worth of goods in the parcel" which were described as "silks"—*Bradbury* v. *Sutten* (2). In fact, any **[193]** declaration of the sender made at the time of delivery calculated to inform the carrier of the nature and value of the articles, so as to enable him to demand the increased charge, was held sufficient.

Now it is the second section of the Carriers' Act which enables the carrier *to demand* the increased rate of charge. Section 1 relates to the duty of the sender of the goods; ss. 2 and 3 relate to the duty of the carrier and his power to make an increased charge. In the Railway Act of 1879, as was the case with the Railway Act of 1854, ss. 2 and 3 of the Carriers' Act are not embodied. Section 1 of the Carriers' Act is enacted as s. 10 of the Act of 1854 and as s. 11 of the Act of 1879. These are in substance the same and differ from s. 1 of the Carriers' Act principally in this that whereas the declaration of value could be made to any person receiving the parcel under the Carrier's Act, and an engagement might be accepted by him, the Indian Acts provide that the increased charge shall be accepted by some railway servant *specially authorized* in this behalf. It does not seem to be necessary that the declaration should be made to the latter. Section 11 after providing for the general non-liability of the company for articles of value runs thus:—"Unless at the time of delivery the value and nature thereof have been declared by the person sending or delivering the same, and an increased charge for the safe conveyance of the same or an engagement to pay such charge has been accepted by some railway servant specially authorized in this behalf." It appears to me that reading that section alone and without the addition of a section similar to s. 2 of the Carrier's Act, which the Courts in England had to read in combination with the first section, it implies that the sender of the goods must make the declaration in such a form as to invite the company to make the insurance charge, and that otherwise the

(1) 6 H. & N. 366.

(2) 19 W. R. 800; 21 *ib.* 128.

company are not entitled to demand it. This was the view taken by the High Court of Madras in *Venkatachala* v. *South Indian Railway Company*(1). That case, I think, in substance governs the case before us. It may be that (as was there suggested) the company may, if they please, waive the increased charge; but if it is waived, it [194] must be on the declaration of value and the invitation to insure being brought to the notice of some duly authorized servant of the company who alone is entitled to bind the company in such matters.

The Station Masters are under art. 40 of the Tariff Charges, as a general rule, authorized to insure, but in case of insurance above Rs. 5,000 applications for insurance are to be referred to various specified officers. I do not say that if an offer to insure were made to the parcels clerk, and he received the insurance money for the company without referring the matter to the Station Master, or if, in the case of large insurance, the latter neglected to refer the matter to the higher authorities and received the insurance, the company would not be bound; but I am clearly of opinion that a mere casual conversation as to the contents of the parcel taking place before the parcel clerk, through which he becomes acquainted with its value, does not bind the company to make good its contents or operate as an increased charge for the safe conveyance of the same, or an engagement to pay such charge accepted by a railway servant specially authorized in this behalf. To hold otherwise would be in effect to deprive s. 11 of the Railway Act of all force. The circumstances here are similar to those in *Robinson* v. *The South-Western Railway Company* (2), a case decided under 17 and 18 Vict., c. 31, s. 7, which is in the same lines as the Carrier's Act. The present is, therefore, an *a fortiori* case to that.

I have given my reasons at length in this case, as the conclusion I have arrived at differs from that of the Calcutta High Court Bench in the case of *Secretary of State for India* v. *Budhu Nath* (3), composed of Judges for whose opinion I entertain sincere respect, unless indeed it be considered that that case was decided upon the special facts stated in the case which the judgment does not refer to. I do not consider that it makes any difference in the construction of s. 11 whether we regard the decision in *Kuverji* v. *G. I. P. Railway Company* (4) as overruled by the *Irrawady Flotilla Company* v. *Bugwandass* (5) and [195] *Chogemull* v. *The Commissioners of Calcutta* (6), or as still in force in this Court.

I am, therefore, of opinion that the company are protected in this case by the provisions of s. 11 of the Railways Act, 1879, and that the appeal ought to be allowed, and the plaintiffs' suit dismissed with costs throughout.

Appeal allowed.

ORDER.

March 1st, 1895. The respondents applied under cl. (*c*), s. 595, of the Civil Procedure Code for leave to appeal to the Privy Council, but the application was refused.

Attorneys for appellants:—Messrs. *Little, Smith, Nicholson* and *Bowen.*

Attorneys for respondents:—Messrs. *Crawford, Burder and Co.*

(1) 5 M. 208. (2) 34 L. J. (C.P.) 234. (3) 19 C. 538.
(4) 8 B. 109. (5) 18 I. A. 121. (6) 18 C. 427.

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APPEL-LATE CRIMINAL.

19 B. 195.

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APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* PAHUJI AND ANOTHER.* [23rd January, 1894.]

Evidence Act (I of 1872), s. 30—Confession of co-prisoner—Joint trial—Plea of guilty—Evidence.

A and B were charged with murder. A pleaded guilty, but he was not convicted or sentenced till the conclusion of the trial of his fellow-prisoner B. The Sessions Judge, holding that both the accused were jointly tried for the same offence, took into consideration as against B the confessions made by A, and convicted both of murder.

Held, that after A had pleaded guilty he could not be treated as being jointly tried with B. A's confessions were, therefore, not admissible against B under s. 30 of the Indian Evidence Act (I of 1872).

[F., 38 C. 446=16 C.W.N. 49=12 Cr. L.J. 479=12 Ind. Cas. 87 ; 22 M. 490 (493)=2 Weir 746 (747) ; 12 Cr. L.J. 605=12 Ind. Cas. 991=15 P.R. 1911 (Cr) ; R , 17 A. 524 (526) ; 23 A. 53 (54) ; 23 M. 151=2 Weir 747 (749) ; 9 C.L.J. 291 (294)=13 C W.N. 552=4 Ind. Cas. 57 ; 14 Cr. L.J. 566=21 Ind. Cas. 166=U.B.R. (1913) 2nd Qr. 170 ; 10 M.L.J. 147 (159) (F.B.) ; Rat. Unr. Cr. Cas. 776 (777); D., 14 M.L.T. 453.]

THE accused Pahuji and Manik were committed for trial to the Sessions Court at Dhulia on a charge of murder under s. 302 of the Indian Penal Code (XLV of 1860). Manik (accused No. 2) pleaded not guilty, and claimed to be tried. Pahuji (accused No. 1) pleaded guilty, but he was not convicted and sentenced till the conclusion of the trial of accused No. 2.

The Sessions Judge, holding that both the accused were being jointly tried for the same offence took into consideration as against accused No. 2 the confessions made by accused No. 1, under s. 30 of the Indian Evidence Act (I of 1872).

[196] Both the accused were convicted of murder and sentenced to death.

The case was submitted to the High Court under s. 374 of the Code of Criminal Procedure (Act X of 1882) for confirmation of the sentences of death passed on the accused.

Narayan Vishnu Gokhale, for accused No. 2.—After accused No. 1 had pleaded guilty, his confessions were inadmissible against his fellow-prisoner under s. 30 of the Indian Evidence Act (I of 1872)—*Venkatasami* v. *the Queen* (1) ; *Reg* v. *Kalu Patil* (2). The proper course would have been to convict the accused No. 1, and then examine him as a witness. Unless this is done, his statement cannot be used against his fellow-prisoner—*Reg.* v. *Gardner* (3). The so-called confession of accused No. 2 was retracted before the committing Magistrate as being the result of tutoring. It does not, therefore, amount to a confession—*Reg.* v. *Garbad* (4).

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.—Section 30 of the Evidence Act empowers the Court to take into consideration the confession of one prisoner against his fellow-prisoner when they are jointly tried for the same offence. In the present case accused No. 1 had no doubt pleaded guilty, but he was not convicted and sentenced till

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* Confirmation Case No. 34 of 1893.

(1) 7 M. 102.
(2) 11 B.H.C.R. 146.
(3) 9 Cox's C.C. 332.
(4) 9 B.H.C.R. 344.

the end of the trial. The Sessions Judge treated both prisoners as being jointly tried. He was, therefore, at liberty to use the confessions of the one against the other. Refers to *Queen-Empress* v. *Chand valad Ibrahim* (1); *Reg.* v. *Hanmanta* (2); *Reg.* v. *Balvant* (3). There is no evidence here that the confession of accused No. 2 was induced by illegal pressure. In the absence of such evidence it will not be presumed that the confession was so induced.

JUDGMENT.

JARDINE, J.—In this case there is no doubt that on the 17th November, 1893, at Bhadgaon the boy Papa was murdered. When the body was found next morning there was a mark round the neck which the witnesses say seemed to be caused by strangulation. Some ornaments which the boy was wearing [197] were missing from the body. On the 20th November the prisoner Pahuji was arrested by the police near his sisters' house at the village of Takli wearing one of these ornaments, a wristlet; and he then produced from an earthen pot others of them, namely, ear-rings. On the same day he made a full confession to a Third Class Magistrate and another on the 24th November to a Magistrate of the First Class. At the trial he pleaded guilty, and in his appeal petition he does not contest the correctness of the conviction, but only asks that the sentence may be commuted, because he has confessed from the beginning. There is some evidence confirming the confession : and we see no reason for interfering with the conviction and sentence of Pahuji, which we now confirm.

The evidence against the other prisoner Manik consists chiefly of his own confession made on the 21st November at Bhadgaon, where an hour or two before he had been arrested by the police and brought before the chief constable. This was in consequence of something which the prisoner Pahuji had told to the police. The confession was recorded by the Magistrate of the Second Class of Bhadgaon. But on the 24th November, when being examined by the Magistrate of the First Class, the prisoner while admitting that he had made the confession said that he had been tutored by the Second Class Magistrate, and had stated what he had been tutored to say. No property has been found on the prisoner Manik, nor in his possession.

The Sessions Judge, however, admitted into his consideration as against Manik the confessions made by the prisoner Pahuji, considering that after the plea of guilty had been recorded, and although no issue affecting Pahuji was raised at the trial, he was nevertheless being "tried jointly" with Manik within the meaning of s. 30 of the Indian Evidence Act, because it was possible that the evidence elicited at the trial of Manik, Pahuji being still at the bar unconvicted and not sentenced, might enable the Sessions Judge to determine whether to pass the sentence of death or that of transportation for life. No precedent has been shown us in which a High Court has in such circumstances held the co-prisoner's statement admissible. In [198] Confirmation Case No. 22 of 1893, the reason, as we have ascertained on consulting our brother Candy, for admitting the statement was that the Court of Session had not dealt with the plea of guilty as if it were such, but had allowed the prisoner so pleading to remain on trial so that he could cross-examine. The opinion of the assessors was also taken about his guilt. These circumstances do

(1) Cr. Ruling No. 60 of 1888. (See Rat. Unrep. Cr. cases 400).
(2) 1 B. 610. (3) 11 B.H.C.R. 137.

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not exist in the present case. After considering *Winsor's case* (1) and other English cases there referred to, as also *Reg* v. *Gardner* (2), *Venkatasami* v. *The Queen* (3), we are of opinion that the Court below ought not to have treated Pahuji as being jointly tried with Manik. The confessions made by Pahuji we must, therefore, hold are not admissible against Manik.

We have to say what value should be placed on the confessions of Manik; and to discharge this duty in the light of whatever evidence is obtainable, we direct that the evidence of the Second Class Magistrate be taken about the alleged tutoring, and also that of the prisoner Pahuji as to the circumstances in which the murder was committed. No objection is taken to this course by the pleader who appears for Manik. Pahuji as a witness may be cross-examined by Manik or his pleader.

We direct the Sessions Judge to take this evidence, and certify it to this Court within one month.

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19 B. 198.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BAI AMBA AND MANGLI (*Original Plaintiffs*), *Appellants v.* PRANJIVANDAS DULLABHRAM AND OTHERS (*Original Defendants*), *Respondents.** [7th February, 1894.]

Stamp—Suits' Valuation Act (VII of 1887), s. 8—Suit to take accounts—Court-fee stamp—Jurisdiction—Amount of claim as fixed by plaintiff—Relief incidental to the principal relief—Appeal.

According to s. 8 of the Suits' Valuation Act (VII of 1887), in suits for taking an account the Court-fee stamp and jurisdiction are both determined by the amount of claim as fixed by the plaintiff.

[199] In a suit for taking account the plaint having contained several items which were all incidental to the chief item of relief, the plaint was held to be substantially one to have the minor plaintiffs' estate administered, that is, to have accounts taken and the accounting party ordered to pay what (if any) should be found due from him on the balance of such account. The plaintiffs having put the valuation of the suit at Rs. 130 in the plaint,

Held that the High Court had no jurisdiction to hear the appeal against an order rejecting the plaint. The appeal lay to the District Court. The appeal was, therefore, returned for presentation in the proper Court.

[R., 9 Bom. L.R. 316.**]**

APPEAL from the decision of Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Surat.

The plaintiffs, who were minors, sued by their next friend Lalbhai Shambhulal to compel the first defendant to produce and prove in Court the authority under which he obtained possession of and was managing the property of the plaintiff's deceased father Narbheram Tapidas; to be declared wards of Court; to have the property managed by the Court if the defendant did not produce and prove any will of their deceased father, and to have accounts taken since his death. In the plaint the claim was valued at Rs. 130, but the property left by the deceased was stated to be worth Rs. 30,000.

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* Appeal No. 143 of 1891.

(1) L. R., 1 Q. B. 289 (390). (2) 9 Cox's C. C. 332. (3) 7 M. 102.

The plaintiffs alleged that their father Narbheram died in May, 1886; that they being his daughters were his heiresses; that the first defendant being related to them took the property left by their father into his possession for their benefit; that he alleged that the deceased had made a will appointing him and three others as executors, but that he had not allowed the plaintiffs to see it.

The first defendant and the other defendants who were subsequently added objected (*inter alia*) that the plaint was not properly stamped, and that the Court had no jurisdiction to entertain the suit in the form in which it was brought.

The Subordinate Judge found that the plaint was not adequately stamped, his opinion being that the prayer for an account was quite independent and not incidental to the other reliefs claimed, and, therefore, it ought to have been valued and paid for. He also held that the property in suit being valued at Rs. 30 000, for the purpose of giving jurisdiction to the Court of **[200]** the First Class Subordinate Judge, the plaint ought to bear a Court-fee stamp on that amount and not on Rs. 130 only, the valuation for the purposes of jurisdiction being the same as the valuation for the purposes of Court-fees under s. 8 of the Suits' Valuation Act VII of 1887. He, therefore, granted one month's time to the plaintiffs to pay the requisite stamp, and the plaintiffs having failed to do so, rejected the plaint.

The plaintiffs appealed.

Jardine (with *Kalabhai Lallubhai*), for the appellants (plaintiffs).—The Judge thought that the reliefs we claimed were not alternative, but separate. He was of opinion that we ought to have fixed a certain value to the claim for an account. We contend that we have valued the whole claim at Rs. 130 and have paid a Court-fee stamp of ten rupees, which covers that amount. It was not necessary for us to pay a Court-fee stamp on Rs. 30,000, the value of the property, because we do not seek to recover the property. We merely wished to have an account taken for the benefit of the minors and nothing more. An account is merely ancillary for the purposes of an administration suit.

[CANDY, J., referred to *Bhagvantrai Munshi* v. *Mehta Bajurao* (1).]

We rely on *Manohar Ganesh* v. *Bawa Ramcharandas* (2), *Govandas* v. *Dayabhai* (3), *Sidha Sardarsingji* v. *Ganpatsing* (4). Originally we paid a Court-fee stamp of rupees ten for the whole claim, and subsequently, when the Subordinate Judge asked for additional stamp, we paid in rupees ten more.

Anderson (with *Motilal M. Munshi*), for the respondents (defendants).—The Subordinate Judge granted to the plaintiffs one month's time to frame the plaint in any way they chose. They failed to do so, and the only course which the Judge could take was to reject the plaint. The plaintiffs themselves valued the suit at Rs. 30,000, and, therefore, the Judge required them to pay the Court-fees on that amount having regard to **[201]** s. 8 of the Suits' Valuation Act (VII of 1887)—*Gulabsingji* v. *Lakshmansingji* (5). The plaint contains the following words:—"We state for the jurisdiction of the Court that the value of the property is Rs. 30,000." The argument of the plaintiffs in the lower Court was that the present suit being for the administration of the property, the claim for account was merely ancillary, and, therefore, it did not require any Court-fee. That is not so. The plaint having been valued at Rs. 130, an appeal

(1) 18 B. 40. (2) 2 B. 219. (3) 9 B. 22.
(4) P.J. (1892) p. 144 *sub nom*=17 B. 56. (5) P. J. (1893) p. 25=18 B. 100.

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would not lie direct to the High Court. The plaintiffs ought to have appealed to the District Court. If the plaintiffs had paid the Court-fees on Rs. 30,000, then they could have appealed to this Court—*Boidya Nath Adya* v. *Makhan Lal Adya* (1).

JUDGMENT.

SARGENT, C. J.—The plaint, although made up of several items, so to speak, is substantially one to have the estate of the minors administered by the Court, *i.e.*, to have the accounts taken, and the accounting party ordered to pay what (if any) should be found due from him on the balance of such account. The other items of relief sought are all incidental to the above application.

The decisions in *Manohar Ganesh* v. *Bawa Ramcharandas* (2), *Govandas* v. *Dayabhai* (3) and *Sidha Sardarsingji* v. *Ganpatsing* (4) show that in suits for taking account the Court-fee stamp and jurisdiction are both determined by the amount of claim as fixed by the plaintiff. This conclusion has now express effect given to it by s. 8, Act VII of 1887, as pointed out by Telang, J., in *Sidha Sardarsingji* v. *Ganpatsing*.

In the 14th paragraph of the plaint the plaintiff has put that valuation at Rs. 130. But that being so, this Court will have no jurisdiction to hear the appeal, which ought to be to the District Court. We must, therefore, return the appeal for presentation in the proper Court. Parties to pay their own costs.

Order accordingly.

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19 B. 202.

[202] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

NARAYANDAS SAKHARAM (*Plaintiff*) *v.* KONDI (*Defendant*).*
[8th February, 1894.]

Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879), *ss.* 49 (*a*) *and* 74†—*Conciliation agreement—Conciliation agreement forwarded to be filed in Court—Death of plaintiff—Substitution by the conciliator of the name of the deceased's heir on the return of the agreement by the Subordinate Judge—Practice.*

A plaintiff applied to a conciliator appointed under the Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879) for an amicable settlement of a dispute between himself and the defendant, and came to an agreement disposing of the matter which was duly forwarded to the Subordinate Judge to be filed in Court. On receipt of the agreement, the Subordinate Judge issued notices to the parties to show cause why the agreement should not be filed, and was, on the day of hearing, informed that the agreement could not be filed owing to plaintiff's death.

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* Civil Reference No. 3 of 1894.

† Sections 49 (*a*) and 74 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

49. The Local Government may from time to time make rules—

(*a*) regulating the procedure before conciliators in matters not provided for by this Act,

(*b*) . . . . .

(*c*) . . . . .

74. Except in so far as it is inconsistent with this Act, the Code of Civil Procedure shall apply in all suits and proceedings before Subordinate Judges under this Act.

(1) 17 C. 680.
(2) 2 B. 219.
(3) 9 B. 22.
(4) P. J. (1892) p. 144, *sub nom* = 17 B. 56.

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The agreement was then returned to the conciliator, who entered therein the name of the deceased plaintiff's heir and forwarded it to the Subordinate Judge. A question having thereupon arisen as to whether the conciliator could enter on the record the name of the heir of the deceased plaintiff,

Held, that although there is no provision in the Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879) empowering a conciliator to enter the name of the heir of a party, and Government have not apparently under s. 49 (*a*) of the Act made any rules regulating the procedure before conciliators in this respect, yet when a Subordinate Judge is seized of a conciliation agreement, there is a "proceeding" before him under the Act. He should, therefore, under s. 74 of the Act follow the provisions of the Civil Procedure Code (Act XIV of 1882) in regard to placing on the record the heirs of the deceased parties.

REFERENCE from Rao Saheb K. S. Riswadkar, Subordinate Judge of Shrigonda in the Ahmednagar District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

Under s. 39 of the Dekkhan Agriculturists' Relief Act, Narayan Sakharam applied to Kaji Mir Bucchasaheb, conciliator of Shrigonda, praying for an amicable settlement of a dispute [203] between himself and the defendant, and came to an agreement finally disposing of the matter in dispute as contemplated by s. 43 of the Act. The agreement being reduced to writing, and signed by the conciliator and the parties, was forwarded to the Court of the Subordinate Judge of Shrigonda Court under s. 44 of the Act for being filed.

The Subordinate Judge returned it to the conciliator for correction, but before it could be corrected the conciliator died, and under orders from the Special Subordinate Judge the agreement was transferred to another conciliator for correction, was duly corrected, and returned to the Court of the Subordinate Judge. Notices were thereupon issued by him to the parties to show cause within one month from the date of service why the agreement should not be filed; but on the day of hearing he was informed that the agreement had not been filed owing to the plaintiff's death. The agreement was then returned to the conciliator with a request that he might take such steps with respect to it as he might deem proper. The conciliator then entered the name of Bakhatram in the agreement in place of his brother the plaintiff, deceased, and returned it to the Court.

The Subordinate Judge being of opinion that the provisions of the Civil Procedure Code do not apply to any proceeding before the conciliator, and that the Dekkhan Agriculturists' Relief Act does not make any provision in respect of entering on the record the name of plaintiff's heir in any application pending or agreement made before him in the event of the plaintiff's death, considered that the conciliator's action was *ultra vires*, and that it would not be legal to file the agreement in question, which should be cancelled. He accordingly referred the following questions :—

(1) Whether in an agreement made before a conciliator under s. 43 of the Dekkhan Agriculturists' Relief Act the conciliator can enter on the record the names of the heirs of the plaintiff in his place in the event of his death before the agreement is duly filed in the proper Court?

(2) Whether on the receipt of such an agreement for being filed in the Court of the Subordinate Judge, the Subordinate Judge can, relying on s. 74 of the Dekkhan Agriculturists' Relief [204] Act, permit the heirs of the plaintiff to come on the record before the agreement is duly filed should the plaintiff die in the meantime?

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(3) Whether the agreement, which is the subject of the reference, can be filed under the circumstances already mentioned, or whether it must be cancelled?

The opinion of the Subordinate Judge on each of the above questions was in the negative.

There was no appearance for the parties.

ORDER.

SARGENT, C. J.—We agree with the Subordinate Judge in his view with regard to the first and second questions referred by him. There is no provision in the Dekkhan Agriculturists' Relief Act empowering a conciliator to enter the name of the heir of a party, and Government have not apparently under s. 49 (*a*) of the Act made any rules regulating the procedure before conciliators in this respect.

When, however, the Subordinate Judge was seized of the agreement there was a proceeding before him under the Act. He, therefore, under s. 74 of the Act should have followed the provisions of the Civil Procedure Code in regard to placing on the record heirs of deceased parties, and there was no reason for him to return the agreement to the conciliator, assuming that he had the power to do so. It remains for him to take the legal steps to bring the heirs of the deceased plaintiff on the record; and it is thus unnecessary to answer the third question, which does not arise.

Order accordingly.

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19 B. 204.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BALKRISHNA PANDHARINATH (*Original Plaintiff*), *Appellant*, *v.* BAPU YESAJI AND OTHERS (*Original Defendants*), *Respondents.**

[12th February, 1894.]

Civil Procedure Code (Act XIV of 1882), *s.* 258—*Amending Act (VII of* 1888), *s.* 27—*Changes of law relating to procedure—Retrospective effect—Practice.*

The change effected in the language of s. 258 of the Civil Procedure Code (Act XIV of 1882) by s. 27 of the Amending Act (VII of 1888), by which [205] uncertified adjustments can now be recognized by other Courts than the Court executing the decree, applies to adjustments previous to the Amending Act.

Changes of law relating to procedure have retrospective effect.

SECOND APPEAL from the decision of T. Hart-Davies, Acting District Judge of Ahmednagar, confirming the decree of Rao Saheb M.V. Kathavate, Subordinate Judge of Shevgaon.

The plaintiff sued for possession of certain land which he alleged he had purchased from defendants Nos. 1 and 2 and subsequently leased to them by a rent-note which they had passed to him.

Defendants Nos. 1 and 2 admitted the execution of the sale-deed and the rent-note passed by them to the plaintiff, but they contended that both these documents were void, having been passed under compulsion in adjustment of a decree on a mortgage for Rs. 282 which the plaintiff had

* Second Appeal, No. 529 of 1892.

obtained against them. They also relied on the point that the plaintiff had failed to certify the adjustment to the Court.

The Subordinate Judge dismissed the suit on the ground that the sale deed and the rent-note were void for want of consideration, as the plaintiff had failed to certify them in accordance with s. 258 of the Civil Procedure Code (Act XIV of 1882).

On appeal by the plaintiff the Judge confirmed the decree.

The following is an extract from his judgment :—

"In this case a conciliator's decision was passed, and it was filed in the Civil Court, so it becomes a 'decree' to all intents and purposes. In satisfaction of this decree the defendants passed a sale-deed to plaintiff and a rent-note on the sale-deed, but this satisfaction was not certified through the Court as required by s. 258 of the Civil Procedure Code. So they are void, and the lower Court held that they could not be sued on. But under the Amending Act (VII of 1888), s. 27, it is clear that such payments or adjustments may be recognised by Courts *except when executing the decree*, so that under the present state of the law s. 258 does not bar such agreements from forming the basis of a suit. But no doubt before Act VII of 1888 was passed such actions would be barred, and in this case the adjustments were made in 1883, and if they were void then, it is doubtful whether s. 258 as amended by Act VII of 1888 has retrospective effect, and renders such adjustments capable of forming the basis of a suit in 1888. It is true that in I. L. R., 15 Bom., p. 420, the bond in that case, where the matter is discussed, was dated 1886, but the decision was on the general question raised, and not on the particular case submitted by the Subordinate Judge, and this point was not taken or apparently brought to the notice of their Lordships. I am inclined to think that the amendment cannot have retrospective effect, and [206] that as the adjustments were made at a time when they were void for the purpose of forming the basis of a suit, subsequent legislation does not alter their character, and that they are still incapable of being used for this purpose."

The plaintiff preferred a second appeal.

Mahadeo Vaman Bhat, for the appellant (plaintiff) :—Rules of procedure have a retrospective effect, and, therefore, the Amending Act VII of 1888 is applicable to the present case. It was not necessary to certify the adjustment to the Court—*Swamirao* v. *Kashinath*(1) ; *Bank of Bengal* v. *Vyabhoy Gangji*(2).

Balaji Abaji Bhagavat, for the respondents (defendants) :—The consideration for the sale-deed being a decretal debt, and the parties having adjusted the debt out of Court, we submit that the sanction of the Court was necessary to the adjustment. The adjustment not being certified to the Court, it became void, and an adjustment which was void when it was made cannot become valid by a subsequent change in the Code of Civil Procedure.

JUDGMENT.

SARGENT, C. J.—The necessity for an adjustment of a decree being certified to the Court and the consequence of its not being so certified were declared by s. 258 of the Code of Civil Procedure (Act XIV of 1882). The effect of that section was only to make an adjustment not cognizable by the Court unless certified. The section, therefore, only affected the practice of the Court, and there seems to be no reason for not applying

(1) 15 B. 419.

(2) 16 B. 618.

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the ordinary rule that changes in matters of procedure are retrospective. The change effected in the language of s. 258 by s. 27, Act VII of 1888, by which uncertified adjustments can now be recognized by other Courts than the Court executing the decree, must, therefore, be held to apply to adjustments previous to the Act. This seems to have been assumed in *Swamirao* v. *Kashinath* (1).

We must, therefore, reverse the decree and send back the case for a decision on the merits. Costs to abide the result.

Decree reversed and case sent back.

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19 B. 207.

[207] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

SAKHARAM MULSHET MHADIK (*Original Plaintiff*), *Appellant v.* VISHRAM AND OTHERS (*Original Defendants*), *Respondents.**

[12th February, 1894.]

Immoveable property—Sale of growing tree—Limitation.

A tree standing on land is immoveable property.

[R., 7 C. L. J. 152.]

SECOND APPEAL from the decision of H. F. Aston, District Judge of Ratnagiri.

The plaintiff sued in 1890 for possession of a certain jack tree, alleging that the first defendant had sold it to him on the 21st October, 1885.

The following was the document of sale passed by the first defendant :—

"I sell you a jack tree for Rs. 5 which I have received in cash. The tree stands in the Kumbhar Vada of the village of Jhadgar . . . It belongs to me and has been in my enjoyment. It is my ancestral property. It is an old decaying tree about forty years old. If any one should hereafter claim it, I will recompense you for the loss you will sustain on that account. You should now make use of it in any way you please. I have no right left to me to the tree."

The lower appellate Court held the suit barred by limitation. In his judgment (after reading the document of sale) the Judge said :—

"There is not a word indicating any intention to give or obtain any right of access to the tree over the ground on which the tree is situated, nor any provision to enable the purchaser to obtain or enjoy the fruit of the tree. The tree is referred to as an old decaying one, and the plaintiff in his plaint complains that he was not allowed to cut it down. It would be unreasonable to interpret such a transaction as that set forth in such a document so worded as any thing more than a sale of growing timber which the plaintiff was expected to remove. The plaintiff could claim to cut down the tree and remove it if permitted access, or to have it cut down and delivered to him. To sue for possession of a tree sold under such a document is to sue for specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same, for the

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* Second Appeal, No. 428 of 1892.

(1) 15 B. 419.

suit is not for the tree with the soil on which it is growing. Such a suit comes under art. 50 of sch. II of Act XV of 1877; as though growing timber would be technically immoveable property at the time the plaint is filed, it would cease to be so, and would become moveable property at the time of awarding relief if the decree orders the tree to be made over as dead timber, the only form in which possession of a tree alone without soil or right of access over soil can be awarded, and the suit [208] having been brought more than three years after the date of alleged purchase is barred by law of limitation."

The plaintiff preferred a second appeal.

Narayan Ganesh Chandavarkar, for the appellant (plaintiff) :—The Judge has treated the tree as moveable property. The tree is standing and is attached to the soil. The sale-deed itself describes the tree as standing in the Kumbhar Vada of the village. It is, therefore, immoveable property, and the suit is consequently governed by twelve years' limitation and is not time barred.

Daji Abaji Khare, for the respondents (defendants).

JUDGMENT.

SARGENT, C. J.—We cannot agree with the District Judge that "suing for possession of a tree sold under Ex. 45 is to sue for moveable property." The intention of the parties is to be gathered from the document, which is in the clearest terms a sale of the jack tree standing in the Kumbhar Vada. The tree so standing is immoveable property, whatever the plaintiff's intention might be as to cutting it down and so converting it into moveable property.

The suit is, therefore, not barred, and we must reverse the decree and send back the case for a decision on the merits. Costs to abide the result.

Decree reversed and case sent back.

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19 B. 208.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

PARVATISHANKAR (*Original Petitioner*), *Appellant v.* ISHVARDAS JAGJIVANDAS AND RAGHUNATHJI NICHHABHAI, OFFICIAL LIQUIDATORS OF THE BAILA SPINNING AND WEAVING COMPANY, LIMITED (*Original Opponents*), *Respondents.**

[13th February, 1894.]

Company—Indian Companies' Act (VI of 1882), s. 169—"Rehearing," meaning of—Application to set aside an ex parte order.

Section 169 of the Indian Companies' Act (VI of 1882) does not apply to an application to set aside an *ex parte* order.

The term "rehearing" in s.169 of the Act means a rehearing in the nature of an appeal.

[R., 95 P.R. 1908=165 P.W.R. 1908.]

[209] THIS was an appeal from the decision of J. B. Alcock, District Judge of Surat, in miscellaneous application No. 46 of 1893.

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* Appeal, No. 150 of 1893.

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The appellant Parvatishankar Durgashankar was a share-holder of the Baila Spinning, Weaving, and Manufacturing Company, Limited.

The company was wound-up under the orders of the Court. In the course of the winding-up proceedings the District Court of Surat passed an *ex parte* order on 29th September, 1893, directing Parvatishankar to be placed on the list of contributories of the company.

On the 5th October, 1893, Parvatishankar applied to the Court to set aside the *ex parte* order passed against him.

Notice of this application was served on the official liquidators of the company on 4th November, 1893.

The District Court rejected this application on the ground that the liquidators were not served with notice of the application within three weeks of the order complained of, as required by s. 169 of the Indian Companies' Act (VI of 1882).

Against this order Parvatishankar appealed to the High Court.

Govardhanram M. Tripathi, for the appellant.

Ganpat Sadashiv Rao, for the respondents (official liquidators).

JUDGMENT.

SARGENT, C. J.—The language of ss. 141 and 169 of the Indian Companies' Acts of 1866 and 1882 is apparently taken from s. 124 of the English Act of 1862. In *Ex parte Besley* (1) it was held that by "rehearings" in s. 33 of the Companies' Act 12 and 13 Vic., c. 108, were meant rehearings in the nature of appeals, and such is said by Mr. Buckley on the Companies' Acts to be its meaning in the Act of 1862. In this country it may be said that the use of the term "rehearing" in the sense of an appeal is not known to the procedure of the Civil Courts, which recognises only a "rehearing" after an order for review has been made. However, bearing in mind the hardship which the section might work in this country where notices are served by the Court, as pointed out by Sir Richard Garth, C. J., in *In the matter of the Sarawak and Hindustan* **[210]** *Banking and Trading Company Limited—Lallah Barroomul* v. *The Official Liquidator* (2), we are not disposed to apply the section beyond what the language clearly requires; and, therefore, without deciding whether it would apply to an application for review, we do not think it was intended to apply to an application to set aside an *ex parte* order, which is not, strictly speaking, an application for a rehearing, although it may result in it. Moreover, the defendant is ordinarily in ignorance of the order having been made against him, and may remain so until it was attempted to be enforced against him.

In this view of s. 169 of the Act we must reverse the order of the Court below and send back the case for a decision on the merits. Costs to abide the result.

Order reversed.

(1) 3 Mac. and G. 287 (298).

(2) 4 C. 704 (706).

19 B. 210.

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APPELLATE CIVIL.

APPELLATE CIVIL.

19 B. 210.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

DWARKADAS PARSHOTAMDAS, *Decree-holder v.* ISABHAI DAUDKHAN, SURETY, AND ABDUL TYAB DAUDKHAN, *Judgment-Debtor.**
[15th February, 1894.]

Civil Procedure Code (Act XIV of 1882), s. 336—Judgment-debtor—Surety—Judgment-debtor's application to be declared an insolvent—Release of the surety.

A person standing surety for a judgment-debtor under s. 336 of the Civil Procedure Code (Act XIV of 1882) is released from his obligation when the judgment-debtor has applied to be declared an insolvent.

[F., 24 M. 560; 26 M. 366; R., 12 C.L.J. 419=7 Ind. Cas. 917.]

REFERENCE by Khan Bahadur Barzorji Edalji Modi, Judge of the Court of Small Causes at Surat, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

One Dwarkadas Parshotamdas obtained a decree in the Court of Small Causes at Surat against his debtor Abbul Tyab Daudkhan, and applied for execution by the arrest and imprisonment of the judgment-debtor. A warrant was issued, and the judgment-debtor was arrested and brought before the Court on the 25th August, 1893. He, thereupon, expressed his intention to apply, under Chap. XX of the Civil Procedure Code (Act XIV **[211]** of 1882), to be declared an insolvent and to furnish security under s. 336 of the Code. He was accordingly released from custody, and one Isabhai Daudkhan stood surety for him. On the 30th September, 1893, he presented his application under s. 344 of the Code to be declared an insolvent. After some postponements the application was finally adjourned for hearing on the 24th November, 1893, on which day he failed to appear, and his application was consequently rejected.

The proceedings under the application for execution being still pending, the warrant for the arrest of the judgment-debtor was re-issued on the 1st December, 1893, at the instance of the decree-holder. In the meantime,—that is, on the 29th November, 1893,—the decree-holder applied to the Court that the surety Isabhai Daudkhan should be called upon to pay the amount of the security under his surety bond, namely, Rs. 147-14-5, or in default that the amount might be recovered from him and his property. On the 8th December, 1893, the surety appeared in person, and gave a written undertaking to produce the judgment-debtor whenever ordered. He was accordingly ordered to produce the judgment-debtor on the 11th idem. On that day the surety appeared with his pleader, and contended that he had been released from liability when the judgment-debtor made an application under s. 344 of the Civil Procedure Code, and in support of his contention relied on *Koylash Chandra* v. *C. Christophoridi* (1) and *Ramzan* v. *Gerard* (2).

The Judge, therefore, submitted the following question :—

" Whether the surety of a judgment-debtor arrested under a warrant in execution of a decree and released under s. 336, Civil Procedure Code,

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* Civil Reference, No. 2 of 1894.

(1) 15 C. 171.

(2) 13 A. 100.

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on his furnishing the required security, is released from the liability merely on the judgment-debtor filing an application for insolvency?"

The opinion of the Judge was in the negative.

Krishnalal M. Javeri (*amicus curiæ*) for the decree-holder.

Markand N. Mehta (*amicus curiæ*) for the surety.

ORDER.

[212] SARGENT, C. J.—We agree with the decisions in *Koylash Chandra* v. *C. Christophoridi* (1) and *Ramzan* v. *Gerard* (2) that the person standing surety for the judgment-debtor under s. 336 of the Civil Procedure Code, is released from his obligation when the judgment-debtor has applied to be declared an insolvent.

Order accordingly.

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19 B. 212.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

THE AHMEDABAD MUNICIPALITY (*Original Defendant*), *Appellant v.* MANILAL UDENATH (*Original Plaintiff*), *Respondent.**

[17th February, 1894.]

Municipality—District Municipal Act (Bom. Act VI of 1873), *ss.* 42, *cl.* (1), 48 *and* 75† *—Public street—Obstruction—Removal—Notice—Corporate bodies.*

Under the District Municipal Act (Bom. Act VI of 1873), a Municipality has power to have all obstructions in a public street removed, whether the obstructions were placed [213] there lawfully or not. The only distinction which the

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* Second Appeal No. 479 of 1892.

† Sections 42 (cl. 1), 48 and 75 of the District Municipal Act (Bom. Act VI of 1873) :—

42. *Clause* 1.—The Municipality may by written notice require the owner or occupier of any house or building to remove or alter any projection, encroachment, or obstruction which, although erected before this Act comes into operation in the place, shall have been erected or placed against or in front of such house or building, if the same overhangs or juts into or in any way projects or encroaches upon any public street, so as to be an obstruction to the safe and convenient passage along such street, or if the same projects and encroaches into or upon any uncovered aqueduct, drain, or sewer in such street so as to obstruct or interfere with such aqueduct, drain, or sewer, or the proper working thereof: Provided always that if such projection, encroachment or obstruction shall have been lawfully made, the Municipality shall make reasonable compensation to every person who suffers damage by such removal or alteration; and if any dispute shall arise touching the amount of such compensation the same shall be ascertained and determined in the manner hereinafter provided.

48. Whoever, after this Act comes into operation in any place, shall build any wall, or erect or set up any fence, rail, post, step, stall, or any erection or thing or other obstruction or encroachment in any public street, or shall deposit or cause to be placed or deposited any box, bale, package of merchandise, or any other thing in such street, or in or over or upon any open drain, gutter, sewer or aqueduct in such street, shall be liable to the penalty hereinafter provided; and the Municipality shall have power to remove any such obstruction or encroachment, and the expense of such removal shall be paid by the person erecting or depositing the same, and shall be recoverable as hereinafter provided. Nothing herein contained shall prevent the Municipality from allowing any temporary erections in any public street on occasions of festivals and ceremonies or the piling of fuel in bye-streets and spaces for not more than four days, and in such manner as not to inconvenience the public or any individual.

(1) 15 C. 171.

(2) 13 A. 100.

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Act draws is between obstructions erected or placed before the Act came into operation and those which have been erected or placed since it came into operation. As to the former, s. 42, cl. (1) of the Act provides that notice should be given, and if legally placed on the street, compensation should be awarded for their removal. As to the latter, the Municipality can remove them under s. 48 even without giving any notice.

The public have a right of passing over the whole of a street if it is a public street.

It is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their power."

[R., 20 B. 146 ; 24 B. 600 ; 27 B. 221 ; 30 B. 558.]

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad, confirming the decree of Rao Saheb Maneklal Narotamdas, Joint Second Class Subordinate Judge of Ahmedabad.

The plaintiff sued the Municipality of Ahmedabad for an injunction restraining the defendants from removing a bench standing upon the ground in front of the plaintiff's *ota* (verandah), alleging that the bench in dispute has been in existence for more than twenty years.

The defendants pleaded (*inter alia*) that the ground on which the bench stood did not belong to the plaintiff ; that it was part of a public street, and that the bench was only erected in 1889.

The Subordinate Judge found (1) that the bench had been standing upon the ground in front of the plaintiff's *ota* (verandah) for upwards of twenty years, (2) that the ground on which the **[214]** bench stood formed part of a street, but not of a public street, and (3) that the Municipality had no power to order the removal of the bench. He, therefore, allowed the claim.

The defendants appealed, urging (*inter alia*) that as there had been no issue raised as to whether the ground on which the bench stood formed part of a public street they had called no evidence to prove that it did, and they contended that they should be given an opportunity of calling such evidence. The Judge confirmed the decree.

The defendants preferred a second appeal.

L. M. Wadia (with *Gangaram B. Rele*), for the appellants (defendants) :—In the first Court no distinct issue was raised as to whether the street in which the plaintiff's house stands was a public or a private street. We, therefore, adduced no evidence to prove that it was a public street vested in the Municipality. The Court decided it to be a private street without any evidence. The plaintiff has admitted that the street belongs to Government, and that being so we contend that it vests in the Municipality.

Govardhanram M. Tripathi, for the respondent (plaintiff) :—It was for the defendants to raise issues. If they failed to raise the proper issues they cannot ask for them in second appeal. Even if the street be found to be a public street, still we contend that the right of the Municipality to remove the bench is time-barred.

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75. All written notices which may be issued by the Municipality under ss. 33 to 39, 41 to 43, 46, 58, 62 and 69 shall prescribe a time, which shall at the discretion of the Municipality be not less than three days or more than one month, within which the action prescribed in the notice should be taken by the person upon whom the notice is served. In the event of non-compliance with the terms of the notice it shall be lawful for the Municipality to take such action, or such steps as may be necessary for the completion thereof, and all the expenses incurred by them shall be paid by the person or persons upon whom the notice was served, and shall be recoverable in the manner hereinafter provided.

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[SARGENT, C. J.—The erection of the bench is a recurring nuisance, and, therefore, the plea of limitation cannot arise.]

We submit that s. 28 of the Limitation Act (XV of 1877), is applicable to the case. Further, the defendants gave us notice to remove the bench in dispute. That notice was given under s. 48 of the District Municipal Act (Bom. Act VI of 1873), which applies to obstructions that have come into existence after the passing of the Act. The bench has been standing, as we alleged in our written statement, since the time of our ancestors, and both the Courts have found that the obstruction existed before the Act came into operation; therefore, that section is not applicable to the present case. The bench cannot be said to be [215] a nuisance, because it is at one side of the road, and it does not cause any obstruction to the passers by.

Wadia, in reply:—The objection as to the illegality of the notice is taken for the first time at the hearing of the second appeal. It was enough for our purpose that we informed the plaintiff to remove the bench. See s. 42, cl. 1 of the District Municipal Act.

JUDGMENT.

SARGENT, C. J.—A Municipality has power under the Act (Bombay Act VI of 1873) to have all obstructions in a public street removed, whether the obstructions were placed there lawfully or not. The only distinction which the Act draws is between obstructions erected or placed before the Act came into operation and those which have been erected or placed since it came into operation. As to the former, it is provided by s. 42, cl. 1, that notice should be given, and if legally placed on the street, that compensation should be awarded for their removal. In the event of such notice not being complied with, then under s. 75 the Municipality can remove them. As to the latter, the Municipality can remove them under s. 48 even without giving notice.

The Courts have found that the obstruction in question existed before the Act came into operation. The plaintiff received notice to remove the obstruction under s. 48, which was, strictly speaking, the wrong section, as the obstruction had existed before the Act, but no objection was taken to this informality in the notice. It was said, however, that the obstruction in question was not an obstruction to "the safe and convenient passage" along the alleged street. The obstruction in this case is a seat permanently fixed into the street, and although it may be close to the verandah of the plaintiff's house, it was none the less in the street, over the whole of which, as pointed out by Sir G. Jessell in *Bagshaw* v. *Buxton Local Board of Health* (1), the public would have the right of passing if it is a public street. The remarks of this Court in *E. C. K. Ollivant* v. *Rahimtula Nur Mahomed* (2) show that the circumstance of the obstruction being near to the plaintiff's house cannot affect the question, the public having the [216] right to go as near as they like to it. Moreover, in the dark, it is plain, that such an obstruction would be distinctly unsafe. We may also add that it is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their powers"—*Duke of Bedford* v. *Dawson* (3).

The only question, therefore, remaining for decision was, whether the land in question formed part of a public street. As to this the lower Courts have found that it did not. It was, however, objected in the

(1) 1 Ch. Div. 220. (2) 12 B. 474 (479). (3) L. R. 20 Eq. 353.

lower Court of appeal by the defendants, and that objection has been renewed before us, that they did not know that it was disputed that it was a public street as alleged in their written statement, and that they were taken by surprise. The second issue raised by the first Court certainly does not in the vernacular distinctly raise this question, and we think, therefore, that we ought not to accept the finding of the lower Courts without giving the defendants an opportunity of giving evidence. We must, therefore, send back the case to the lower appellate Court for a finding on the following issue:—

Whether the land in question forms part of a public street vested in the Municipality ?

The finding to be sent to this Court in three months. Both parties to be allowed to give fresh evidence.

Issue sent back.

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19 B. 216.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

MATHURADAS (*Original Defendant No.* 1), *Appellant v.* PANHALAL (*Original Plaintiff*), *Respondent.**

[19th February, 1894.]

Civil Procedure Code (Act XIV of 1882), *ss.* 312 *and* 320—*Transfer of execution of a decree to Collector—Court sale—Collector's order setting aside the sale—Suit by auction purchaser to set aside the Collector's order and to have his purchase confirmed.*

Certain property was sold in execution of a decree by the Collector, to whom the execution had been transferred under s. 320 of the Code of Civil Procedure [217] (Act XIV of 1882). The Collector set aside the sale before the date of confirmation, on the sole ground that the judgment-debtor had, subsequent to the sale, made full payment of the sum decreed. Thereupon the auction-purchaser filed a suit for a declaration that the sale had been improperly set aside, and for a confirmation of the sale.

Held, that the suit would lie. Reading s. 312 with s. 311 of the Code of Civil Procedure, the suit was not barred under the last clause of s. 312, nor under s. 588, cl. 16.

Held, also, that the rules framed by Government under s. 320 of the Code only restricted the powers of the Court to interfere with the procedure of the execution of decrees transferred to the Collector. They did not come in the way of a party to bring a civil suit to establish his purchase.

Held, also, that the Collector had no power under s. 311 of the Code to set aside the sale and receive payment from the judgment-debtor.

[R., 11 C.P.L.R. 33.]

SECOND appeal from the decision of S. Hammick, District Judge of Ahmednagar, in appeal No. 190 of 1891 confirming the decision of Rao Bahadur Ganpatrao A. Mankar, Subordinate Judge of the First Class, in suit No. 294 of 1891.

On the 29th October, 1890, the property in dispute was sold in execution of a decree by the Collector to whom the execution had been transferred under s. 320 of the Code of Civil Procedure (Act XIV of 1882).

* Second Appeal, No. 678 of 1892.

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On the 7th November, 1890, the judgment-debtor applied to the Collector not to confirm the sale, on the ground that he was ready to satisfy the decree.

The judgment-debtor paid up the amount of the decree, and on that ground the Collector set aside the decree and ordered the purchase-money to be restored to the auction-purchaser on the 14th December, 1890.

Thereupon the auction-purchaser filed the present suit to have the auction sale of the 29th October, 1890, confirmed, alleging that there was no irregularity in publishing or conducting the sale, and that the Collector had no authority to set aside the sale.

Defendant No. 1, the judgment-debtor, did not appear to contest the claim.

Defendant No. 2, the judgment-creditor at whose instance the property was put up to sale, pleaded that he was unnecessarily made a party to the suit, and that the sale was not set aside at his instance.

[218] The Court of first instance held that the judgment-debtor's paying the decretal amount after the auction sale was not a sufficient reason for setting aside the sale; that there was no irregularity in publishing or conducting the sale, and that, therefore, it could not be set aside under s. 311 of the Code of Civil Procedure. The Court further held, on the authority of *Azim-ud-din* v. *Baldeo* (1) and *Bandi Bibi* v. *Kalka*(2), that the suit was maintainable.

The Court, therefore, passed a decree confirming the auction-sale at which the plaintiff had purchased the property in dispute.

This decree was affirmed, on appeal, by the District Judge.

From this decision the defendant No. 1 preferred a second appeal to the High Court.

Daji Abaji Khare, for appellant:—The suit is not maintainable. It is barred under the last clause of s. 312 of the Code of Civil Procedure. The decree in execution of which the property was sold, was sent to the Collector for execution under s. 320 of the Code. The rules framed by the Local Government under that section confer upon the Collector the powers of the Court under s. 312. It is competent, therefore, for the Collector either to confirm or refuse to confirm an auction sale. The Court has no jurisdiction to interfere with his orders passed under s. 312. If his order was wrong or illegal, it was open to the aggrieved party to appeal against that order under s. 588, cl. (16). It is not open to him to file a regular suit to set aside the order. Referring to ss. 311, 312 and 313, they contemplate an application to be made to the Court, and not a suit, as the proper procedure to adopt in a case like this. Refers to *Mohendro Narain* v. *Gopal* (3), *Viraraghava* v. *Venkatacharyar*(4), *Modun Mohun* v. *Boroda Soondari* (5).

Ganasham Nilkanth, for respondent:—Section 312 should be read with s. 311 of the Code of Civil Procedure. When so read, they refer to applications either by a decree-holder [219] or by a judgment-debtor to set aside a Court sale, and not to an application by an auction-purchaser. The last clause of s. 312 does not, therefore, apply. And there is nothing in the Code which bars a suit like the present. That such a suit can lie, see *Azim-ud-din* v. *Baldeo*(1); *Bandi Bibi* v. *Kalka*(2). Nor is the suit barred by any of the rules framed by Government under s. 320 of the Code of Civil Procedure. Those rules only restrict the jurisdiction of the Court

(1) 3 A. 554.
(2) 9 A. 602.
(3) 17 C. 769.
(4) 5 M. 217.
(5) 8 C. L. R. 261.

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to interfere with the procedure adopted by the Collector in executing the decree. They do not prevent the Court from entertaining a suit like the present.

JUDGMENT.

RANADE, J.—In this case plaintiff brought his suit to have it declared that the auction-sale at which he had bought certain property was improperly set aside by the Collector, to whom the execution had been transferred by the Civil Court under ss. 320—326 of the Code, and to have his auction-purchase confirmed. The suit was brought against the original judgment-debtor, who did not appear to defend the suit, and the judgment-creditor who appeared, urged that he had received the money due to him from the Collector. The Collector set aside the sale, before the date of confirmation, solely on the ground that the judgment-debtor had made full payment of the sum decreed.

It was contended on plaintiff's behalf that the Collector had no power under s. 311 to set aside the sale, and to receive payment from the judgment-debtor. This contention was upheld by both the lower Courts. In second appeal, the appellant's pleader urged before us the objection that plaintiff's suit was not maintainable, and that plaintiff's remedy was by an application to the lower Court.

On a careful consideration of ss. 311—316, and of the authorities cited on both sides, we feel satisfied that the suit was maintainable in the circumstances of the present case. Section 311 contemplates applications by the decree-holder or by a person whose property has been sold on the ground of irregularity, while s. 313 only permits the purchaser so to apply when the judgment-debtor is found to have no saleable interest **[220]** in the property sold. With s. 311, s. 312 must be read, and when so read the last clause of s. 312 creates no bar to the suit, neither does s. 588, cl. 16. See *Azim-ud-din* v. *Baldeo* (1).

It was further contended by Mr. Khare for the appellant that, as the execution in this case was transferred to the Collector, that officer had, under the rules framed by Government and s. 320 of the Code, full powers, and Civil Court had no jurisdiction to interfere in the matter. This restriction obviously has reference to the powers of the Court to interfere with the procedure of the execution of decrees transferred to the Collector. It could not come in the way of the right of the party to bring a civil suit to establish his purchase. The Allahabad High Court has expressly held that such a right exists even in the case of irregularities in the conduct of sales ordered by civil Courts. See *Azim-ud-din* v. *Baldeo*(1) and *Bandi Bibi* v. *Kalka*(2). This Court has also held in *Bai Amthi* v. *Madhav Manor*(3) that the Collector's procedure in re-selling property already sold by him should be treated as a nullity. Section 325 permits a resale when the Collector buys in the property, but not where there has been a formal sale. If the right exists, it is open under s. 311, Civil Procedure Code, to the plaintiff to assert it in a Civil suit, unless it can be shown that it has been expressly taken away.

We accordingly confirm the decree of the Courts below and dismiss the appeal with costs.

Decree confirmed.

(1) 8 A. 554. (2) 9 A. 602. (3) P. J. (1891), 81=15 B. 694.

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ORIGINAL CIVIL.

19 B. 221.

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[221] ORIGINAL CIVIL.

Before Mr. Justice Candy.

BECHAR AKHA AND OTHERS (*Plaintiffs*) *v.* P. DE CRUZ AND OTHERS (*Defendants*).* [18th and 22nd September, 1894.]

Will—Construction—Gift of life interest or corpus—Discretion of executors to hand over corpus—Costs.

Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died in April, 1884, leaving three sons, Michael, Silveiro, and Joaquim (defendant No. 3), and two daughters, Rose and Caroline. By her will she directed that her daughter Rose should enjoy the rents and profits of certain immoveable property for her life, and that after her death the said property should be sold, and the sale-proceeds (after payment of two legacies thereout) be divided equally between her two sons Silveiro and Joaquim (defendant No. 3). She further, however, directed that Joaquim's share of such proceeds should be held in trust by her executors and invested in Government securities, the interest of which should be applied to Joaquim's maintenance, and that in case Joaquim should die leaving a widow or issue, his share should go to them as he should devise or bequeath. The will then continued:—"Should my said son Joaquim Amador Bocarro reform himself, and shake off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (*c*) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

Silveiro died in 1885, unmarried and intestate, leaving his two brothers, Michael and Joaquim, and his two sisters, Rose and Caroline, him surviving. Michael died in 1889, leaving a widow and children.

In 1891 Joaquim (defendant No. 3) mortgaged all his interest under the said will to the plaintiffs to secure a loan of Rs. 6,100. In 1893 Rose died, and in 1894 Caroline died.

Subsequently the executors were proceeding to sell the property mentioned in the will when the plaintiffs filed this suit praying for a declaration that they had a valid charge upon Joaquim's interest therein, and that his interest should be ascertained and declared, and he himself ordered to pay the amount of their claim; that the property should be sold and their claim paid out of the funds; that the executors should be restrained from selling, save subject to their (plaintiffs') rights, &c.

The plaintiffs and Joaquim contended that he (Joaquim) in the events that had happened was entitled to the whole of the proceeds of the property absolutely and that the gift in the sixth clause of the will could not be cut down by the provisions of the seventh clause.

[222] *Held*:—(1) That the defendant Joaquim had no interest in the house mentioned in the will. He was only entitled to a share of the proceeds after it had been sold.

(2) That his interest in his share of such proceeds was merely a life interest, with power to appoint to his widow or issue, and that he was not entitled to be paid, the *corpus* of such share; but that the executors might under certain circumstances and at their discretion hand over to him the said *corpus*.

(3) That neither the plaintiffs nor Joaquim could interfere in the sale of the said property.

(4) That the plaintiffs had a valid charge upon Joaquim's interest in the sale-proceeds of the said property to the extent of their mortgage.

(5) That Joaquim's interest was (after deducting the legacies given by the sixth clause) an absolute interest in one-fourth share of Silveiro's moiety and a life interest in his (Joaquim's) moiety subject to the contingency of the executors in their discretion handing over the *corpus* of the share or part thereof, for his

* Suit No. 57 of 1894.

absolute use, in which event the plaintiffs had the right to the same so far as their debt was unsatisfied.

(6) As to costs, the plaintiffs and third defendant Joaquim should pay their own costs; that the executors and defendants Nos. 4 to 12 should have their costs paid out of Joaquim's share in Silveiro's moiety of the sale-proceeds, and, if that fund were not sufficient to pay such costs, the plaintiffs and the third defendant Joaquim to pay the deficiency.

[Confirmed on appeal, 19 B. 770.]

ONE Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died on the 19th April, 1884, leaving three sons (Michael, Silveiro Joseph, and the third defendant Joaquim), and two daughters, Rose Maria and Caroline.

Anna Maria Bocarro, at the time of her death, possessed both moveable and immoveable property. She left a will dated 12th March, 1884, and a codicil of the same date, and the first and second defendants were the executors. With reference to certain immoveable property belonging to the testatrix the will contained the following directions:—

4. "If my daughter Rose Maria Bocarro should survive me, I direct that so long as she lives, my large house No. 57 and such of my smaller buildings Nos. 55, 56 and 71 as may not be sold should be rented, and the rents which may be received therefrom should, after deducting such sums as may be necessary for the payment of all kinds of tax on property and for whitewashing and repairing the said houses, be applied for the maintenance of my aforesaid daughter Rose Maria Bocarro."

5. "But should my said daughter Rose Maria Bocarro predecease me, or should she die after me, then I direct that my executors herein named should sell within a reasonable time, either privately or by public auction, my large house No. 57 and such of my smaller houses Nos. 55, 56 and 71 which may not be sold, preference being given to any of my sons and heirs hereafter named who may desire to purchase any or all of the said houses."

[223] 6. "After the houses, referred to in the preceding paragraph 5, are sold, I direct that out of the proceeds of the sale (*a*) a sum of Rs. 500 (five hundred) should be made over by my executors to my daughter-in-law Anna Joaquina Bocarro, wife of my eldest son Michael Bocarro, to be assigned by her in such proportion and in such manner as she may deem proper for the benefit of her four daughters, namely, Anna L. Bocarro, Cecilia Bocarro, Rosalind Bocarro and Catherine Bocarro; (*b*) that a sum of Rs. 1,000 (one thousand) should be given to my daughter Caroline Britto, wife of Julius Lucas Britto, for her own and absolute use; and (*c*) that the remainder should be divided among my two sons Joaquim Amador Bocarro and Silveiro Joseph Bocarro in equal proportions."

7. "I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (*c*) of paragraph six above should be held in trust by my executors hereinafter named and converted by them into Government securities, the interest accruing wherefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son Joaquim Amador Bocarro die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim Amador Bocarro reform himself, and shake off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he

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may be entitled to under (c) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

The testatrix died, as above mentioned, on the 19th April, 1884.

Silveiro died in 1885, unmarried and intestate.

Michael died in June, 1889, leaving a widow and seven children (defendants Nos. 5 to 12).

Rose Maria died in June, 1893.

Caroline died on the 19th February, 1894, leaving a will of that date, of which defendant No. 4 was executor.

On the 12th February, 1891, (while Rose Maria was still living and in receipt of the rents and profits of the property mentioned in the above clauses of the will) the third defendant Joaquim, the son of the testatrix, executed a mortgage to the plaintiffs for Rs. 6,100. The property assigned by him as security for the said sum was as follows:—

"All that the right, title, interest, benefit, reversion, claim and demand of him the said defendant into and upon all and singular the estate, effects and property left by the said Anna Maria Bocarro, or any part thereof, to which the said defendant was then or might thereafter be entitled under and by virtue of the directions, provisions and bequests contained in the said will of the said Anna Maria Bocarro dated the 12th [224] March, 1884, and the said codicil thereto or to which the said defendant was then or might thereafter be entitled to as one of the heirs of the said Anna Maria Bocarro, deceased, under the said will or codicil thereto or otherwise howsoever. And the stocks, funds and securities for the time being representing the same and the dividends, interest and annual produce thereof, and all the right, title, interest, claim and demand whatsoever of the said defendant into and upon the same. And all that piece or parcel of land, &c." (Here followed the assignment of the house.)

The executors (defendants Nos. 1 and 2) subsequently proposed to sell the said houses and informed the third defendant (Joaquim) of their intention. The plaintiffs (the mortgagees), however, hearing of the proposed sale wrote to the executors informing them of their charge on the third defendant's interest in the property, and stating that they would have no objection to join in a sale, provided that the amount due to them was paid out of the proceeds. The third defendant also wrote to the executors asking them to pay off the plaintiffs out of the proceeds. The executors replied that they knew nothing of the mortgage. Whereupon the plaintiffs filed this suit.

The plaint stated that the executors had advertised the properties for sale, and unless restrained would sell them, and distribute the proceeds without regard to the plaintiffs' claim. The plaintiffs, therefore, prayed (1) for a declaration that they had a valid charge upon the interest of the third defendant in the said properties; (2) that the third defendant's interest therein should be ascertained and declared; (3) that the third defendant should be ordered to pay the amount of their claim and costs, and in default of payment by a fixed date, the interest of the third defendant might be sold and the proceeds applied in satisfaction of their claim; (4) that the defendants should be restrained from selling the properties, save subject to the plaintiffs' right, or from parting with the proceeds of the property, if sold, until the plaintiffs' claim was satisfied; (5) that such of the defendants as contested the plaintiffs' claim should pay the costs of suit.

The executors (defendants Nos. 1 and 2) filed a written statement, submitting the construction of the will and the question as to the interest

taken by the third defendant to the determination of the Court. They alleged that the suit was unnecessary, and that the plaintiffs had no right to restrain the sale.

[225] The third defendant (Joaquim) contended that under the will, and in the events that had happened, he was absolutely entitled to the whole of the proceeds of the property after satisfying the plaintiffs' claim, and he asked for a declaration to that effect.

The fourth defendant, who was the executor of Caroline, (daughter of the testatrix) who died in February, 1894, contended that on the death of Silveiro in March, 1885, his surviving brothers and sisters became entitled to his estate, and that he, as Caroline's executor, was entitled to her share. He also claimed an interest in the share intended for Silverio under cl. 6. He submitted that the third defendant should pay the costs of suit and not the estate.

Defendants Nos. 5 to 12 also filed a written statement setting forth their claim.

Lang (Advocate-General) and *Inverarity*, for the plaintiffs.

Kirkpatrick and *Lowndes*, for defendants No. 1 and 2.

Scott and *Raikes*, for defendant No. 3.

Melsheimer and *Robertson*, for other defendants.

The following authorities were cited:—*Mills* v. *Johnston* (1); *Brook* v. *Brook* (2); *Green* v. *Spicer* (3); *Gough* v. *Bult* (4); *Younghusband* v. *Gisborne* (5); Theobald on Wills (3rd Ed.), 353; Indian Succession Act (X of 1865), s. 106.

JUDGMENT.

22*nd September*, 1894. CANDY, J.—The decision in this case depends upon the construction of the will of Anna Maria Bocarro, who died on 19th April, 1884, leaving (1) a son Michael, who died in 1889 and who is represented in this suit by his widow and children defendants Nos. 5 to 12; (2) a son Silveiro, who died unmarried and intestate in 1885; (3) a son Joaquim, who is third defendant in this suit; (4) a daughter Rose Maria, who died unmarried in 1893 and is represented in this suit by the Administrator General; (5) a daughter Caroline, who died in February, 1894, and is represented in this suit by her husband (defendant No. 4), who has obtained probate of her will. Defendants Nos. 1 and 2 are executors of Anna Maria Bocarro's will.

[226] Plaintiffs are mortgagees of certain interest of Joaquim (the third defendant) under the said will. They ask for a declaration that they have a valid charge upon the interest of the third defendant in certain properties and the sale-proceeds thereof to the extent of Rs. 6,100 *plus* interest and costs, and that, in default of payment of such by third defendant, the properties may be sold and applied in satisfaction of such debt.

The plea of the defendants (except the third defendant, who supports the claim of his incumbrancers) is generally that the interest of the third defendant in the properties in question is of a very limited nature.

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(1) 42 W. R. 616. (2) 8 Sm. and Giff. 280. (3) 1 Russ. and Myln. 395.
(4) 16 Sim. 45. (5) 1 Coll. 400.

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The clauses of the will, which for the purpose of this suit it is necessary to consider, are paragraphs 4 to 7. They run as follows: (His Lordship read the clauses above set forth (*supra* p. 222) and continued:—)

Now it is admitted that the executors are taking steps to sell houses Nos. 57, 55 and 71; and the first question is, whether under the will Joaquim has any interest in those houses. The answer must be in the negative. The executors are directed by the will to sell the said houses on the death of Rose Maria. *After* the houses are sold, two legacies (Rs. 500 and Rs. 1,000) are to be paid out of the proceeds, and the 'remainder' is to be "divided among Joaquim and Silveiro in equal proportions." Joaquim's interest, therefore, is limited to a moiety of the sale-proceeds after payment of the two legacies.

It is asserted for the plaintiffs that Joaquim is entitled to the *corpus* of that money which belongs absolutely to him, and counsel contend that in the sixth paragraph of the will there is an absolute gift of the said moiety to Joaquim, with an attempt by the testatrix in the seventh paragraph to fetter the enjoyment of the said moiety, an attempt which on the authorities of certain cases the Court will not permit. I have perused the cases quoted by the learned counsel and also nearly all of the long list given in Theobald (3rd Ed.), p. 353; but it seems unnecessary to burden this judgment with my notes of the various and interesting points which arose in those cases, because **[227]** in the present case there are no express words of absolute gift; and to hold that the testatrix must have intended to make in any case an absolute gift to Joaquim of the *corpus* of the moiety of the sale-proceeds of the houses in question would be inconsistent with certain clear expressions in the will. She does not in the sixth paragraph direct the money to be paid over to Joaquim; she directs that the remainder should be divided among Joaquim and Silveiro in equal proportions. That direction simply prescribes the shares in which the two brothers are to enjoy the sale-proceeds. Having prescribed the method of division, testatrix goes on in the seventh paragraph to prescribe the interest which Joaquim was to enjoy in his "share." It was to be a life interest, with power to appoint to his widow or issue. And then follows a direction empowering the executors in the exercise of their discretion under certain circumstances to give the whole or part of the *corpus* of the moiety of the sale-proceeds to Joaquim for his absolute use. There are only two ways in which those directions can be read. Either testatrix meant to say:—"I direct my executors to invest Joaquim's share of the sale-proceeds and pay him the interest, with power, under certain circumstances, to give him for his absolute use the whole or part of the *corpus*, and on his death to pay the *corpus* (or such part as shall not have been given over to Joaquim for his absolute use) to Joaquim's widow or issue according as he shall have so appointed." That seems good sense. Or testatrix meant to say:—"I give to Joaquim absolutely the moiety of the sale-proceeds. And I further direct that under certain circumstances the executors may give to him for his absolute use the whole or part of the said moiety which I have already given him absolutely." That hardly seems sense.

There are two and apparently only two arguments which can be raised in favour of the latter construction:—(1) Delete the seventh paragraph of the will, and there can be no doubt that both Silveiro and Joaquim took an absolute interest in the *corpus* of their moieties of the remainder of the sale-proceeds. Silveiro is not mentioned in the will except in the sixth paragraph. There is no doubt that under s. 106 of the Succession Act of 1865 there was vested in Silveiro on the death **[228]** of

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testatrix a right to receive at once the moiety of the remainder of the sale-proceeds which would arise on the death of Rose. That vested right passed on Silveiro's death to his representatives, and Joaquim as one of these representatives will be entitled to receive his share of Silveiro's moiety. But, it is contended, Joaquim's "share" is given in the same words as Silveiro's; therefore there is as much an absolute gift of the *corpus* in the one case as in the other. The answer to that argument is that no doubt, if the seventh paragraph is deleted, the fund will be rightly taken as absolutely bequeathed to both sons. But, as was said by Lord Cottenham in *Lassence* v. *Tierney* (1), "the intention that the gift should be absolute as between the legatee and the estate is, as in all cases of construction, to be collected from the will and not from there being words which standing alone would constitute an absolute gift." Here, as shown above, the only way in which to construe with sense the sixth and seventh paragraphs together is to suppose that testatrix gave a life interest in the fund to Joaquim, with power to the executors under certain circumstances to hand over the *corpus* to Joaquim for his absolute use.

(2) The other argument is that, if testatrix did not intend to give the *corpus* of the fund absolutely to Joaquim, then there is no gift over, and an intestacy as to this part of the estate may ensue. a contingency which the testatrix could not have comtemplated. If, for instance, Joaquim died to-morrow without having appointed to his widow or issue, it is said that his share in this fund would revert to Anna Maria Bocarro's estate; and under these circumstances the Court must incline to the view that the testatrix intended to bequeath Joaquim's share absolutely to him. The answer to that argument is that the fact that Joaquim's share may fall back into the estate of the testatrix, and that the testatrix may not have contemplated such an event, is not enough to outweigh the clear words of the will. And, indeed, the argument assumes what is not shown to be a fact. Testatrix may well have hoped, and contemplated, that the executors would be able under the certain circumstances specified to hand over to Joaquim his share for his absolute use. It is, moreover, **[229]** premature to say that there was no gift over. I understand that Joaquim has now a wife and children, though he had not in 1884. They are not parties to the suit, but it is possible that, if Joaquim died without exercising his power of appointment, the widow and children may contend that the fund passes to them under the will, such being the intention of the testatrix. I do not say that they would succeed in such a contention. Possibly the power given to Joaquim to appoint is not imperative, and there is no expression sufficiently clear and strong to amount to a trust in favour of Joaquim's widow and children—*Brook* v. *Brook* (2). And in truth, if the case be regarded still further in this light, it will be seen that the contentions of the plaintiffs and third defendant are altogether premature. For the case falls under s. 126, and not under s. 125 of the Succession Act (X of 1865). Testatrix did not simply bequeath Joaquim's share to him for his maintenance and there stop, but she bequeathed him his share and directed that the mode of enjoyment by the legatee should be restricted to a life interest, with power to the executors under certain circumstances to give him the *corpus* for his absolute use and with power to Joaquim to appoint to his widow or issue. If Joaquim's wife and issue predecease him, and the executors have not exercised their power, then it is quite possible that Joaquim's

(1) 1 M. and G. 551 (562).

(2) 3 Sm. and Giff. 280.

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representatives will on his death be entitled to the fund. But all this is premature. Admitting that Joaquim's share is a fund absolutely bequeathed so as to sever it from the estate of testatrix, the mode of enjoyment directed by the will has not failed. Joaquim is still alive. The interest can be paid to him; the executors can in the exercise of their discretion pay him the *corpus*. Nothing has yet happened which makes the fund belong to Joaquim as if the will had contained no such directions as are found in the seventh paragraph of the will.

For these reasons I find—

On the first issue that third defendant is not now absolutely entitled to the *corpus* of a half share in the sale-proceeds, but is at present entitled to a life interest in the said share, after **[230]** deduction of the legacies referred to in the 5th paragraph of the will.

On the second issue that on the death of Silveiro his share became vested in his representatives, and third defendant as such is entitled to the one-fourth of such share.

On the third issue that plaintiffs have no right to restrain the defendants Nos. 1 and 2 from selling the properties. They have simply a charge on Joaquim's share in the sale-proceeds. I notice that the plaintiffs' mortgage-deed purports to cover certain premises, but it is impossible from the description to say whether these are the properties which are now being sold, and which are referred to in sch. (C) attached to the plaint. The prayer of the plaint is concerned with these only; and regarding them there is no dispute.

On the fourth issue that the plaintiffs are so entitled. That point has never been disputed.

I decline to find on the issues raised by the learned counsel at the last hearing, and numbered by me 6, 7 and 8. They do not arise from the pleadings.

The relief, therefore, which the plaintiffs are entitled to is—

Declare that plaintiffs have a valid charge upon the interest of the third defendant in the sale-proceeds of the properties in question to the extent of Rs. 6,100 *plus* interest at 12 per cent. per annum from 12th February, 1891.

Declare that interest to be, after deducting the legacies of Rs. 500 and Rs. 1,000, one-fourth share of Silveiro's moiety; to this Joaquim is absolutely entitled; also that interest includes a life interest in Joaquim's moiety of the said sale-proceeds, subject to the contingency of the executors in the exercise of their discretion under certain circumstances handing over to Joaquim the *corpus*, or part thereof, of the said share for his absolute use; in such event the plaintiffs will have the right to receive the same to such extent as their debt is unsatisfied.

Decree payment of the debt as shown above. I decline to order sale of Joaquim's interest in the houses. He has none, nor have his incumbrances, except so far that they and he can insist **[231]** on the executors selling within a reasonable time according to the directions in the will. But the executors have shown that they are complying with the directions of the will and selling within reasonable time.

Let the moneys, if realized, be handed over to defendants Nos. 1 and 2, and enjoin them to hold and pay such subject to the above directions.

I have carefully considered the question of costs.

I note that the third defendant in his letter of 15th January last to the executors claimed the whole of the proceeds of sale, both under the will of Mrs. Bocarro and also independent of such will. Similarly the

plaintiffs in their letter of 16th January alleged that the third defendant is the residuary legatee and heir of the testatrix and entitled to the properties in question both under the will and otherwise. They also claimed to join in any sale, a claim which is not well founded. The executors in their reply of 19th January speak of the third defendant having at the utmost a life interest in a part of the estate, but that evidently was with reference to Joaquim's share of the residue of the sale-proceeds, and was not intended to deny that Joaquim had an interest in Silveiro's share. This is made clear by the written statement of the executors. It is true that in a subsequent letter of 27th January the executors speak of being desirous of having the opinion of the Court as to whether Joaquim was entitled to the bulk of his share of the proceeds of sale, or only to the interest thereof, for his life, a question which, in my opinion, hardly admits of doubt. But in any case it was the plaintiffs and the third defendant who caused the litigation, and I see no reason why the executors should not have their costs taxed as between attorney and client out of the estate, that is, out of Joaquim's share in Silveiro's moiety of the residue of the sale-proceeds. And defendants Nos. 4 to 12 are entitled to their costs out of the same funds, for it would not be right that their shares in that moiety should be diminished owing to this litigation into which they were unwillingly brought. Let the plaintiffs and the third defendant bear their own costs. Let defendants Nos. 1 and 2 pay their own costs as directed above and the costs of **[232]** defendants Nos. 4 to 12 out of the fund, as just shown. Of course, if the fund just described is not sufficient to pay the costs of defendants Nos. 1 and 2 and of defendants Nos. 4 to 12, then plaintiffs and defendant No. 3 must pay the deficiency. Let the decree so direct.

Attorneys for plaintiffs :—Messrs. *Little. Smith & Co.*

Attorneys for defendants :—Messrs. *Bicknell & Co.* and Mr. *M. H. Khan.*

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INSOLVENCY JURISDICTION.

Before Mr. Justice Farran.

IN THE MATTER OF C. M. J. DONAGHUE, AN *Insolvent.*
[3rd October, 1894.]

Insolvency—Insolvent Act, Stat. 11 *and* 12 *Vict., C.* 21 *ss.* 7 *and* 27—*After-acquired property of insolvent—Salary—Pension—Personal earnings of insolvent.*

After-acquired property of an insolvent, whether it consists of salary, personal earnings or property of a different kind, is property which vests in the Official Assignee, but subject to the provision of s. 27 of the Indian Insolvent Act (1) as to salary and pension and subject to the unwritten law as to personal earnings

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(1) Statute 11 and 12 Vict., c. 21, ss. 7 and 27 (Indian Insolvent Act) :—

"And be it enacted, that upon the filing of such petition as is aforesaid, it shall be lawful for the said Court and the said Court is hereby authorized and required to order that all the real and personal estate and effects of such petitioner, whether within the territories within the limits of the charter of the East India Company, or without, except the wearing apparel, bedding and other such necessaries, of such petitioner and his family, not exceeding in the whole the value of Company's Rupees three hundred for each petitioner with his family, and all debts due to him, and all the future estate, right, title, interest and trust of the said petitioner in or to any real or personal estate or effects within or without the said territories, which such petitioner may purchase, or

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sufficient for the maintenance, according to his position in life, of the insolvent and his family. Accordingly the Official Assignee is not entitled to claim such salary or income except by means of an order obtained under s. 27 of the Act, nor such personal earnings at all unless and until in either case the insolvent has accumulated a margin beyond what has been required for his adequate support.

An attachment upon the salary of a railway servant ceases to be operative after he has filed his petition in insolvency, and should be withdrawn on notice being given of the making of the vesting order.

[Appr., 34 M. 183=7 Ind. Cas. 801=21 M.L.J. 78=8 M.L.T. 202; R., 13 C.P.L.R. 61; 10 Ind. Cas. 698=7 N.L.R. 19.]

THE insolvent, who was an engine-driver in the employment of the G. I. P. Railway Company, filed his petition in the Insolvent [233] Court in Bombay on the 28th September, 1893. Prior to that date a decree had been obtained against him in the Court of the Subordinate Judge at Bhusaval, and in execution of that decree half his salary had been attached under s. 266 of the Civil Procedure Code (Act XIV of 1882) and the money so attached was paid into the Court of Bhusaval.

The fact that insolvent had filed his petition in Bombay, and that the usual vesting order had been made, was duly reported to [234] the Court at Bhusaval, but the attachment was nevertheless continued, and half the insolvent's salary continued to be paid into that Court, which remitted the moneys so paid in to the Official Assignee at Bombay.

On the 13th June, 1894, the insolvents' petition came on for hearing before Farran, J.; and as the opposing creditors did not appear, the insolvent obtained his discharge. He thereupon applied to the Court that the moneys which had been remitted from Bhusaval to the Official Assignee, as above mentioned, should be paid over to him.

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[233] which may revert, descend, be devised or bequeathed, or come to him, and all debts growing due to him before the Court shall have made its order in the nature of a certificate as hereinafter mentioned, do vest in the Official Assignee for the time being of the said Court, and that all books, papers, deeds, and writings in any way relating to such petitioner's estate and effects in his possession, or under his custody or control, shall be deposited with such assignee, and such order shall be entered of record in the said Court, and such notice thereof shall be published as the said Court shall direct: and such order, when so made, shall by virtue of this Act relate back to and take effect from the filing of the said petition, and shall instantly, and without any conveyance or assignment, vest all the real or personal estate, effects and debts as aforesaid in the said Official Assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same for the purposes and in manner hereinafter mentioned: Provided always that in case, after the making of any such vesting order, the petition of any such petitioner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes. Provided also, that in case any such vesting order as aforesaid shall become null and void by the dismissal of such petition, all acts theretofore done by any assignee or other person acting under his authority, according to the provisions of this Act shall be good and valid, and no action or suit shall be commenced against any such assignee, nor against any person duly acting under his authority, except to recover any property of such petitioner detained after an order made by the said Court for the delivery thereof, and demand made thereupon; and until the appointment of an Official Assignee as hereinafter is directed, the common assignee of the Court shall stand and be in the place of the Official Assignee, and this present clause shall apply and have effect accordingly.

"27 And be it enacted, that if any such insolvent as aforesaid shall, at any time, before he shall obtain his discharge in the nature of a certificate as hereinafter mentioned, hold any public office, appointment or benefice, civil military or ecclesiastical, not saleable, or shall be in any situation or employment whatsoever in respect of which he shall receive any salary or emolument, or shall be in receipt of any pension, then it shall be lawful for the said Court to order the said insolvent to pay such proportion of his receipts therefrom to his assignee as the said Court shall think right; and all saleable offices, appointments or benefices shall vest by virtue of the vesting order as aforesaid in the Official Assignee, in trust for the creditors of such insolvent as aforesaid."

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The Court thereupon directed that notice should be given to the attaching creditor and to the opposing creditors calling upon them to show cause "why the moneys now in the hands of the Official Assignee to the credit of this estate, being deduction from the insolvent's salary earned by him after the date of his petition, should not be paid over to the said insolvent."

On the 5th September, 1894, the matter came again before the Court, but the parties did not appear. The Official Assignee, however, asked the Court to give its decision upon the application.

On the 3rd October, the Court delivered the following judgment :—

JUDGMENT.

FARRAN J.—The insolvent in this case upon receiving his discharge applied that certain moneys which were in the hands of the Official Assignee, the proceeds of his salary which had been attached, should be paid over to him. I directed notice of this application to be given to the attaching creditor, which was done. When the matter came before me on the 5th September, the parties did not appear, but the Official Assignee asked for my decision upon the application.

Previous to the insolvency the attaching creditor obtained a decree in the Court of the Subordinate Judge at Bhusaval, and in pursuance of it attached, under s. 266 of the Civil Procedure Code, half the salary of the insolvent, an engine-driver in the employment of the G. I. P. Railway Company. The insolvent filed his petition in this Court on the 28th of September, 1893, [235] when the usual vesting order, under s. 7 of the Indian Insolvent Act, was made. Notwithstanding this petition and vesting order (which were duly notified to the Subordinate Judge), the half-salary of the insolvent still continued to be recovered by attachment, and the Bhusaval Court caused the moneys so recovered to be remitted to the Official Assignee, and they are the subject of the present application.

The first question which arises for consideration is, whether the salary of a railway employe earned after his petition vests in the Official Assignee. It is a question of much difficulty, and I should have wished that it could have been fully argued before me. The words of s. 7 are very general, and it is difficult to see why they should not include the salary of the insolvent earned by and coming to him after his insolvency. In *Ex parte Huggins* (1), the salary and income of a bankrupt were treated as property vesting in his trustees under ss. 4, 15, and 17 of the Bankruptcy Act, 1869. The Court, in fact, decided that the income in that case, which was a pension, did so vest, and I cannot see that the definition of property in that English Act is more wide than are the comprehensive provisions of s. 7 of the Indian Act. In *Ex parte Benwell*(2), Brett, M.R., on the other hand, treated the salary of an insolvent as not vesting in his trustees under ss. 15 and 17, but only as property liable to be dealt with by the Court under s. 90, which correspond to s. 27 of our Act. It was not there necessary to decide the point, and the other Judges in appeal did not refer to it. In *Wadling* v. *Oliphant* (3), Archibald, J., says: "The general principle is that the property of the debtor passes to his assignees, and in order to divest it the case must be brought within some recognized exception. The exception relied upon here is that the money is due for the personal labour of the bankrupt. Now, the cases do show that there is a rule, the extent and

(1) 21 Ch. D. 85. (2) 14 Q. B. D. 301. (3) 1 Q. B. D. 145 151.

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limit of which is not exactly defined, by which the bankrupt, after the date of his bankruptcy, may in certain cases keep the [236] produce of his personal labour." These remarks were not directed to the case of salary earned by the bankrupt. In *Re Rogers*(1), Vaughan Williams, J., referring to the same subject, says: "It is said—and rightly said—that the personal earnings of a bankrupt do not pass to his trustee, at all events in cases where there is no margin shown after sufficient has been applied for the maintenance of the bankrupt."

There is not much difference in the practical result at which the Courts in England have arrived as to salary and personal earnings, but the mode in which it is arrived at is in most of the cases not defined. To my mind the most legal and logical way of treating the subject is that adopted in *Ex parte Huggins* (*supra*), *viz.*, to treat after-acquired property of an insolvent, whether it consists of salary, of personal earnings, or property of a different kind, as property all alike vesting in the Official Assignee, but subject to the provisions of s. 27 as to salary and pensions, and subject to the unwritten law as to personal earnings sufficient for the maintenance, according to his position in life, of the insolvent and his family, the result being that the Official Assignee is not entitled to claim such salary or income from the insolvent except by means of an order obtained under s. 27, nor such personal earnings at all unless and until in either case the insolvent has accumulated a margin beyond what has been required for his adequate support.

If this be the true way of regarding this rather obscure subject, it follows that after petition filed, and vesting order made, an attachment laid or continued upon the salary of a railway servant ceases to be operative and should be withdrawn, on the attaching creditor or the Court which issued the attachment, having official notice of the making of the vesting order and the title of the Official Assignee; and under this view of the law, I should be justified in directing the Official Assignee to restore the salary of the insolvent earned since the date of the vesting order to him. If this be not the correct mode of regarding the subject, and if the wide words of s. 7 are cut down, or qualified by the provisions of s. 27, and I feel diffident in acting upon [237] my view of the law as it has been come to without hearing arguments, then I have to consider whether the Court at Bhusaval was justified in continuing the attachment after schedule filed by the insolvent admitting the claim of the attaching creditor, or whether it ought not to have stayed all further proceedings under s. 49 of the Indian Insolvent Act.

Now no doubt the staying of proceedings under s. 49 is discretionary, and the Court, on proof to its satisfaction that the execution process which it is issuing is in respect of a debt or demand admitted in the schedule, is not bound to stay its hand; yet the provision that the party is to pay the costs incurred in the matter by the insolvent, if (after the party has notice that his debt or demand has been admitted in the insolvent's schedule) he continues his execution, indicates clearly that the insolvent is entitled *ex debito justitiæ* to such a stay unless the party satisfies the Court that execution should not for some particular reason be suspended. The same remarks apply to the continuing of a suit for money after notice. It is only in exceptional cases that the suit or execution should be allowed to proceed. Such would be suits for libel or slander, or other suits which

(1) L. R. (1894), 1 Q. B. 425 (429, 30).

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are brought for the purposes of vindicating the character of the party, or are of punitive nature.

It is of course impossible, and it would be improper for me to attempt to define the various classes of suits which may properly be continued after the insolvency of the debtor or the particular circumstances under which even suits for money may be prosecuted (the claim being admitted in the schedule) ; but it may safely, I think, be laid down that, under ordinary circumstances, an insolvent is entitled when sued for a sum of money which he has admitted in his schedule, to have the suit or execution proceedings upon it stayed upon proof of its being so admitted. This is now the general practice in the High Court, and is, in my opinion, the more correct practice, but some Judges think it advisable to pass a formal judgment before actually staying the proceedings.

In addition to the reasons I have stated, there is this further reason for not continuing an attachment upon salary [238] after vesting order, *viz.*, that the Insolvent Court is vested under s. 27 of its Act with the discretionary power of dealing with the salary of the insolvent, a power which it can no longer exercise if the half of such salary continues under attachment by the Civil Courts after petition. Such a clashing of jurisdictions cannot have been intended by the Legislature, and the discretion to deal with the insolvent's salary is manifestly intended to be entrusted to the Insolvent Court. Though I am now sitting as Commissioner in Insolvency, and have as such no power to interfere with the discretion of the Subordinate Judge, yet I think that, as the matter has been brought before me, I ought to express my opinion upon the subject, though I must decide that I have no jurisdiction on this latter ground to treat the attachment in question as otherwise than properly made. I understand, however, that since the matter was brought before me, the attachment in question has on appeal been set aside by the District Court, no doubt on grounds similar to those I have assigned. It will be better, therefore, that I make no order, except to allow the Official Assignee to remit the money to the Court of the Subordinate Judge, to be by him returned to the insolvent. As to the salary (if any) of the insolvent attached *before* the petition was filed, the question is different. The right to it lies between the attaching creditor and the Official Assignee. The case of *Gamble* v. *Bholagir* (1) seems conclusive as to the superior title of the attaching creditor to such salary if the attachment has been levied before vesting order, and is in execution of a decree, and not a mere attachment before judgment ; if not attached after decree, the Official Assignee is entitled for the benefit of the creditors in general.

(1) 2 B. H. C. R. 146.

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[239] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

MAHADU GANU (*Original Defendant No. 1*), *Appellant v.* BAYAJI SIDU (*Original Plaintiff*), *Respondent.**

[20th December, 1893.]

Hindu law—Adoption—Relinquishment by the adopted son in favour of his adoptive mother of his rights as adopted son—Release—Second adoption—Registration—Registration under the Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 56† and 60‡—General Registration Act (III of 1877).

The plaintiff was adopted in 1880 by Koina, the widow of one Ganu. In June 1885, he executed a document which recited that he and Koina had not been on amicable terms, and that his adoption had consequently been cancelled, and that she had adopted another son (defendant No. 1) to whom she had given all rights of heirship, and declared that in consideration of Rs. 200 paid by Koina he delivered back to her the rights which he had obtained by virtue of his adoption and heirship. This document was not registered under the General Registration Act (III of 1877), but was registered under s 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), which section applied to the district in which the transaction took place. Koina died in October, 1885, and the plaintiff brought this suit, as adopted son, to recover the property of Ganu. The first defendant, who had been adopted by Koina subsequently to the plaintiff's adoption, contended that he had been validly adopted and that he was entitled to the property. He relied (*inter alia*) upon the document executed by plaintiff in June, 1885.

[240] *Held*, that the plaintiff could not renounce his status as adopted son, although he might give up his right of inheritance, and that whatever estate became vested in Koina by the release came to the plaintiff on her death, either as adopted son of Ganu or as heir of Koina.

Held, also, that the defendant's subsequent adoption was invalid, and that nothing would pass to him by force of such adoption.

It was contended that the release in question was not admissible in evidence, not having been registered under the General Registration Act (III of 1877).

Held, that the document was admissible. It was a conveyance within s. 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and the law in force as to its registration was contained in ss. 56 and 60 of that Act.

[D., 3 P.R. 1904 = 43 P.L.R. 1904.]

THIS was a second appeal from the decision of J. W. Walker, District Judge of Satara.

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* Second Appeal, No. 277 of 1892.

† Section 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

56. No instrument which purports to create, modify, transfer, evidence or extinguish an obligation for the payment of money or a charge upon any property, or to be a conveyance or lease, and which is executed after this Act comes into force by an agriculturist residing in any local area for which a village registrar has been appointed, shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon by any such person, or by any public officer, unless such instrument is written by, or under the superintendence of, and is attested by, a village registrar:

Provided that nothing herein contained shall prevent the admission of any instrument in evidence in any criminal proceeding, or apply to any instrument which is executed by an agriculturist merely as a security, or to any instrument required by s. 17 of the Registration Act (1877) to be registered under that Act.

‡ 60. Every instrument executed and registered in accordance with the foregoing provisions shall be deemed to have been duly registered under the provisions of the Indian Registration Act, 1877; and no instrument which ought to have been executed before a village registrar, but has been otherwise executed, shall be registered by any officer acting under the said Act, or in any public office, or shall be authenticated by any public officer.

The plaintiff alleged that he was the adopted son of Ganu bin Sadu, and he brought this suit to recover certain property that had belonged to his adoptive brother. He alleged that he had been adopted by Ganu's widow Koina on the 16th September, 1880; that she had executed to him a deed of adoption dated the 20th September, 1880; that owing to disagreements he had lived apart from her and allowed her to remain in possession of the property; that she died on the 2nd October, 1885, and that while he was absent from the village, Sonu, the natural father of the first defendant, took possession of the property, falsely alleging that his son Mahadu (defendant No. 1) had been adopted by Koina.

The first defendant Mahadu, a minor represented by his natural father Sonu as guardian, denied plaintiff's adoption and set up his own. He further alleged (*inter alia*) that Koina acted as his guardian and administratrix under a certificate from the District Court, and that after her death the certificate was renewed in the name of his father and present guardian Sonu; that plaintiff had never had possession of the property in dispute, and had on the 16th June, 1885, in consideration of Rs. 200 paid to him by Koina, executed a release and conveyance to her of all his rights as adopted son. The other defendants supported the first defendant's case. The following is a translation of the release referred to; it had been registered by a village registrar under s. 57 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), but had **[241]** not been registered under the General Registration Act (XV of 1877):—

"Agreement dated Shake 1807, cyclical year named Parthiv, Jeshta Shuddha 11th, passed to Koina kom Ganuji bin Sadu Patil Salukhe, occupation agriculturist, residing at Koregaon, taluka Satara, agreement passed by Bayaji bin Siduji Salukhe, occupation agriculturist, residing at Boregaum in taluka aforesaid, to the effect as follows:—On 16th September, 1880, you took me in adoption and we have not been on amicable terms; consequently you do not give me the immoveable and moveable property in your possession, and thinking that I have not acted according to your wishes you have cancelled my adoption, and have adopted another boy, son of Sonu Santaji. You have performed his adoption, have given him all rights of heirship, and have obtained a certificate of heirship in his name. In reference to this I do not consider it proper that there should be further disputes between us and that we both of us should be put to the difficulties of expense; therefore, I have received to-day rupees two hundred in cash from you and have delivered back to you the right which I had obtained by virtue of my adoption and heirship. I have nothing further to say. I have returned to you the deed of adoption you had executed to me. I have received the said sum of rupees two hundred in cash. To this effect I have given you in writing, dated 16th June, 1885.

"Endorsement by the village registrar appointed under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879)."

The Subordinate Judge found that the plaintiff's adoption was proved, and that the plaintiff's adoption being prior in date, the subsequent adoption of the first defendant was invalid; that the release passed by plaintiff to Koina, relinquishing all his rights as adopted son for Rs. 200, being unregistered was inadmissible in evidence under s. 17 of the Registration Act (III of 1877), and that its registration by a village registrar under s. 57 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) was improper and insufficient, inasmuch as it did not purport to create, transfer or extinguish an obligation for the payment of money or a charge on

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any property, nor was it a conveyance or lease falling under any of the kinds enumerated in s. 56 of the Act.

He, therefore, allowed the plaintiff's claim, except as to certain portions of the property in question. Plaintiff and the first defendant preferred cross appeals. The First Class Subordinate Judge with appellate powers (Rao Bahadur N. G. Phadke) held that Sonu bin Santaji Salukhe, the natural father of the first defendant, ought to have been joined as a party defendant to the suit, and not merely in his representative capacity as the [242] guardian of his minor son. He therefore, reversed the decree and remanded the case under s. 562 of the Civil Procedure Code (Act XIV of 1882), directing that Sonu should be joined as a defendant and the case investigated and determined on the merits.

Against the order of remand the plaintiff appealed to the High Court, which passed the following order (see Printed Judgment for 1890, p. 100) :—

"The lower appellate Court's order of remand was not justified by s. 562 of the Code of Civil Procedure, as the Court of first instance did not dispose of the suit upon a preliminary point. It disposed of the suit on its merits, and its decision on none of the issues was reversed in appeal. The lower appellate Court remanded the case only because it considered that one Sonu should be joined as a defendant. But that was not a sufficient ground for an order of remand by a Court hearing a first appeal. The proper course in such case is referred to in *Ganesh Bhikaji* v. *Bhikaji Krishna* (I. L. R. 10 Bom., 398). The order of the lower appellate Court is reversed. The appeal should be heard according to law. Costs to be costs in the cause."

The case accordingly went back to the lower appellate Court which passed a decree for the plaintiff. The first defendant filed a second appeal.

Jardine (with *Mahadev Chimnaji Apte*), for the appellant (defendant No. 1):—The release of the 16th June, 1885, was admissible in evidence although not registered under the General Registration Act (III of 1877). It was sufficiently registered under ss. 56 and 57 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The district in which the transaction took place is a district to which Act XVII of 1879 applies, and the so-called release was a conveyance to Koina, by the plaintiff, of his rights as adopted son. The proviso now added to s. 56 was added by Act XXIII of 1886 and was not in force at the date of this document. That proviso has no retrospective operation—*Javanmal* v. *Muktabai* (1).

The lower Court held that even if the release was admissible it was inoperative, as the plaintiff could not relinquish his status as adopted son, and it relied upon *Balkrishna Trimbak* v. *Savitribai* (2). In the present case, however, the plaintiff, after conveying or releasing to Koina his rights in the property, by his conduct confirmed the subsequent adoption made by Koina [243] and the consequent devolution of property to the first defendant as her adopted son, and is now estopped from disputing the effect of the document.

Branson (with *V. K. Bhatavdekar*), for the respondent (plaintiff) :—The document in question is not a conveyance within the meaning of s. 56 of the Dekhan Agriculturists' Relief Act, and its registration under that section does not make it admissible: see Wharton's Law Lexicon. The document is a release, and could not be registered under s. 56, but ought to have been registered under the General Registration Act (III of 1877).

(1) 14 B. 516.

(2) 3 B. 54.

But even if admissible it is ineffectual. An adopted son cannot relinquish his status as adopted son—*Balkrishna Trimbak* v. *Savitribai* (1). It is by virtue of his status as adopted son that the plaintiff now claims the property as heir. Even assuming the document in question to be a conveyance, it was a conveyance to Koina and not to the first defendant. On Koina's death the plaintiff as her adopted son succeeds as her heir. The first defendant, his adoption being illegal, cannot succeed.

Mahadev Chimnaji Apte, in reply :—Assuming that the conveyance was a conveyance to Koina only, the property then became her property and she could dispose of it as she chose. Her adoption of the first defendant was, in effect, a declaration that it was to go to him after her death. She died in the belief that the first defendant would succeed her as her son. The plaintiff stood by and allowed her to get a certificate of guardianship of the first defendant as her adopted son. In all respects he confirmed the new arrangement made by her after his release. He is now estopped from disputing it. The transaction may be regarded as a family arrangement and should on that ground be upheld—*Aishabibi* v. *Khurshedbibi* (2), *Bhavanishankar* v. *Ganda* (3), *Stapilton* v. *Stapilton* (4). Even though the parties were under the erroneous impression as to the operation of the release, or as to the validity of the first defendant's adoption, the family arrangement would be good. A mistake on a point of law common to both parties **[244]** does not upset such an arrangement—*Pullen* v. *Ready* (5) ; *Stapilton* v. *Stapilton* (4) ; Snell's Equity (8th Ed.), p. 525 ; Indian Contract Act IX of 1872, s. 21.

Branson (with *V. K. Bhatavdekar*) :—The contention that the transaction was a family arrangement has been raised for the first time in reply. It was not urged at any previous stage of the suit. It should, therefore, not be allowed. The conveyance purports to have been made for a valuable consideration of Rs. 200. But the consideration came from the property which legally belonged to us. Therefore, there was no consideration for the conveyance.

JUDGMENT.

SARGENT, C.J.—Both the lower Courts have found that the plaintiff was adopted as the son of Ganu and that his adoption was prior to the first defendant's alleged adoption. It was contended, however, that plaintiff relinquished his rights as the adopted son. The District Judge held that the only evidence of such relinquishment was the release (Ex. 70) passed by plaintiff to Koina in 1885, but which, he held was not admissible for want of registration under the General Registration Act, having been only registered before a village registrar. But the law in force as to registration, when the document in question was executed, was provided by ss. 56 and 60 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and was applicable to all documents purporting to be a "conveyance," which this document undoubtedly is, if it passes all the plaintiff's rights as adopted son in the immoveable property of Ganu, and, as such, required to be registered.

This document was, therefore, validly registered, and the important question arises as to the construction and effect of it. After reciting that disputes had arisen between the plaintiff and Koina, and that she

(1) 3 B. 54. (2) P. J. (1892), 97. (3) P. J. (1892), 103.
(4) 2 White & Tudor, L. C. (6th Ed.), 920 (935). (5) 2 Atk 587.

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had superseded him and adopted the defendant, it states that he had agreed to accept Rs. 200 and to give into her possession whatever right he had acquired by adoption and heirship. An adopted son cannot renounce his status as an adopted son—see West and Buhler, pp. 938 and 1153, where it is stated, as the result of the authorities, that "the status created [245] by adoption cannot be given up by the adopted son," although "he may give up his right of inheritance." This document, therefore, can only operate as a release to Koina of all the plaintiff's rights as adopted son in Ganu's property, and would, we think, only reinstate her in the same position as she occupied before plaintiff was adopted by her; and as defendant's adoption was invalid, nothing would pass to him by force of such adoption.

It was contended, however, by Mr. Apte that Koina, after the plaintiff had passed the release, became a trustee of the property for the benefit of the defendant; but if Koina could possibly be regarded as a trustee for the defendant, it could not be otherwise than in his intended character of the adopted son of Ganu, which character he could not legally fill as before stated. The defendant No. 1, therefore, never acquired any title to the property.

On the other hand, whatever estate may have been vested in Koina by the release, plaintiff would be entitled to it on her death either as the adopted son of Ganu or as heir of Koina. We must, therefore, confirm the decree with costs.

Decree confirmed.

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19 B. 245.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BAI SOMI (*Original Opponent*), *Applicant v.* CHOKSHI ISHVARDAS MANGALDAS (*Original Applicant*), *Opponent.** [20th February, 1894.]

Surety—Surety for guardian of a minors' estate—Release af surety—Minors' Act (XX of 1864), s. 12—Contract Act (IX of 1872), s. 130.

Where a surety for the guardian of a minor's estate appointed under the Minors' Act (XX of 1864) applied to be released from his obligation as surety on account of the guardian's mal-administration of the estate,

Held, that the very object of requiring security was to guarantee the minor's estate against such misconduct or mismanagement on the part of the guardian; that the surety, therefore, could not be discharged, and that s. 130 of the Contract Act (IX of 1872) was not applicable to the case.

Quære—Whether the surety may not apply to the Court for protection against the guardian.

[F., 28 M. 161=14 M L.J. 482; Appl., 5 P.L.R. 1901; Appr. 5 A.L.J. 349 N.; R., 52 P.R. 1902; Expl. 29 C. 68=6 C.W.N. 7.]

[246] APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order of G. McCorkell, District Judge of Ahmedabad.

One Bai Somi, widow of Patel Harjivan Kevaldas, applied to the District Judge under the Minors' Act (XX of 1864) for a certificate of management of the property of her two minor sons. A certificate was granted to her on her furnishing two sureties for Rs. 28,600. Subsequently

* Application No. 169 of 1893 under the extraordinary jurisdiction.

one of them (Chokshi Ishvardas Mangaldas) applied to be released from his liability as surety, on the ground (*inter alia*) that Bai Somi declined to show the accounts and was mismanaging the property. A notice was served upon Bai Somi calling upon her to furnish a fresh surety. She did not do so, and in answer to the surety's application she contended that he could not withdraw or be released from his obligation as surety. The Judge held that under s. 130 of the Contract Act (IX of 1872) the surety could claim to be released, and that he (the Judge) could not refuse to discharge him.

Bai Somi then applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling upon the surety to show cause why the Judge's order should not be set aside.

Govardhanram M. Tripathi, for the applicant Bai Somi, in support of the rule:—The appointment of the manager and sureties was made under the Minors' Act (XX of 1864). The Judge was, therefore, wrong in applying the Contract Act (IX of 1872) to the case. The present Guardian and Wards' Act (VIII of 1890), which repealed Act XX of 1864, lays down that all the proceedings commenced or held under the repealed Act shall be considered to be proceedings under the new Act: see s. 2, cl. 2; and s. 48 enacts that orders passed under the Act are final. The Judge was, therefore, wrong in interfering with the order under which the sureties were appointed.

Markand M. Mehta, for the opponent Chokshi Ishvardas, showed cause:—We rely on *Bhat Harikrasan* v. *Ramchandra* (1). We were [247] unwilling to continue surety because the manager withheld accounts from us and was otherwise mismanaging the property.

[SARGENT, C.J.:—That was not a sufficient reason for discharging the surety. If the manager mismanages the property, the surety will be held liable.]

If a manager mismanages the property he is liable to be removed, and on his removal the sureties will be absolved from their liability, and that being so, we submit that the surety can be relieved on his own application.

JUDGMENT.

SARGENT, C.J.—Section 130 of the Contract Act, on which the District Court relies for its decision, is not applicable to a security by way of suretyship required by the Court and undertaken under s. 12 of Act XX of 1864 by the surety.

The original applicant asks to be released from his obligation as surety on account of the guardian's mal-administration of the minor's estate; but the very object of requiring such security was to guarantee the minor against such misconduct or mismanagement on the part of the guardian. The case is not like that in *Bhat Harikrasan* v. *Ramchandra* (1), where the Court held that the District Judge could cancel the suretyship in the interest of the minor. In holding this view of the surety's obligation, we do not say that the surety may not apply to the Court to take steps for his protection against the guardian.

We must, therefore, make the rule absolute and discharge the order with costs.

Rule made absolute.

(1) P. J. (1888), 288.

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FEB. 21.

APPEL-LATE CRIMINAL.

19 B. 247.

19 B. 247.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* VASTA CHELA AND OTHERS.*

[21st February, 1894.]

Penal Code (Act XLV of 1860), *ss.* 320 *and* 326—*Grievous hurt—Remaining in hospital for twenty days—Presumption.*

The accused were charged with causing grievous hurt. The Joint Sessions Judge, relying apparently on evidence that the injured person remained in a hospital for the space of twenty days, drew from that circumstance alone the inference [248] that he was during that period unable to follow his ordinary pursuits and convicted the accused under s. 326 of the Indian Penal Code (Act XLV of 1860).

Held, reversing the convictions, that in the absence of any evidence that the injured person was unable to follow his ordinary pursuits during the space of twenty days, such an inference could not legally be drawn.

Before a conviction can be passed for the offence of grievous hurt, one of the injuries defined in s. 320 of the Indian Penal Code must be strictly proved, and that the eighth clause is no exception to the general rule that a penal statute must be construed strictly.

Proof of being in a hospital for the space of twenty days cannot be taken as equivalent to proof of grievous hurt.

[F., U.B.R. (1897—1901) 96 (98).]

APPEAL from the convictions and sentences recorded by Dayaram Gidumal, Joint Sessions Judge of Ahmedabad, in the case of *Queen-Empress* v. *Vasta Chela and two others.*

The three accused were convicted by the Joint Sessions Judge of voluntarily causing grievous hurt with a sword (1) to one Shivbhai Chala, and (2) to his son Mathur under s. 326 of the Indian Penal Code.

The Joint Sessions Judge gave the following reasons for the conviction :—

"The medical evidence shows that Shivbhai's right thumb had been cut with a sharp weapon. It was hanging merely by the skin, and the hospital assistant separated it. He was under treatment in the hospital from 18th July, 1893, to 22nd August, 1893, and even after August 22nd he was treated as an out-door patient for a week. For over a month Shivbhai was not able to follow his ordinary pursuits.

"Mathur, a lad of fifteen or thereabouts, had (*a*) an incised wound on the head about 4 inches long and $\frac{1}{4}$ inch deep and $\frac{1}{4}$ inch broad ; (*b*) another incised wound, somewhat superficial, on the upper portions of his forehead, about $\frac{1}{2}$ an inch long and $\frac{1}{4}$ inch broad, which appeared to have been caused by the end of a sword ; and (*c*) a contused wound on his left elbow, about $\frac{3}{4}$ an inch long, $\frac{3}{4}$ of an inch broad and $\frac{1}{4}$ inch deep. *He was under treatment in the hospital from the* 18*th of July*, 1893, *to the* 28*th of August*, 1893.

"There can be thus no doubt that grievous hurt was caused to Shivbhai and Mathur."

Accused Nos. 1 and 3 were sentenced each to five years' rigorous imprisonment for causing grievous hurt to Mathur, and to transportation for life for causing grievous hurt to Shivbhai, the second sentence to commence after the expiry of the first.

* Criminal Appeal, No. 460 of 1893.

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Accused No. 2 was sentenced to two years' rigorous imprisonment for each offence, and ordered to execute after the expiry of [249] his sentences a security bond for Rs. 250, with two sureties for keeping the peace for three years under s. 106 of the Code of Criminal Procedure.

Against these convictions and sentences the accused appealed to the High Court.

Jardine (with him *Govardhanram M. Tripathi*), for appellants.

Rao Saheb *Vasudev Jagannath Kirtikar*, Government Pleader, for the Crown.

JUDGMENT.

JARDINE, J.—We confirm all the three convictions for the grievous hurt done to Shivbhai, but alter the two sentences of transportation for life passed on the prisoners Vasta and Vaja (Nos. 1 and 3) for the same to sentences of five years' rigorous imprisonment. We reduce the sentence of two years' rigorous imprisonment passed on the youthful prisoner Chuntha to one year for that offence.

We alter the three convictions for the injury done to Mathur. The Joint Sessions Judge has found this to be grievous hurt, relying apparently on the evidence that Mathur remained in a hospital for the space of twenty days. The inference which he apparently draws is that Mathur was during that period unable to follow his ordinary pursuits. In the absence of any evidence to that effect, we are of opinion that such an inference cannot legally be drawn. An injured man may be quite capable of following his ordinary pursuits long before twenty days are over, and yet for the sake of permanent recovery or greater ease or comfort be willing to remain as a convalescent in a hospital, especially if he is fed at the public expense. As we have observed that in several Courts under our superintendence, proof of mere residence in a hospital has been taken as equivalent to proof of grievous hurt, we think it important to point out that before a conviction can be passed for that very serious offence, one of the injuries defined in s. 320 must be strictly proved; and that the eighth clause is no exception to the general rule of the law that a penal statute must be construed strictly.

In the present case we see no reason to suppose that the wounds given to Mathur were so severe as to come within the definition of grievous hurt. We, therefore, alter the three convictions [250] from s. 326 to convictions for hurt under s. 324; and instead of the sentences of five years' rigorous imprisonment passed on Vasta and Vaja, we sentence them to two years' rigorous imprisonment; and instead of that of two years' rigorous inprisonment passed on Chuntha, we sentence him to one year. These sentences to commence at the expiry of the other sentences.

We uphold the order about security to be given by Chuntha, but reduce the amount to Rs. 100, with two securities each for that sum.

Convictions and sentences altered.

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APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

DHARAMDAS SAMBHUDAS (*Original Plaintiff*), *Appellant v.* HAFASJI AND ANOTHER (*Original Defendants*), *Respondents.** [28th February, 1894.]

Hereditary Offices Act (*Bombay Act III of* 1874), s. 13—*Hereditary service vatan*—Kazi—Kazi's *office*—Rozina *allowance—Its liability to attachment and sale in execution of a decree—Pensions Act* (*XXIII of* 1871), s. 4.

The office of *kazi* is not a hereditary service vatan under Bombay Act III of 1874.

Plaintiff obtained a money decree against Hafasji and in execution sought to attach and sell a decree obtained by Hafasji against Mohiyodin which entitled Hafasji to receive annually a certain portion of the *rozina* allowance paid by Government to Mohiyodin as *kazi*. Hafasji contended that the *rozina* allowance was paid to Mohiyodin and his family for service as *kazi*, and that, therefore, it was not liable to the process of a Civil Court under s. 13 of Bombay Act III of 1874. This contention was upheld by both the lower Courts.

Held, that as the *kazi's* office was not a hereditary service vatan, plaintiff's right to attach the decree obtained by Hafasji against Mohiyodin was not barred by s. 13 of Bombay Act III of 1874.

Held, also, that as Hafasji was not liable to serve as *kazi*, it was not open to him to urge that the allowance in question was appropriated as service remuneration, and was not, therefore, transferable.

Held, also, that as the decree sought to be attached was passed before the Pensions Act (XXIII of 1871) came into force, plaintiff's *darkhast* was not barred for want of a certificate under s. 4 of the Act.

[R., 86 P.R. 1914.]

[251] SECOND appeal from the decision of A. B. Steward, District Judge of Khandesh, in appeal No. 247 of 1892.

In original suit No. 1352 of 1872 the plaintiffs obtained a decree for Rs. 2,402-1-3 against the defendant Hafasji valad Gulami.

In execution of this decree the plaintiff sought to attach and sell a decree obtained by Hafasji in suit No. 1490 of 1864, under which he was to receive annually a 1 anna and $11\frac{1}{3}$ pies' share in the rupee out of a cash allowance known as *rozina* allowance payable by Government to one Mohiyodin as *kazi*.

The *sanad*, under which that allowance was originally granted in 1825, stated that it was to be paid to the grantee and his descendants from generation to generation as service emolument appurtenant to the office of *kazi*. And the *sanad* issued in 1880 under the Summary Settlement Act showed that the allowance would be continued as long as the village community required the services of a *kazi*.

The defendant Hafasji pleaded (*inter alia*) that the *rozina* allowance was granted for performing the services attached to the office of a *kazi*, and being a service vatan was not liable to attachment and sale in execution of a decree.

The Court of first instance was of opinion that the allowance in question was not liable to the process of any civil Court, under s. 13 of Bombay Act III of 1874. The application for execution was, therefore, dismissed.

This order of dismissal was confirmed, on appeal, by the District Judge. His reasons were as follows:—

"There is no doubt, in my mind, that the *rozina* allowance is a hereditary service vatan, and that Mohiyodin and Hafasji, the defendants in

* Second Appeal, No. 626 of 1893.

this case, are members of the family which is to supply the *kazi*. Defendant has by the decree (above mentioned) a share of 1 anna and 11⅓ pies in the rupee in the allowance, and to the extent of that share he can be called upon by Mohiyodin to assist in carrying out the duties of *kazi*. As the defendant could be called upon for this purpose by Mohiyodin, it stands to reason that his share cannot be transferable, as the *sanad* distinctly states that the *rozina* allowance is not transferable, and the allowance cannot be purchased by anybody, as it was granted for the performance of the duties of *kazi*. Section 13 of Bombay Act III of 1874 shows that the allowance in question is not liable to the process of any civil Court. Defendant's share, awarded to him by the decree, is not, therefore, liable."

[252] Against this decision the decree-holders appealed to the High Court.

Daji Abaji Khare, for appellant (decree-holder) :—The office of *kazi* is not a hereditary one. By Regulation XXVI of 1827 *kazis* are no doubt recognized as vatandars. But this regulation is repealed by Act XI of 1864. Under Act XII of 1880, which modifies Act XI of 1864, Government have the power of appointing a *kazi*, but the appointment is not hereditary. That being the case, the *rozina* allowance, which in the present case we seek to attach, is not a hereditary vatan under the Bombay Vatandars' Act (III of 1874)—*Baba Kakaji* v. *Nassaruddin* (1). Section 13 of the Act has, therefore, no application to the present case. Even if it did apply, only so much of the *rozina* allowance as was assigned by the Collector for the remuneration of the officiator would be exempt from liability to the process of a civil Court—*Nilkanth* v. *Baslinga* (2). There is no evidence that the defendant ever acted as *kazi*, or that his share of the allowance in question was ever assigned for the remuneration of the officiating *kazi*. We are, therefore, entitled to attach his interest under the decree in the allowance in question.

Ganesh Krishna Deshmukh, for respondents:—The *kazi's* office and the emoluments attached to the office are a hereditary vatan within the meaning of the Vatandars' Act. The *kazi* has to perform certain services to the Mahomedan community. His presence is necessary at the celebration of marriages and the performance of other rites and ceremonies. The office of *kazi* is hereditary in the defendant's family. And the allowance, which is granted for the support of the office, is also hereditary. It is, therefore, a hereditary vatan, and as such not liable to any process of the Civil Court. Even if it be not a hereditary vatan, the allowance is expressly declared by the *sanad* to be inalienable. It is a right of personal service within the meaning of s. 266 (*f*) of the Code of Civil Procedure, and as such it is protected from attachment—*Ganesh Ramchandra Date* v. *Shankar Ramchandra*(3); *Diwali* v. *Apaji Ganesh*(4). Lastly I contend that the allowance in **[253]** question is a grant of money within the meaning of s. 3 of Act XXIII of 1871. The present proceeding is, therefore, barred under s. 4 of the Act for want of the Collector's certificate—*Janardhan Bhaskar* v. *The Secretary of State for India* (5).

Daji Abaji Khare in reply :—The Pensions Act is not retrospective. The decree which entitles the defendant to receive his share of the cash allowance, and which we now seek to attach, was passed before the Pensions Act. Under that decree the defendant is to get his share of the allowance from Mohiyodin and not from Government. Moreover, s. 4 of

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(1) 18 B. 103. (2) 9 B. 104. (3) 10 B. 395.
(4) 10 B. 842. (5) 14 B. 573.

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the Pensions Act applies to suits and not to execution proceedings—*Vajiram Bhagvan* v. *Ranchordji Gopalji* (1).

JUDGMENT.

JARDINE, J.—In this case plaintiff obtained a decree against the defendant in 1879, and in execution of the same, plaintiff sought to attach by a prohibitory order, and thereafter to sell, a decree which defendant had obtained in suit No. 1490 of 1864 against one Mohiyodin on account of defendant's share in a *rozina* allowance payable to Mohiyodin as *kazi*. It was contended on defendant's behalf that the arrears of the allowance, to which he had a claim under his decree against Mohiyodin, had been recovered by him before plaintiff's *darkhast* was given, and, further, that the *rozina* allowance was paid to Mohiyodin for service as *kazi*, and that it was not liable to attachment and sale under s. 13 of Bombay Act III of 1874. This latter contention was upheld by both the lower Courts.

It was urged before us by the appellant's pleader, (1) that the *kazi's* office was not an hereditary vatan under the Vatandars' Act ;(2) that, even if it was held to be a vatan, the allowance in question was not appropriated for the vatan service, and (3) that the decree sought to be attached was passed before the Act, and could not be affected by its provisions. The respondent's pleader urged, on the other hand, that the *kazi's* office was hereditary vatan ; that the original *sanad* rendered the allowance non-transferable ; that the *kazi's* vatan is like the *joshi vritti*, which latter had been held to be not liable to attachment. He also [254] contended that plaintiff could not proceed with his *darkhast*, as he had obtained no certificate under the Pensions Act.

We are of opinion that both the lower Courts were in error in holding that s. 13 of Bombay Act III of 1874 barred plaintiff's right to attach the decree obtained by defendant against Mohiyodin. Plaintiff sought to attach and sell only the defendant's interest under his decree which entitled him to receive annually a portion of the *rozina* allowance. The *kazi's* office has been held to be not an hereditary vatan—see *Baba Kakaji Shet* v. *Nassaruddin* (2). The office itself, or rather the power of appointing *kazis*, was taken away by an express Act of the Legislature so far back as 1864, and though this Act has been since then modified by Act XII of 1880, that amendment has in no way invested the office with the character of a hereditary service vatan under Bombay Act III of 1874. Admittedly, defendant has no obligation of service imposed on him—see *Nilkanth* v. *Baslinga* (3). Mohiyodin acts as *kazi*, and it may be open to him, but not to the defendant, to urge that the allowance is appropriated as service remuneration, and is non-transferable. As regards the objection under the Pensions Act, it was not taken in the lower Courts, and we do not think that it is valid as against the plaintiff, inasmuch as he only seeks to attach the decree defendant had obtained against Mohiyodin. That decree was passed before the Pensions Act came into operation, and plaintiff's *darkhast* is not, therefore, barred by reason of his having obtained no certificate under s. 4 : see *Vajiram* v. *Ranchordji* (1).

We accordingly reverse the decrees of the lower Courts and direct that plaintiff's *darkhast* should be duly executed according to the provisions of law in that behalf. Costs on respondent throughout.

Decree reversed.

(1) 16 B. 731. (2) 18 B. 103. (3) 9 B. 104.

19 B. 255.

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LATE
CIVIL.

19 B. 255.

[255] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

DWARKOJIRAV BABURAV AND ANOTHER (*Original Plaintiffs*), *Applicants v.* BALKRISHNA BHALCHANDRA AND OTHERS (*Original Defendants*), *Opponents.** [6th March, 1894.]

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 2†—Suit by agriculturist—Agriculturist also owner of the inam villages and a pensioner—Income from villages owing to mortgage together with pension less than income from other sources—Definition of agriculturist—Agriculturist.

Where an owner of inam villages, the revenue from which, together with his income from other sources not agricultural, was greatly in excess of the income he derived from agriculture, mortgaged the inam villages, and thereby reduced the income actually received by him from non-agricultural sources to less than the income he derived from agriculture.

Held, that although his income from the inam villages and from other sources not agricultural might together be sufficient for his maintenance, nevertheless the construction of the definition of agriculturist given in the Act which is quite independent of any such question, could not be affected thereby, and that he must be deemed to "earn the means of livelihood" principally from agriculture and to be an agriculturist within the meaning of Act XVII of 1879.

[F., 36 B. 496=14 Bom L.R. 385=15 Ind. Cas. 827; Expl., 33 B. 376=11 Bom. L.R. 342=2 Ind. Cas. 515.]

[256] APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur R. D. Paranjpe, First Class Subordinate Judge of Satara.

Plaintiffs Dwarkojirav and Ramrav Baburav Patankar instituted the present suit to redeem certain lands. They alleged that they were agriculturists within the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and they, therefore, in pursuance of the Government of India's Notification No. 3502, dated the 14th October, 1885,‡ affixed to

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* Application No. 162 of 1893 under the extraordinary jurisdiction.

† Section 2 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879):—

2. In construing this Act, unless there is something repugnant in the subject or context, the following rules shall be observed, namely.

1*st*.—"Agriculturist" shall be taken to mean a person who by himself, his servants or tenants earns his livelihood wholly or principally by agriculture carried on within the limits of the said districts "(namely Poona, Satara, Sholapur and Ahmadnagar)," or who ordinarily engages personally in agricultural labour within those limits.

Explanations:—(*a*) An agriculturist who, without any intention of changing his status as such, temporarily ceases to earn his livelihood or to engage personally in agricultural labour as aforesaid does not thereby cease to be an agriculturist within this definition.

(*b*) An assignee of Government assessment or a mortgagee is not such an agriculturist within this definition.

2*nd*.—In Chapters II, III, IV and VI and in section sixty-nine the term "agriculturist" when used with reference to any suit or proceeding shall be deemed to include a person who, when any liability incurred by him and forming the subject or part of the subject of that suit or proceeding was so incurred, was an agriculturist as defined in the first rule.

‡ The following is the material portion of the Government of India's Notification No. 3502, dated the 14th October, 1885:—

"* * * From 1st December, 1885, in the District of Satara the fees shall be reduced to one-half in the case of documents specified in the first and second schedules to the said Court Fees Act annexed in the case of suits for the redemption of mortgaged property when the plaintiff, or, when there are several plaintiffs, any one of the plaintiffs, is an agriculturist."

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the plaint the Court-fees stamp which was equal in value to one-half of that which would have been ordinarily payable under the provisions of the Court Fees Act (VII of 1870).

The defendants contended that the plaintiffs were not agriculturists as defined in Act XVII of 1879.

The first plaintiff received from the Kolhapur State a monthly pension of Rs. 33 and his mother Rs. 19, the yearly income from that source being Rs. 624. The plaintiff's mother also received from another source a sum of Rs. 6 per mensem, being a yearly income of Rs. 72. The plaintiffs were also owners of certain villages the revenue of which was considerable, but owing to mortgages on them they only yielded to the plaintiffs a sum of Rs. 333 per annum.

The Subordinate Judge, who was of opinion that what goes to a man's creditors for the satisfaction of his debts is as much his income as that which is actually received by him, found that the plaintiffs were not agriculturists as defined in the Dekkhan Agriculturists' Relief Act, and that they did not earn their livelihood principally from agriculture, their income from sources [257] other than agriculture being in excess of the income derived from that source. He, therefore, directed the plaintiffs to make up the deficiency in the Court-fees stamp on the plaint, and adjourned the hearing to enable them to pay in the requisite stamp.

The plaintiffs applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling on the defendants to show cause why the order should not be set aside.

Anderson (with *D.A. Khare*), for the applicants (original plaintiffs) in support of the rule.

Lang (Advocate-General, with *M.C. Apte*), for the opponents (original defendants), appeared to show cause.

JUDGMENT.

SARGENT, C. J.—The expression "earns his livelihood" can only mean "obtains the means of maintaining himself." At the present moment the inam villages, owing to the mortgage on them, only contribute Rs. 333 per annum towards the plaintiffs' maintenance, that being the only sum which comes into their hands from that source. Therefore, even if the whole of the pension from the Kolhapur State were added to it, still the means of providing for the plaintiffs' livelihood would be less than that derived from agriculture; and, therefore, under those circumstances we think they must be deemed at the time of bringing the suit to obtain or, in other words, "earn the means of livelihood" principally from agriculture. The fact that the 333, 624 and 72 Rs. might together be sufficient for the plaintiffs' maintenance, cannot, in our opinion, affect the construction of the definition of "agriculturist," which is quite independent of any such question.

We must, therefore, in the exercise of our extraordinary jurisdiction, make the rule absolute and direct that the suit be tried under the Dekkhan Agriculturists' Relief Act. The plaintiffs to have their costs of this application.

Rule made absolute.

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19 B. 258.

[258] APPELLATE CIVIL.

Before Mr. Jardine and Mr. Justice Ranade.

NANCHAND (*Original Plaintiff*), *Appellant v.* VITHU (*Original Defendant*), *Respondent.** [12th March, 1894.]

Decree—Execution—Application for execution of decree—Dismissal of the first application—Appeal from decree—Decree confirmed on appeal—Application for execution of appellate decree—Appellate decree is the decree to be executed—Former dismissal of application for execution of original decree does not bar execution of appellate decree—Res judicata—*Limitation—Second application for execution.*

Where the High Court confirms, on appeal, the decree of a Subordinate Court, such confirmation has the same effect as an order of reversal would have had, in so far as it leaves the decree of the High Court as the only decree which exists for the purpose of execution, and the decree of the lower Court becomes incorporated with it

On 23rd July, 1888, plaintiff obtained a decree for the redemption of certain lands, on payment within three months of the amount due to the mortgagee, which was to be ascertained in execution proceedings. Against this decree the defendant appealed to the High Court.

Pending the appeal, the plaintiff presented a *darkhast* for execution on the 4th October, 1888. This *darkhast* was dismissed, as the plaintiff failed to produce a copy of the mortgage-bond within the time allowed by the Court. The three months allowed by the decree for payment expired on the 23rd October, 1888.

On 11th February, 1890, the High Court confirmed the decree, and on 11th April, 1890, plaintiff presented a fresh *darkhast* for execution. Both the lower Courts dismissed this *darkhast* on the ground that the dismissal of the first *darkhast* operated as *res judicata*.

Held, that the plaintiff was entitled to execute the decree, and that his second *darkhast* was not barred either by limitation or on the principle of *res judicata*.

[R., 17 C.L.J. 120=17 C.W.N. 457=18 Ind. Cas. 747; 16 Bom.L.R 778.]

THIS was an appeal from the decision of Rao Bahadur R.D. Paranjape, First Class Subordinate Judge of Ahmednagar (with appellate powers), in appeal No. 54 of 1891.

On 23rd July, 1888, the plaintiff (mortgagor) obtained a decree for redemption of certain lands on payment to defendant No. 3 of what might be due to him under his mortgage-bond. The decree directed that the amount due to defendant No. 3 should be ascertained at the time of execution and that the lands should be redeemed within three months. It also provided that if the lands were not redeemed within three months, the plaintiff's right of redemption would be for ever foreclosed.

[259] On the 4th October, 1888, the plaintiff presented his first *darkhast* for execution (No. 440 of 1888). On receiving the *darkhast* the Court fixed a day for taking evidence and for ascertaining the amount of the mortgage-debt.

On the 6th September, 1889, the Court dismissed the *darkhast* for the following reasons:—

"A copy of the mortgage-bond is not produced, though two adjournments were given on the applications of Waman Trimbak. Without the mortgage-bond the Court is unable to make up the account of the mortgage-debt. So the *darkhast* is dismissed."

In the meantime the mortgagee (defendant No. 3) had preferred an appeal to the High Court against the original decree of the 23rd July,

* Second Appeal, No. 794 of 1892.

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1888. The High Court confirmed the decree with costs on 11th February, 1890.

Thereupon the plaintiff applied by *darkhast* No. 129 of 1890 on the 11th April, 1890, for execution of the appellate decree of the high Court.

This *darkhast* was rejected by both the lower Courts on the ground that it was barred by the dismissal of the first *darkhast* on the principle of *res judicata*.

Against this decision the decree-holder appealed to the High Court.

Dhondu M Sanzgiri, for appellant.—The decree which we now seek to enforce is the decree of the High Court and not that of the lower Court. The High Court's decree is the only decree capable of execution—*Sakhalchand* v. *Velchand* (1); *Shivlal* v. *Jumaklal* (2); *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (3); *Daulat* v. *Bhukandas* (4). Limitation counts from the date of the High Court's decree. Our *darkhast* is, therefore, not time barred. The lower Courts wrongly held that the order dismissing the first *darkhast* operates as *res judicata*. That *darkhast* was not disposed of on the merits. It was an application for execution of the first Court's decree. The present is an application for execution of the High Court's decree. It is, therefore, not barred **[260]** by the first *darkhast*. Refers to *Rupchand* v. *Shamsh-ul-Jehan* (5) and *Patloji* v. *Ganu* (6).

Mahadev C. Apte, for respondent.—The question in the present case is not whether the appellant could have executed the High Court's decree, but whether he could ignore and disregard the execution proceedings taken under his first *darkhast*. Pending the appeal to the High Court, execution of the first Court's decree had not been stayed. The decree-holder applied for execution of the decree, and failed. He cannot re-open the same matter by presenting another application. The order passed on the first *darkhast* operates as *res judicata*—*Mungul Pershad Dichit* v. *Grija Kant* (7); *Baron Forester* v. *The Secretary of State for India* (8); *Sheik Budan* v. *Ramchandra* (9). The High Court decree can only give a fresh starting point about costs. Except on the question of costs awarded by the High Court, the present *darkhast* is barred.

JUDGMENT.

RANADE, J.—In this case, both the lower Courts appear to have assumed that the appellant plaintiff's *darkhast* No. 440 of 1888, and his present *darkhast* No. 129 of 1890, related to the execution of the same decree, and that in consequence the order of dismissal passed on the *darkhast* of 1888 operated as *res judicata*, and barred the entertainment of the present *darkhast* proceedings. The fact, however, appears to be that the decree sought to be executed in 1888 was the decree of the District Court in appeal No. 68 of 1887; while the present execution proceedings relate to the decree of the High Court which was passed subsequently to the disposal of the first *darkhast*. This point was brought to the notice of the lower appellate Court, but was passed over by it, presumably because the High Court confirmed the decree of the District Court. Such confirmation, however, it has been ruled, has the same effect as an order of reversal would have had, in so far as it leaves the decree of the High Court as the only decree which exists for the purpose of execution, and

(1) 18 B. 203. (2) 16 B. 542. (3) 11 A. 267.
(4) 11 B. 172. (5) 11 A. 346. (6) 15 B. 370.
(7) 8 I. A., 123. (8) 4 I. A. 137. (9) 11 B. 537.

the decree of the lower Court becomes incorporated with it. See *Sakhalchand* v. *Nelchand* (1) and *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (2).

[261] The respondents' pleader admitted the correctness of this view, but urged that as the two *darkhasts* of 1888 and 1890 covered the same ground of relief, the dismissal of the first *darkhast* barred the entertainment of the second *darkhast*, except in the matter of the costs. We cannot accept this contention of the respondents. Apparently the first *darkhast* was not proceeded with, because the respondents in the decree of the District Court had preferred a second appeal from that decree. Both parties must be held equally bound or equally benefited by the result of this second appeal, and if the original respondents would have become entitled to execute the decree of the High Court in case it had reversed the decision of the lower Courts, we do not see any reason which prevents the present appellant from claiming his right to execute the decree of the High Court in his favour. The proceedings of 1888 had no reference to that decree, and the order of dismissal passed thereon had, therefore, no operation as regards the appellant's right to seek execution of the decree in his favour. If the appellant has a right to execute this decree, there is admittedly no room for the objection about limitation.

We accordingly reverse the order of dismissal passed by the lower appellate Court, and direct the Court of the Subordinate Judge at Parner to proceed with the execution of the High Court's decree. All costs on respondents.

Decree reversed.

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19 B. 261.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

KESHAVLAL BECHAR (*Original Defendant*), *Appellant v.* PITAMBERDAS TRIBHUVANDAS (*Original Plaintiff*), *Respondent.**
[12th March, 1894.]

Decree—Execution—Limitation Act (XV of 1877), art. 179, cl. 4—Step-in-aid of execution—Civil Procedure Code (Act XIV of 1882), s. 230—Application for execution.

A obtained a decree against B upon an award, which directed that the sum of Rs. 1,840 awarded to A should be recovered with interest by attachment of the mortgaged property and not by sale, except in case of its being held that the property was not liable to attachment.

[262] On 12th October, 1874, A applied for execution of the decree, and thereupon the mortgaged property was attached and placed under the management of the Collector, who paid the proceeds from time to time into Court till 1891. The Court paid the proceeds to A on 25th February, 1876, 5th February, 1877, and 7th October, 1877.

In 1878, A being dead, his son C applied to the Court to be made a party to the record and to be allowed to continue the execution proceedings.

In 1880 C applied to the Court under s. 248 of the Code of Civil Procedure (Act XIV of 1882) to issue notice to D, as B's heir and legal representative, to show cause why the decree should not be executed against him. D did not appear, and an *ex parte* order was passed for execution to proceed as against him.

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* Second Appeal No. 582 of 1892.

(1) 18 B. 203.

(2) 11 A. 267.

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The Collector continued in management till 5th February, 1892, when the application (*darkhast*) of 1874 was withdrawn and a fresh application was made by C on 12th June, 1892.

D resisted on the ground that the application was time-barred under art. 179 of the Limitation Act (XV of 1877).

Held, that the application was not barred by limitation, as the execution proceedings under the first *darkhast* of 1874 were continuously going on during the whole period that the Collector's management lasted under the orders of the Court, and as each year's payment received by the decree-holder was but a partial step-in-aid of execution of the decree.

Held, further, that the applications made by C in 1878 and 1880 were also "steps-in-aid of execution" within the meaning of art. 179, cl. 4 of the Limitation (Act XV of 1877).

[R., 22 B. 340; 22 B. 722; 11 C.P.L R. 161; 8 Ind. Cas. 377=13 O.C. 303; 76 P.R. 1904=132 P.L.R. 1904.]

SECOND APPEAL from the decision of Gilmour McCorkell, District Judge of Ahmedabad, in appeal No. 404 of 1892.

The sole question argued at the hearing of the appeal was whether the plaintiff's *dharkhast* or application for execution of a decree was barred by limitation.

On the 26th January, 1874, one Tribhuvan Jetha obtained a decree in terms of an award, which directed that the defendant Bechar should pay him the sum of Rs. 1,840; that the said sum was not to carry interest if paid within one year, and that after that period it was to be recovered with interest at 6 per cent. per annum, by attachment of the mortgaged property, which property was, however, not to be sold unless it was held that it was not liable to attachment.

On the 12th October, 1874, Tribhuvan applied for execution of this decree. The mortgaged property was attached and placed under the management of the Collector, who from time to time paid the income into Court up to 1891.

[263] Tribhuvan received payments from the Court in part satisfaction of the decree on 25th February, 1876, 5th February, 1877, and 7th October, 1877, respectively.

In January, 1878, Tribhuvan having died, his son Pitamberdas applied to the Court to be made a party on the record, and to have the money levied and paid to him.

In 1880, Pitamberdas applied to the Court under s. 248 of the Code of Civil Procedure (Act XIV of 1882) to issue notice to the present defendant, as Bechar's heir and legal representative, to show cause why the decree should not be executed against him. On his application an *ex parte* order was passed that execution should proceed as prayed for.

The Collector's management accordingly continued till 5th February, 1892, when the *darkhast* of 1874 was withdrawn. The present *darkhast* was filed on 12th June, 1892.

The defendant resisted this *darkhast* on the ground that it was barred by limitation both under s. 230 of the Code of Civil Procedure (Act XIV of 1882) and under art. 179 of the Limitation Act (XV of 1877).

The Court of first instance held that it was barred under art. 179 of the Limitation Act (XV of 1877).

On appeal the District Judge was of opinion that the *darkhast* was not barred either under s. 230 of the Civil Procedure Code or under art. 179 of Act XV of 1877. He, therefore, reversed the first Court's order and directed execution to issue.

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Against this decision the present appeal was preferred to the High Court.

Govardhanram M. Tripathi, for appellant.

Bhaishankar Nanabhai, for respondent.

The following authorities were referred to in argument:—*Prabhacararow* v. *Potannah* (1); *Chunder Coomar Roy* v. *Bhogobutty* (2) *Unnoda Persad Roy* v. *Sheikh Koorpan Ally* (3); *Hem Chunder Chowdhry* v. *Brojo Soondury Debee* (4); *Fazal Imam* v. **[264]** *Metta Singh* (5); *Gunga Pershad Bhoomick* v. *Debi Sundari Dabia* (6); *Toree Mahomed* v. *Mahomed Mabood Bux* (7); *Jibhai Mahipati* v. *Parbhu Bapu* (8); *Jamnadas* v. *Lalitaram* (9); *Mungul Pershad Dichit* v. *Grija Kant* (10); *Manjunath Badrabhat* v. *Venkatesh Govind* (11); *Sher Singh* v. *Daya Ram* (12); *Dalichand Bhudar* v. *Bai Shivkar* (13); *Venkatarayalu* v. *Narasimha* (14); *Paran Singh* v. *Jawahir Singh* (15); *Jogesh Prokash* v. *Kalee Coomar Roy* (16); *Govind Shanbhog* v. *Appaya* (17); *Nukanna* v. *Ramasami* (18); *Chowdhry Paroosh Ramdas* v. *Kali Puddo Banerjee* (19).

JUDGMENT.

JARDINE, J.—In this case the chief point that was argued before us related to the question of limitation.

The undisputed facts of the case are: Tribhuvan and Bechar, fathers respectively of the parties to the present execution proceedings, agreed to a private award, which was duly filed in Court on 26th January, 1874. Plaintiff's father Tribhuvan gave *darkhast* No. 1791 of 1874, on 12th October, 1874, and the execution work was transferred to the Collector, who attached the defendant's *san*-mortgaged property in the terms of the award, and paid over the proceeds from time to time in Court down to 1891. The Collector's management continued till 5th February, 1892, when the *darkhast* of 1874 was disposed of, and a fresh *darkhast* No. 570 of 1892 was given on 12th June, 1892.

The contention of the appellant-defendant in both the lower Courts was that the *darkhast* of 1892 was time-barred under s. 230, Civil Procedure Code, and art. 179 of the Limitation Act. The Court of first instance held that the *darkhast* was not barred under s. 230, but that it was barred under art. 179 of Act XV of 1877. The District Judge held that the *darkhast* was not time-barred either under s. 230 or art. 179. In the appeal before us, the appellant urges that the *darkhast* of 1892 **[265]** was barred by limitation, chiefly under art. 179. The objection of the bar under s. 230 was not seriously pressed in the argument of the appellant's pleader.

It was urged by Mr. Govardhanram that as the decree was passed in January, 1874, and the first *darkhast* was given on 12th October, 1874, the second *darkhast* ought to have been given before 12th October, 1877, under art. 179 of Act XV of 1877, which came into operation in July, 1877. He urged, further, that the payments received by the plaintiff of the proceeds of the property under the Collector's management from 1874 to 1891 did not prevent the bar of limitation from being operative, and that there were no applications made or steps taken by plaintiff to keep alive his right of execution under the decree. It was finally contended that the plaintiff's right to execute his decree being once lost in 1877

(1) 2 M. 1. (2) 8 C. 235. (3) 3 C. 518. (4) 8 C. 89.
(5) 10 C. 549. (6) 11 C. 227. (7) 9 C. 730. (8) 1 B. 59.
(9) 2 B. 294. (10) 8 I. A. 123. (11) 6 B. 54. (12) 13 A. 564.
(13) 15 B. 242. (14) 2 M. 174. (15) 6 A. 366. (16) 8 W.R. 274.
(17) 5 B. 246. (18) 2 M. 218. (19) 17 C. 53.

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could not be revived by the change in the law in 1879 which introduced s. 325-A, on which the lower Court of appeal has relied in support of its view.

On respondent's behalf it was contended by Mr. Bhaishankar that verbal applications had been made by the plaintiff to the Court before the moneys received from the Collector were paid over to plaintiff, that these verbal applications were as good as written, and these applications and receipts of money were steps-in-aid of execution, which enlarged the period of limitation. It was further urged that in January, 1878, plaintiff, as heir of deceased Tribhuvan, had applied to be made a party to the record, and allowed to continue the execution proceedings, and that in February and September, 1880, written applications were made to the Court by plaintiff to issue notice to the present defendant under s. 248, and to adjust the interest accounts. These applications, it was contended, saved the darkhast from being time-barred, and that since the Act of 1879, s. 325-A entitled plaintiff to exclude from computation the time during which the defendant's property was under the management of the Collector, and, lastly, that defendant was estopped from raising this contention in 1893 when he failed to urge it in 1880.

After a careful consideration of the authorities cited on both sides, and the fuller statement of facts placed before us by the [266] respondent's pleader, we feel satisfied that the contentions of the appellant in this case must be disallowed. In considering the true character of the payments of the proceeds received by the decree-holder, it is necessary to bear in mind the particular circumstances of this case. The attachment in this case was not so much an order of Court, as an enforcement of the particular agreement arrived at with the consent of the parties in the arbitrator's award. That award directed that the sum found due and awarded to plaintiff (Rs. 1,840) should be paid by defendant in one year, and that during that period it should carry no interest, and that after that time, plaintiff should receive 6 per cent. interest, and recover the sum due to him by the attachment of the *san*-mortgaged property, which property was, however, not to be sold except in case of its being held to be not liable to attachment. The decree, therefore, in express terms directed that the sum found due with interest should be recovered by the attachment of the property of the defendant, and not by sale. The parties appear to have expressly contemplated that the debt should be satisfied by a long-continued sequestration of the profits, and the Collector's management under the Court's order only gave effect to this private arrangement. The arrangement was meant to protect the debtor from the risk of losing his property altogether by sale. There are always a few *darkhasts* in all Courts when such permanent or long-period attachments have to be made (see *Mahadaji* v. *Krishnaji* (1) and *Jamnadas* v. *Lalitaram* (2)), and s. 325-A has been expressly enacted to remove all doubts as to the legality of such long sequestrations. There is nothing in the law which requires that the execution of a decree may not continue for a period of years till the debt is satisfied.

This peculiar nature of the arrangement between the parties furnishes a satisfactory explanation why both parties remained quiet for the whole period of eighteen years (1874—1892). The cases—*Hem Chunder* v. *Brojo Soondury* (3), *Toree Mahomed* v. *Mahomed Mabood* (4), *Fazal Imam* v. *Metta Singh* (5), and *Gunga* [267] *Pershad* v. *Debi Sundari* (6),—cited

(1) P. J. (1875) p. 233.
(2) 2 B. 294.
(3) 8 C. 89.
(4) 9 C. 730.
(5) 10 C. 549.
(6) 11 C. 227.

by the appellant's pleader, in which it was ruled that the mere receipt of money by the decree-holder, or payment of *batta* by him in Court, does not extend the period of limitation, have, therefore, no application in the present case. They were all cases of mere money decrees, in which the execution by attachment was never intended to be a permanent arrangement. Mere receipt of money under such circumstances is not a step-in-aid of execution, but the present case is clearly distinguishable from such single acts. Here the payments were made almost every year up to 1886, and it cannot be presumed that plaintiff took no steps to move the Court in this behalf. It was not necessary—*Maneklal* v. *Nasia* (1), *Amarsingh* v. *Tika* (2)—that these applications should be in writing. They may be verbal. There have been rulings in *Nukanna* v. *Ramasami* (3), *Paran Singh* v. *Jawahir Singh* (4), *Jogesh Prokash* v. *Kalee Coomar* (5) and *Chowdhry Paroosh Ramdas* v. *Kali Puddo* (6) that, under certain circumstances, applications made by the judgment-creditor to receive the proceeds of the attached property in part execution of the decree do extend the period of limitation, as being steps-in-aid of execution. Of course, ineffective or informal attempts will not be deemed sufficient for such a purpose—*Jibhai Mahipati* v. *Parbhu Bapu* (7) and *Prabhacararow* v. *Potannah* (8); but there is no suggestion here that the attachment was ineffectual, or the payments from year to year anything but a *bona fide* execution of the decree—*Shankar Bisto* v. *Narsinghrao* (9).

Under these circumstances we must hold that the execution work of the first *darkhast* of 1874 was continuously going on during the whole period that the Collector's management lasted under the orders of Court, and that each year's payment received by plaintiff was only a partial step-in-aid of execution of the decree—*Maneklal* v. *Nasia* (1) and *Ambica Pershad* v. [268] *Surdhari Lal* (10). There appear to have been three such payments on 25th February, 1876, 5th February, 1877, and on 7th October, 1877. From 1878 there is admittedly no difficulty. In January, 1878, the original plaintiff being dead, his son, the present respondent, applied to be made a party to the record and to have money levied and paid, and such an application has been held to be a step-in-aid of execution—*Govind Shanbhog* v. *Appaya* (11). In 1880 he again applied to the Court to issue notice under s. 248 to defendant as heir to his deceased father, and to require him to adjust the interest account. This application was clearly a step-in-aid of execution, since the date Act XII of 1879, s. 325-A, came into operation, and there is admittedly no difficulty either under s. 230, Civil Procedure Code, or art. 179 of Act XV of 1877.

It may also be observed that the question as to whether the plaintiff's claim was or was not time-barred before, 1878, appears to have been expressly decided in November, 1880, by the Court of first instance after serving defendant with notice to show cause against plaintiff's application. It may fairly be questioned whether it is open to the defendant now after twelve years to raise this objection, which he should have raised in 1880—*Dalichand Bhudar* v. *Bai Shivkar* (12). If defendant chose to allow the order in 1880 to be passed against him *ex parte*, he cannot claim the right to urge this objection now. On the whole, we feel satisfied, on the

(1) 15 B. 405. (2) 3 A. 139. (3) 2 M. 218. (4) 6 A. 366.
(5) 8 W. R. 274. (6) 17 C. 53. (7) 1 B. 59. (8) 2 M. 1.
(9) 11 B. 467. (10) 10 C. 851. (11) 5 B. 246. (12) 15 B. 242.

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authorities, that the decision of the lower appellate Court is correct, and we accordingly reject the appeal, and confirm the order of the District Judge. Costs on the appellant.

Order confirmed.

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19 B. 269.

[269] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

ANANT RAMRAV (*Original Defendant*), *Appellant v.* GOPAL BALVANT (*Original Plaintiff*), *Respondent.** [13th March, 1894.]

Hindu family—Joint family property—Injunction—Injunction obtained by one member of a joint family against another, when granted.

In disputes between members of a joint Hindu family with respect to joint property, the exercise of the Court's jurisdiction to grant relief by injunction should be confined to acts of waste, illegitimate use of the family property, or acts amounting to ouster.

[F., 29 C. 500; R., 23 B. 144; 11 C.L.J. 189=5 Ind. Cas. 171.]

SECOND APPEAL from the decision of T. Hart-Davies, Acting District Judge of Ahmednagar, reversing the decree of Rao Saheb Dinanath A. Dalvi, Second Class Subordinate Judge of Parner.

The plaintiff and defendant were members of a joint Hindu family. The plaintiff sued to recover joint possession with the defendant of the door of a certain house, and for an injunction against the defendant, who (he alleged) obstructed his use of the door. He alleged that he and the defendant were owners of the house in equal shares; and that the door was jointly used by both of them.

The defendant pleaded that the plaintiff was not entitled to an injunction, and that his remedy lay in a suit for partition.

The Subordinate Judge dismissed the claim, holding that the suit was one virtually for partition, and that the plaintiff was not entitled to succeed, as all the family property had not been brought into hotch-pot.

On appeal the Judge held that one member of an undivided Hindu family can get an injunction against another who caused obstruction. He, therefore, reversed the decree and allowed the claim.

The defendant preferred a second appeal.

Dhondu M. Sanzgiri, for the appellant (defendant).—An injunction cannot be granted to one co-parcener against another. The aggrieved party can seek redress by bringing a suit for partition—*Balaji Anant* v. *Ganesh Janardan* (1); *Watson and Company* v. *Ramchand Dutt* (2). A complete remedy, namely a suit for [270] partition, being open to the plaintiff, he is not entitled to an injunction under s. 56 of the Specific Relief Act (I of 1877).

Daji Abaji Khare, for the respondent (plaintiff).—There is no authority to show that in a joint family an injunction cannot be granted. Although a suit for partition would be a remedy, that cannot prevent one member from obtaining an injunction against another. There is only one door through which both the portions of the house can be approached.

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* Second Appeal No. 452 of 1892.

(1) 5 B. 500.

(2) 18 C. 10.

The defendant has shut the door by putting a lock over it, and the plaintiff is thus prevented from using his portion of the house—*Sheo Pershad Sing* v. *Leelah Singh* (1); *Lloyd* v. *Soyra* (2); *Bapuji* v. *Mansukhram* (3).

JUDGMENT.

SARGENT, C.J.—The exercise of the Court's jurisdiction to grant relief by injunction must, it is plain, in disputes between members of a Hindu family, be attended from their very nature with great difficulty. However, we do not think that there would be any practical objection to the Court interfering by injunction in those particular cases in which, as between tenants-in-common, the Court grants that form of relief. Following the practice of a Court of Equity in England, that would be confined to acts of waste, illegitimate use of the family property, or acts amounting to ouster. See *Bapuji* v. *Mansukhram* (3). This would appear to have been the opinion of Phear, J., as regards illegitimate use of the property. See *Sheo Pershad Sing* v. *Leelah Singh* (1). In the present case, assuming that the plaintiff was in possession and enjoyment of portion of the house before the door was closed, and that the only ingress to that portion was by the door, the closing of it would amount to ouster.

As there is no distinct finding on these issues, we must send down the case to the District Court for findings on the following issues :—

1. Was the plaintiff in enjoyment of the portion of the house as claimed by him in his plaint when the door in question was closed by the defendant ?

2. Was the door the only mode of ingress to that portion ?

Finding to be transmitted to this Court within two months.

Issues sent down.

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19 B. 271.

[271] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

RAMCHANDRA SHANKARBAVA DRAVID (*Original Plaintiff*), *Appellant v.* KASHINATH NARAYAN DRAVID AND OTHERS (*Original Defendants*), *Respondents.** [15th March, 1894]

Religious endowments—Temple—Manager—Alienations by manager—Necessity.

Grants of permanent under-tenures such as *mirasi*, *putni*, *mokurruri*, grants by managers of endowed temple lands, are not void if made for a necessary purpose. Where lands belonging to a temple were granted in *miras* by the manager of the temple, but not for a necessary purpose, and the successor of the grantor sued to eject the assignee of the grantee,

Held, that the effect of such a grant was to enable the grantee to hold the lands during the lifetime of the grantor, but would not confer on him any title binding on the successor in the management of the temple lands.

[F., 18 Ind. Cas. 686; R., 16 C.L.J. 349=17 C.W.N. 873=16 Ind. Cas. 927.]

SECOND APPEAL from the decision of J. W. Walker, District Judge of Satara, confirming the decree of Rao Saheb S. B. Upasani, Joint Subordinate Judge of Satara.

Suit to recover possession of lands and for declaration of title as manager.

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* Second Appeal No. 699 of 1892.

(1) 20 W. R. 160. (2) 25 W. R. 313. (3) P. J. (1893) 552.

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The plaintiff's father Shankarbava as manager of the temple of Yavteshvar granted the land in question for building sites at fixed rents to certain European residents about forty years before the date of this suit. Bungalows were built and occupied, and in the year 1867 the lands with the buildings thereon were sold to one Krishnaji Limaye, who in 1884 sold them to the defendants. Meantime the original grantor Shankarbava had died in 1880 and his son the plaintiff had succeeded him as manager of the temple. In 1886 the plaintiff brought this suit to recover possession of the lands and for mesne profits.

The defendant pleaded (*inter alia*) that he had the right of occupancy, that the plaintiff's only right was to the rents, and that the suit was barred by limitation.

The lower Courts rejected the plaintiff's claim, holding that the defendant had a right of perpetual tenancy.

The plaintiff preferred a second appeal.

[272] *Daji Abaji Khare*, for the appellant (plaintiff).—It is settled that a manager of temple property cannot permanently alienate it except in the case of absolute necessity—*Konwur Doorga Nath* v. *Ram Chunder*(1); *Tahboonissa* v. *Koomar Sham* (2). Here absolute necessity is not shown, nor is it even pleaded. Alienations of temple property by a manager stand good only during the lifetime of the grantor, and after his death come to an end— West and Buhler (3rd ed.). p. 557 ; *Bhagu* v. *Byramji* (3). Further, the grant was made for the purpose of erecting buildings. The buildings which were erected have fallen, and the lands are now cultivated. The buildings having disappeared, the grant must be set aside.

Mahadev B. Chaubal, for the respondent (defendant).— Shankarbava, who made the grant, died in the year 1880, and since then plaintiff's management began. Most of the lands were brought under cultivation by us in 1884, and we have paid rent to the plaintiff. The plaintiff has confirmed the grant by accepting the rent from us, and he is now estopped from disputing its validity.

JUDGMENT.

SARGENT, C. J.—The authorities show that permanent under-tenures, such as *mirasi*, *putni* and *mokurruri* grants, by managers of endowed temple lands, are not void if made for a necessary purpose—*Konwur Doorga Nath* v. *Ram Chunder* (1); *Tahboonissa* v. *Koomar Sham* (2). It is no part of the defendants' case that the *miras* grant in question was for a necessary purpose, nor is there any evidence in the case which even points to this having been the cause of the grant, although it may establish that the rent reserved was a proper one.

The effect of such a grant according to the decisions in *Arruth Misser* v. *Juggurnath* (4) and *Bhagu* v. *Byramji* (3) would be to enable the grantee to hold the lands during the life of the grantor Shankarbava, but would not confer on him any title binding on his successor in the management of the temple lands.

As the District Judge held that the *miras* granted was valid and binding on the plaintiff, we must reverse the decree and send **[273]** back the case for a fresh decision, but we think it is necessary for a satisfactory decision on the rights of the parties, having regard to the manner in which

(1) 4 I.A. 52. (2) 15W. R. 228. (3) P.J. (1892), 39. (4) 18 W.R. 439.

the case has been tried, that an issue should be raised as to whether anything has occurred since the death of the previous manager which would give a legal right to the defendant to continue to hold the land during the plaintiff's life-time. Costs to follow the result.

Decree reversed and case sent back.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

AMBASHANKAR HARPRASAD (*Plaintiff*) *v.* SAYAD ALI RASUL AND ANOTHER (*Defendants*).* [19th March, 1894.]

Mahomedan law—Money due by a deceased Mahomedan—Suit by a creditor against only one of the heirs of the deceased—Practice—Procedure.

A suit for money due by a deceased Mahomedan lies against one of his heirs in respect of his share in the property left by the deceased, though it may not bind the share of another heir.

Quære—Whether, there having been no division of the estate, the share of the heir sued is liable for the whole debt of the deceased.

REFERENCE by Khan Bahadur B. E. Modi, Judge of the Court of Small Causes at Broach, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued in the Court of the Small Causes at Broach to recover the amount due on a bond executed in his favour by Rasul Karim and Jamiatram Sobharam. He sought to recover the amount from Jamiatram personally and from the estate of Rasul Karim who was dead. The case came on for hearing on the 3rd October, 1893, and the defendant Sayad Ali, the son and heir of Rasul Karim, deceased, was examined as a witness, and admitted the bond. In his evidence he stated that the deceased had left behind him (among other relatives) a widow, who, according to Mahomedan law, being interested as a sharer in the property of the deceased, ought to have been joined as a co-defendant in the suit. As the cause of action had arisen on the [274] 26th September, 1890, the plaintiff's suit against her would have been time-barred if she had then (*i.e.*, on 3rd October, 1893) been added as a party. The plaintiff, therefore, asked the Court to pass a decree against the share of the defendant Sayad Ali alone and not against the entire estate of the deceased as prayed for in the plaint. The point then arose as to whether such a decree could be passed, and the Judge submitted the following question to the High Court :—

"Whether, when the original debtor is dead, the creditor, in bringing a suit, is or is not bound to bring all the heirs or representatives on the record, and whether it is allowable for him to ask for a decree against one heir only to the extent of the share represented by him."

The Judge was of opinion that a decree could not be passed against a part only of the deceased's estate, that the entire estate should be represented, and that the omission of some of the heirs was fatal to the claim.

Kalabhai Lallubhai (*amicus curiæ*), for the plaintiff.—We contend that a decree should be passed against the entire estate of the deceased, because until the debts are paid there can be no shares. The whole estate would be divided into different shares after the debts of the deceased are paid

* Civil Reference No. 13 of 1893.

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off, because the entire estate is liable for the debt and not any particular portion of it. Even if the widow be now joined, still our remedy against the estate would not be barred, because under s. 22, para. 1, of the Limitation Act (XV of 1877) only the personal remedy against the added defendants is barred, but not the remedy against the property. The question as to the joinder of the widow was not raised by the defence. It was during the hearing that it was ascertained that the deceased had left a widow, and it was then that the question of making her a party was raised by the Court. The question having been raised by the Court, the point of limitation cannot arise—*Khadir Mohidin* v. *Rama Naik* (1). In any case the plaintiff is entitled to proceed against the defendant Sayad Ali, who is in possession of the property; it does not matter whether our claim against the widow is barred or not.

[275] *Vasudeo G. Bhandarkar* (*amicus curiæ*), for the defendant.—When an owner of property dies, each of his heirs gets an interest in it. The vesting of that interest is not postponed until the debts of the deceased have been paid. In order that a decree should be passed against a co-sharer, he must be in possession of his share of the property. The plaintiff here seeks to recover the debt from the property of the deceased, but he cannot succeed, because he has not brought on the record all the persons interested in the property. The following cases were referred to;—*Hamir Singh* v. *Mussummat Zakia* (2), *Pirthi Pal Singh* v. *Husaini Jan* (3), *Jafri Begam* v. *Amir Muhammad* (4), *Bussunteram Marwary* v. *Kamaluddin Ahmed* (5).

Kalabhai Lallubhai in reply.

JUDGMENT.

SARGENT, C.J.—We agree in the decision of the majority of the Judges in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Sirgh* (6) which was approved of by Mahmood, J., in *Jafri Begam* v. *Amir Muhammad Khan* (4), that the suit against Sayad Ali, although it could not proceed so as to bind the widow's share, would still lie against Sayad Ali in respect of his share in the property of Rasul.

A question may arise whether, there having been no division, his share in the property would be liable for the whole debt. That question has not been referred to us, but we may refer the Small Cause Court Judge to *Bussunteram* v. *Kamaludin* (5) and *Pirthi Pal Singh* v. *Husaini Jan* (3) to assist him in arriving at a conclusion.

Order accordingly.

(1) 17 M. 12.
(2) 1 A. 57.
(3) 4 A. 361.
(4) 7 A. 822 (827).
(5) 11 C. 421.
(6) 4 C. 142.

19 B. 276.

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[276] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

ABA BIN KHESAJI (*Original Defendant No.* 2), *Appellant v.* DHONDU BAI (*Original Plaintiff*), *Respondent.**

[27th March, 1894.]

Decree—Execution of decree—Death of judgment-debtor after attachment but before sale in execution—Sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civil Procedure Code (Act XIV of 1882), *ss.* 311, 316—*Practice—Procedure.*

Tukaram obtained a decree against one Subhankhan, and in execution attached certain land which Subhankhan had previously mortgaged to Krishnaji. On the 11th June, 1877, a warrant for sale was issued followed by the usual proclamation. Subhankhan died on the 27th September, 1877, and a few days afterwards, *viz.*, on the 3rd October, 1876, the sale took place without any notice being given to Dhondu Bai, who was the heir and legal representative of Subhankhan, who, however, came to know of it shortly after. Tukaram, the decree-holder, purchased the land at the sale, and in 1883, sold it to Aba, who redeemed the mortgage from Krishnaji and took possession. In 1891 Dhondu Bai, as heir and legal representative of Subhankhan, brought this suit claiming to redeem the mortgage. She made Krishnaji (original mortgagee) and Aba (the purchaser) parties to the suit. She contended that the sale in execution was bad, having taken place after the death of the judgment-debtor and without his legal representative having been placed on the record.

Held, that the plaintiff was not entitled to redeem.

Per JARDINE, J.—As no "substantial injury" was alleged to have resulted by reason of the plaintiff not having been brought on the record of the execution proceedings immediately on the death of the judgment-debtor and before the sale took place, the purchaser acquired a valid title under s. 316 of the Code of Civil Procedure (Act XIV of 1882).

Per RANADE, J.—The omission to join the name of the representative of the deceased judgment-debtor as a party to the record was a material irregularity and a serious defect in the title of the auction-purchaser. But this irregularity did not vitiate the sale under the special circumstances of the present case, *viz.*, that the plaintiff had taken no step to set aside the sale although she came to know of the sale within a few days after it took place; that there was no fraud or *mala fides* on the part of the judgment-creditor; that the sale had not resulted in any substantial injury to the plaintiff, and that the auction purchaser and his assignee had been in adverse possession for more than twelve years.

[Appr., 21 B. 424; R., 23 C. 686; 19 M. 219.]

SECOND appeal from the decision of Rao Bahadur C. N. Bhat, First Class Subordinate Judge A. P. at Satara, in Appeal No. 322 of 1892, reversing the decision of Rao Saheb Shivram Sitaram Wagh, Second Class Subordinate Judge of Karad.

[277] Suit for redemption. The plaintiff Dhondu Bai was heir and legal representative of one Subhankhan, deceased.

Subhankhan had mortgaged the land in dispute to the first defendant (Krishnaji Vyankatesh) in 1871.

Subsequently the land was attached in execution of a decree obtained by one Tukaram Dhanji against Subhankhan, the mortgagor. The warrant for sale in execution was issued on 11th June, 1877.

Subhankhan died on 27th September, 1877.

The sale took place on 3rd October, 1877, without any notice being given to Dhondu Bai, the daughter and legal representative of the deceased

* Appeal No. 40 of 1893 from order.

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Subhankhan, and without her name being placed on the record of the execution proceedings.

Dhondu Bai became aware of the sale fourteen days after it took place, but took no steps to set it aside.

Tukaram Dhauji purchased the property at the auction sale, and afterwards sold it to Aba bin Khesaji Mane (defendant No. 2) on the 8th November, 1883.

Aba redeemed the land from Krishnaji on payment of Rs. 947-14-6 in 1886.

In 1891 Dhondu Bai filed the present suit as heir and legal representative of Subhankhan, deceased, to redeem the land in dispute.

The Subordinate Judge dismissed the suit, holding that the mere omission to make the legal representative of the deceased judgment-debtor (Subhankhan) a party to the record of the execution proceedings did not vitiate the auction sale of the 3rd October, 1877, and that as the plaintiff had not taken any steps to set aside the sale, it was binding on her.

On appeal the Subordinate Judge with appellate powers was of opinion that the sale in execution which took place after Subhankhan's death, without bringing Subhankhan's heir on the record, was illegal and invalid; that it was not necessary to set it aside; and that as the plaintiff was not bound by the sale she was entitled to redeem the property in dispute. The decree of the first Court was, therefore, reversed, and the case remanded for the [278] purpose of determining the amount of the mortgage-debt due to Krishnaji (defendant No. 1).

Against this decision Aba (defendant No. 2) appealed to the High Court.

Shamrao Vithal, for appellant.—The judgment-debtor was the mortgagor of the land. In execution of the decree his interest was attached during his life-time, but the sale took place after his death, and the question is whether the sale is vitiated by the fact that before it took place his legal representative was not placed upon the record. On this point there is a conflict of authorities. The Madras High Court decides that a sale held under such circumstances is invalid—*Ramasami* v *Bagirathi* (1) and *Krishnayya* v. *Unnissa Begam* (2). But the Allahabad High Court decides the other way—*Dulari* v. *Mohan Singh* (3); *Stowell* v. *Ajudhia Nath* (4); *Sheo Prasad* v. *Hira Lal* (5). These rulings of the Allahabad High Court are completely in our favour. It does not appear that the latest of these rulings, which is a Full Bench ruling, was brought to the notice of the Madras High Court in *Krishnayya's* case. Even assuming that it was necessary to bring the representative of the judgment-debtor on the record, still I submit that under the circumstances of the present case it is not open to the plaintiff to impeach the validity of the sale. She came to know of the sale within a few days after it took place, and yet she did not apply under s. 311 of the Civil Procedure Code (XIV of 1882) to set it aside. It is, therefore, binding on her.

Vishnu K. Bhatavdekar, for respondent.—The provisions of the Code of Civil Procedure (XIV of 1882) relating to abatement of suits do not apply to execution proceedings. See s. 647 of the Code as amended by Act VI of 1892—*Hajrat Akramnissa Begam* v. *Valiunissa Begam* (6); *Gulabdas* v. *Lakshman* (7). The policy of the Code is to give the defendant the fullest opportunity of being heard. No step is allowed to be taken by any

(1) 6 M. 180. (2) 15 M. 399. (3) 3 A. 759. (4) 6 A. 255.
(5) 12 A. 440. (6) 18 B. 429. (7) 3 B. 221.

party to a suit or other proceeding behind the back of his opponent. Otherwise the greatest injustice would result from *ex-parte* proceedings. [279] The Code contemplates the presence of the judgment-debtor at every stage of the execution proceedings. The interest of his representatives would suffer if they were not brought on the record immediately after his death. They can save the property from attachment and sale by payment of the judgment-debt or by adjustment of the decree to the satisfaction of the decree-holder. See ss. 257, 257-A, 290, &c., of the Code. This opportunity would be lost if they were not brought on the record. If all questions relating to the execution of decrees between the parties to the suit and their representatives are to be determined under s. 244 during the course of execution proceedings, and not by a separate suit, then the representatives of the judgment-debtor must be brought on the record—*Punchanun* v. *Rabia Bibi* (1). *Abrahamji* v. *Nathwa Kallya* (2); *Ramchandra Bapuji* v. *Vinayak Anant* (3).

Shamrao Vithal in reply.—It is not alleged that any substantial injury has resulted from the omission to make the representative of the judgment-debtor a party to the record. That being the case, even if the omission be treated as a material irregularity, it would not be a ground for setting aside the sale—*Tasadduk Rusul Khan* v. *Ahmad Husain* (4).

JUDGMENT.

JARDINE, J.—Subhankhan mortgaged the land in suit to Krishnaji, defendant No. 1. One Tukaram Dhanji Guzar, a creditor of Subhankhan, obtained a decree against him, and during Subhankhan's life-time a warrant for sale was issued and the proclamation published for the sale of the land. It is found as a fact that Subhankhan died on the 27th September, 1877; the sale took place on the 3rd October, 1877, without any notice being given to Dhondu Bai, the present plaintiff, daughter of Subhankhan and his legal representative, or her name being placed on the record. Tukaram became the purchaser. Dhondu Bai became aware of the sale some days after it took place. She took no steps to set it aside. The second defendant Aba is in possession, claiming as purchaser from Tukaram by a sale-deed dated the 8th November, 1883.

[280] The defendants allege that Aba redeemed the land from Krishnaji by means of a redemption suit, No. 982 of 1882. No *mala fides* or fraud on the part of Tukaram or Aba is alleged or found; and there is no finding that at the time of the auction sale in 1877 Tukaram was aware of Subhankhan having died.

The lower Court of appeal has held that the plaintiff may redeem the property on payment of the mortgage-money due to the second defendant, as in its opinion the purchaser at the Court sale acquired no title as against the plaintiff Dhondu Bai, her name not having been put on the record upon her father's death.

Whether this substitution is required by the Code of Civil Procedure (Act XIV of 1882) and whether the omission makes the sale invalid, are questions on which no direct authorities have been found in the decisions of this High Court. *Baswantapa* v. *Ranu* (5) and *Akoba* v. *Sakharam* (6) must be distinguished, as they relate to the constitution of suits, and not to matters in execution. As pointed out in *Gulabdas* v. *Lakshman* (7) before execution can be had at all, a right must have been fully established;

(1) 17 C. 711. (2) P.J. (1878), p. 190. (3) P.J. (1879), p 21. (4) 21 C. 66.
(5) 9 B. 86. (6) 9 B. 429. (7) 3 B. 221.

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and s. 647 of the Code does not apply the provisions about abatement to these proceedings—*Krishna* v. *Bhau* (1); *Dhonkal* v. *Phakkar* (2). *Hub Lal* v. *Kanhia Lal* (3) is a case of a sale being upheld as against an objector who had not been a party to the suit.

The views expressed in *Gulabdas* v. *Lakshman* have been approved by the High Court at Allahabad in *Dulari* v. *Mohan Singh* (4) by Oldfield and Straight, JJ. (where the question was whether the Court sale was invalid by reason of the prior death of the decree-holder), in *Stowell* v. *Ajudhia Nath* (5) by the same learned Judges (where the death of the judgment-debtor was prior to the sale), and in *Sheo Prasad* v. *Hira Lal* (6) by Edge, C J., and Straight, Brodhurst, Tyrrell, JJ. (Mahmood, J., dissenting) where the judgment-debtor had died after the attachment and before the sale.

[281] In the last named case the fully considered judgment of Sir John Edge discusses and dissents from *Ramasami* v. *Bagirathi*(7) (followed in *Krishnayya* v. *Unnissa Begam* (8), the authority followed in the present case by the lower Court of appeal. Sir John Edge's reasoning supports the Bombay decision, when after considering ss. 234, 275, 276, 280 and 284 of the Code of Civil Procedure he observes that he does not find in that Code any provision requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. The view that the abatement sections do not apply to execution proceedings has been adopted by the Legislature in Act VI of 1892 amending s. 647. The learned Chief Justice then goes on to consider s. 311, about which, in the last of the two Madras cases, the learned Judges of Madras say that the sale without notice to the legal representative of a deceased party was a material irregularity and must necessarily cause him substantial injury. The Act of 1892, however, shows that this procedure by notice is not obligatory. It would appear from the Madras Report that the Allahabad Full Bench decision was not brought to the notice of the Court in that case.

The present case resembles the two last Allahabad cases in that there is no question raised that the sale might have been voidable by reason of valid objections which the plaintiff had no opportunity of preferring at or soon after the time of sale, or on other equitable grounds. The contention is that the sale is absolutely void by reason of the plaintiff not having been brought on the record of the execution proceedings immediately on her father's death. Sir John Edge treats this as mere technical pleading and as not touching the merits and at p. 446 points out the uncertainty and risk which such a doctrine would impose on the purchaser at the execution sale. On this point, the construction of s. 311, Mr. Justice Mahmood concurs, and at p. 459 notices the important decisions of the Judicial Committee of the Privy Council, which show that for the purpose of setting aside a sale on the ground of irregularity, "substantial injury by reason of such irregularity" must be proved. In the present case, none such is averred.

[282] It follows that under such circumstances the purchaser acquires a valid title under s. 316 even if the doctrine of *Gulabdas* v. *Lakshman*, distinguishing execution proceedings from suits, had not been followed by the Legislature.

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(1) 18 B. 61. (2) 15 A. 84. (3) 7 A. 365. (4) 3 A. 759 (764).
(5) 6 A. 255. (6) 12 A. 440. (7) 6 M. 180. (8) 15 M. 399.

It appears unnecessary to discuss the effect of s. 244 on the present litigation.

For the above reasons my opinion is that the decree of the District Court should be reversed, and that of the original Court restored, and that the respondent here should pay the costs of both appeals.

RANADE, J.—The only point of law which has to be considered in this case relates to the question whether an auction sale in execution of a decree is invalidated by reason of the death of the judgment-debtor after attachment, but before sale, and the failure of the attaching creditor to join the heir or representative of the deceased debtor as party to the record of the execution proceedings. There has been no authoritative ruling of this Court on the points, while there has been a conflict of rulings in the decisions of the Madras and Allahabad High Courts.

The Madras High Court held in *Ramasami* v. *Bagirathi* (1) that the representatives of the deceased judgment-debtor ought to have been brought in, and that the further process of sale could not legally issue without some person being on the record to represent the deceased judgment-debtor, and that the sale held under such circumstances must be set aside. This same view was re-affirmed by the Madras High Court in *Krishnayya* v. *Unnissa Begam* (2), although its attention was specially drawn to the ruling of the Allahabad High Court in *Stowell* v. *Ajudhia Nath* (3). In this last case the Allahabad High Court held that as the sale was held on the authority of the order of the Court which had jurisdiction to make it, it was not affected by the prior death of the judgment-debtor. The Madras High Court distinguished this Allahabad case, as being one in which the contest was between two mortgagees. The second mortgagee was the first purchaser and purchased the judgment-debtor's [283] interest subject to the first mortgagee's claim, and the death of the original owner could not affect the proceedings in any way. It was further observed that Mr. Justice Straight did not concur with the remark of Mr. Justice Oldfield on this point, and that both Judges agreed that the question whether the sale might be voidable at the instance of the representative of the judgment-debtor did not arise for decision in that case. The Madras High Court held that the sale which took place under such circumstances without notice to the representative, was vitiated by a material irregularity, and must necessarily cause the debtor substantial injury.

Although the decision in *Stowell* v. *Ajudhia Nath* (3) was thus distinguished, the point now in dispute came again directly before the Allahabad High Court, and a Full Bench of that Court held in *Sheo Prasad* v. *Hira Lal* (4), (Justice Mahmood dissenting), that the sale was regular and valid, notwithstanding the failure of the judgment-creditor in the matter of joining the name of the representative of the deceased judgment-debtor as a party to the sale proceedings. The Judges of the Allahabad High Court remarked that the Judges who decided *Ramasami* v. *Bagirathi* (1) gave no reasons for their opinion that s. 234 applied to such cases. It may also be observed that although this Full Bench decision was passed in 1889, it does not appear to have been noticed by the Madras High Court in their second decision quoted above, though that Court referred to the earlier ruling in *Stowell* v. *Ajudhia Nath* (3).

In this state of the law, it becomes necessary to consider the grounds on which the decision of the Allahabad High Court rests. The chief grounds appear to be, (1) that execution proceedings, such as attachment,

(1) 6 M. 180. (2) 15 M. 399. (3) 6 A. 255. (4) 12 A. 440.

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&c., do not abate by reason of the death of the judgment-debtor, (2) that property under attachment must be considered as being in the custody of the law, (3) that it is not necessary to give notice of the sale to the judgment-debtor after his property has been duly attached, (4) that the interest of the representative of the judgment-debtor cannot in any way be damnified by the sale, and (5) that he has his remedy, if the [284] sale was irregularly conducted and resulted in actual injury, under s. 311 of the Code (Act XIV of 1882). The Chief Justice of the Allahabad High Court noticed in detail ss. 234, 275, 276, 280, 284 and 311 of the Code, and as the result of this review he held that there was nothing in the Code of Civil Procedure which warranted the suggestion that an attachment would abate on the death of the judgment-debtor, or that his death would render it necessary for the judgment-creditor to take steps to issue notice to the representatives of the deceased judgment-debtor. There are, however, other sections of the Code which were not noticed in that judgment, and which appear to me to show clearly that the Code does contemplate the necessity of the judgment-debtor or his representative being a party to the sale proceedings. Sections 286—295 lay down general rules for the sale of immoveable and moveable property. Section 290 provides that no sale shall take place without the consent in writing of the judgment-debtor, until after the expiration of thirty days from the fixing of the proclamation. Section 291 similarly requires a fresh proclamation of an adjourned sale, unless the judgment-debtor consents to waive it. The same section provides that, even after proceedings in auction-sale have commenced, they shall be stopped, if, before the lot is knocked down, the debt and costs are paid or tendered. This indulgence clearly presupposes the active presence of the judgment-debtor or his representative as the person paying or offering to pay the sum due. Section 293 gives the judgment-debtor a right to recover loss caused by the resale of property in consequence of the default of the first purchaser. Section 294 permits the judgment-debtor to apply to the Court for setting aside a sale, if the attaching creditor purchases without previously obtaining the permission of the Court. Sections 304—325 lay down special rules for the sale of immoveable property. Section 305 empowers the Court to grant time to the judgment-debtor to raise money even after an order for sale has been made. The judgment-debtor can of course apply under s. 311 to set aside a sale on the ground of irregularity. Section 322 specially contemplates that the Collector shall make an inquiry into the liabilities of the judgment-debtor, and on the basis of that inquiry he may even stop the sale, in whole or in part, if any of [285] the expedients suggested in s. 323 can be adopted with advantage.

I do not, therefore, think that it can justly be laid down that the Code contemplates *ex parte* sale proceedings in execution, and dispenses with the necessity of having the judgment-debtor or his representative before the Court at all stages of these proceedings. It may be conceded that s. 234 is not mandatory, but permissive, and that under the amended s. 647, execution proceedings do not necessarily abate by reason of the death of the judgment-debtor; but it does not follow from this that the sale, when it takes place under such circumstances, cannot be challenged by the representative of the judgment-debtor, whose rights were ignored by the judgment-creditor, either by an application under s. 311, or by a regular suit. There have been decisions of this Court where the judgment-creditor joined the names of other than the true heir of the deceased judgment-debtor, and it was held that the sales which took place in such

proceedings did not affect the right of the true heir, in one case a minor son, and in the other a widow, to sue for redemption, which they could only do by first suing to set aside the sales—*Baswantapa* v. *Ranu*(1) and *Akoba* v. *Sakharam* (2). This analogy appears to me to suggest that, on the point of law now in issue, the decisions of the Madras High Court are entitled to greater consideration than those of the Allahabad High Court, and that the omission to join the name of the representative of the deceased judgment-debtor was a material irregularity, and a serious defect in the title of the purchaser.

The next question for consideration is, whether this irregularity and defect vitiated the sale. In this connection, it must be noted that the plaintiff in this case could have applied under s. 311 to have the sale set aside. It is in evidence that she came to know of the sale within the period allowed by law for applications to set the sale aside. She remained quiet, and allowed the sale to be confirmed. No fraud or *mala fides* on the part of the judgment-creditor is alleged in this case. He was not aware of the death of the judgment-debtor. It is not contended that [286] the sale has resulted in any substantial damage. More than twelve years have elapsed since the date of the confirmation of the sale. Since then the purchaser became adverse owner of the property, and his long possession must be held to have operated as a bar to the legal remedy of the present plaintiff. Moreover, a third person, who had no notice of the plaintiff's right and the defect in the sale proceedings, purchased the property for valuable consideration so far back as 1883. In the Madras cases, this question of limitation did not arise, and was not raised. Under all these special circumstances, I think that the present plaintiff cannot maintain her suit for redemption, and that, notwithstanding the legal defect in the sale proceedings, the defendant's title cannot now be questioned after more than twelve years.

I would, therefore, reverse the order of remand of the lower Court of appeal, and restore the decree of the original Court. Respondent should pay the costs of both appeals.

Order reversed.

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19 B. 286.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

GURUBASAYA (*Original Defendant*), *Applicant v.* CHANMALAPPA (*Original Plaintiff*), *Opponent.** [27th March, 1894.]

The Dekkhan Agriculturists' Relief Act (*Act XVII of* 1879), *s.* 53†—*Revisionary power of the Special Judge—Cases in which failure of justice appears to have taken place —Jurisdiction—Civil Procedure Code* (*Act XIV of* 1882), *s.* 622.

Section 622 of the Civil Procedure Code (Act XIV of 1882) gives to the High Court jurisdiction to interfere only where the lower Court acts without jurisdiction or has exercised its jurisdiction "illegally or with material irregularity."

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* Application No. 140 of 1893 under the extraordinary jurisdiction.

† Section 53 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879):—

53. The District Judge may, for the purpose of satisfying himself of the legality or propriety of any decree or order passed by a Subordinate Judge in any suit or other matter under chap. II, chap. IV, or chap. VI of this Act, and as to the regularity of the

(1) 9 B. 86. (2) 9 B. 429.

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[287] Under s. 53 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) the Special Judge has a revisionary power in all cases where a failure of justice appears to have taken place. It is for him to decide whether the finding on a question of fact by a Subordinate Judge is of that nature, and in doing so he is entirely within his jurisdiction.

Shidhu v. *Bali* (1), dissented from.

THIS was an application under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur Mahadeo Govind Ranade, Special Judge under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879).

Plaintiff Chanmalappa bin Malkappa sued to recover Rs. 333-14-9 due on an account. The defendant disputed certain items in the account and among them one for Rs. 130; he further claimed a set-off on account of commission due to himself.

The First Class Subordinate Judge of Sholapur found that the defendant was not entitled to the commission, and that the plaintiff's claim to the item of Rs. 130 was not proved. He, however, allowed the plaintiff's claim to the extent of Rs. 203-14-9.

Against this decision both the plaintiff and the defendant applied for revision to the Special Judge, who found that the plaintiff's claim to the item of Rs. 130 was proved; that the defendant was entitled to the commission, and that the inquiry before the Subordinate Judge was defective. He, therefore, reversed the decree, and remanded the case for a fresh decision.

On remand the First Class Subordinate Judge gave to the plaintiff a decree for Rs. 40-14-9.

Both the parties again applied for revision to the Special Judge, who on retaking the account amended the decree and awarded to the plaintiff Rs. 275-14-9 and costs in proportion.

[288] The defendant thereupon applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling upon the plaintiff to show cause why the order of the Special Judge should not be set aside.

Ganesh Krishna Deshamukh appeared for the applicant (original defendant) in support of the rule, and relied upon *Shidhu* v. *Bali* (1).

Nagindas T. Marphatia appeared for the opponent (original plaintiff) to show cause, and relied upon *Usmanbhai* v. *Imratbhai* (2) and *Rayachand* v. *Sultan Rahimbhai* (3).

JUDGMENT.

SARGENT, C. J.—We think the decision in *Shidhu* v. *Bali* (1) proceeds upon a mistaken application of s. 622, Civil Procedure Code, which only gives this Court jurisdiction to interfere where the lower Court acts without jurisdiction or has exercised its jurisdiction "illegally or with material irregularity."

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proceedings therein, call for and examine the record of such suit or matter, and pass such decree or order thereon as he thinks fit;

and any Assistant Judge or Subordinate Judge appointed by the Local Government under section fifty-two may similarly, in any district for which he is appointed, call for and examine the record of any such suit or matter, and, if he see cause therefor, may refer the same, with his remarks thereon, to the District Judge, and the District Judge may pass such decree or order on the case as he thinks fit:

Provided that no decree or order shall be reversed or altered for any error or defect, or otherwise, unless a failure of justice appears to have taken place.

(1) 15 B. 180. (2) P. J. (1893), 148. (3) 18 B. 347.

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The Special Judge by s. 53 of Act XVII of 1879 has a revisionary power in all cases where a failure of justice appears to have taken place. It is for him to decide whether the finding on a question of fact by a Subordinate Judge is of that nature, and in doing so he is entirely within his jurisdiction. The practice of this Court under the criminal procedure referred to in the above cases is determined by our own view of the proper way of exercising our revisionary jurisdiction, but cannot, in the absence of words to that effect, be properly imposed on the Special Judge as matter of law determining his jurisdiction.

This view of the law is no doubt more distinctly expressed than in either of the cases of *Usmanbhai* v. *Imratbhai* (1) or *Rayachand* v. *Sultan Rahimbhai* (2); but Mr. Justice Telang, who was one of the Judges who decided *Shidhu* v. *Bali* (3) when sitting with the Chief Justice in the above cases, was, on reconsideration, of the same opinion as that now expressed. We must, therefore, discharge the rule, with costs.

Rule discharged.

19 B. 289.

[289] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

KHANDERAO (*Original Defendant*), *Applicant v.* NARSINGRAO (*Original Plaintiff*), *Opponent.** [3rd April, 1894.]

Mamlatdars' Act (Bombay Act III of 1876). s. 15†—Possessory suit—Mortgagee's possession not on behalf of the mortgagor—Jurisdiction.

The possession by a mortgagee is not possession on behalf of his mortgagor within the meaning of s. 15 of the Mamlatdars' Act (Bombay Act III of 1876) so as to give the Mamlatdar jurisdiction under that section.

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb C. K. Hardikar, Mamlatdar of Koregaon, in the Satara District.

The plaintiff brought a summary suit in the Mamlatdar's Court against the defendant to recover possession of certain lands. He alleged that he had been in actual possession up to within six months before the institution of the suit, and that the defendant had wrongfully dispossessed him on the 29th April, 1893. The suit was filed on the 27th October, 1893.

The Mamlatdar found that the plaintiff had been in actual possession of the lands up to the 14th November, 1892, and that from that date up to the date of dispossession by the defendant, plaintiff's mortgagee was in possession. He, however, held that the mortgagee was in possession on plaintiff's behalf, and, therefore, awarded the plaintiff's claim.

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* Application No. 6 of 1894 under extraordinary jurisdiction.

† Section 15 of the Mamlatdars' Act (Bombay Act III of 1876) :—

15. On the day appointed the Mamlatdar shall proceed to hear all the evidence that is then and there before him, and to try the following issues, *viz.* :—

(*a*) If the plaintiff avers that he has been unlawfully dispossessed of any property or deprived of any use :—

(1) Whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed ;

* * * *

(1) P.J. (1893), 148. (2) 18 B. 347. (3) 15 B. 150.

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[290] The defendant applied under the extraordinary jurisdiction of the High Court and obtained a rule *nisi* to set aside the decision, on the ground (*inter alia*) that the plaintiff having had no actual possession within six months prior to the institution of the suit the Mamlatdar had no jurisdiction to entertain it.

Inverarity (with *B. A. Bhagavat*) appeared for the applicant (defendant) in support of the rule.

Daji Abaji Khare appeared for the opponent (plaintiff) to show cause.

JUDGMENT.

SARGANT, C. J.—The possession of the plaintiff's mortgagee after 14th November, 1892, cannot, we think, be regarded as a possession "on his behalf" within the meaning of s. 15 of Bombay Act III of 1876, and, therefore, the plaintiff, upon the findings of the Mamlatdar, was not in possession six months before the suit, and the Mamlatdar had, therefore, no jurisdiction to entertain it. We must, therefore, make the rule absolute and reverse the decree of the Mamlatdar, and direct him to restore possession to the defendant.

Defendant to have his costs of this application.

Rule made absolute.

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19 B. 290.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

VISHNU MAHADEV SONAR (*Original Defendant*), *Applicant v.*
DAGADU VALID MANAJI (*Original Plaintiff*), *Opponent.**
[12th April, 1894.]

Transfer of Property Act (IV of 1882), s. 135—Construction—Assignment of an actionable claim—Suit by the assignee—Recovery of the full amount of debt.

Vishnu owed a sum of Rs. 483 to Govindsing, who assigned the debt to the plaintiff for Rs. 200. The plaintiff sued Vishnu to recover the whole amount.

Held, that under s. 135 of the Transfer of Property Act (IV of 1882) the plaintiff was entitled to recover the whole amount of the debt.

[R., 3 O.C. 18.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of [291] 1882), against the decision of Rao Babadur N. N. Nanavati, First Class Subordinate Judge of Dhulia, in a Small Cause suit.

One Govindsing Ramsing was prosecuted by the defendant Vishnu Mahadev Sonar upon a charge of cheating in respect of certain cloth, and was convicted and sentenced to imprisonment and a fine of Rs. 1,000, which sum was to be paid to Vishnu for his loss. Vishnu then filed a civil suit against Govindsing to recover the price of the cloth, obtained a decree, and applied for execution, but the execution proceedings were compromised on the 6th October, 1890, for Rs. 760 paid by Govindsing to Vishnu, who thereupon gave Govindsing a receipt in full discharge of the decretal amount and agreed to take steps to cancel the warrant for

* Application No. 185 of 1893 under extraordinary jurisdiction.

the recovery of the fine. The Magistrate, however, declined to cancel the warrant, and Rs. 483 were recovered under it and paid over to Vishnu.

Govindsing subsequently assigned to the plaintiff for Rs. 200 his right to recover this sum of Rs. 483 from Vishnu. The plaintiff gave due notice of the assignment to Vishnu and brought the present suit against him to recover the amount.

The defendant (*inter alia*) pleaded that the plaintiff under s. 135 of the Transfer of Property Act (IV of 1882) could not recover more than he had actually paid for the assignment.

The Subordinate Judge in the exercise of his Small Cause Court powers awarded the plaintiff's claim on the ground that the amount of Rs. 483 was held by the defendant for and on behalf of Govindsing.

The defendant applied under the extraordinary jurisdiction, and obtained a rule *nisi* calling upon the plaintiff to show cause why the decree should not be set aside.

Daji Abaji Khare appeared for the defendant in support of the rule :— Under s. 135 of the Transfer of Property Act (IV of 1882) the plaintiff cannot recover more than Rs. 200 actually paid by him. There is a conflict of decisions on this point. The rulings of the Madras and Allahabad High Courts support our contention—*Nilakanta* v. *Krishnasami* (1) ; *Jani Begam* v. [292] *Jahangir Khan* (2) ; while the Calcutta High Court has held that, notwithstanding an assignment for a smaller amount, the assignee is entitled to recover the whole amount of the debt—*Grish Chandra* v. *Kashisauri Debi* (3) ; *Khoshdeb Biswas* v. *Satar Mondol* (4) ; *Rajendra Narain* v. *Watson and Co.* (5).

Hormusji C. Koyaji appeared for the opponent (plaintiff) to show cause.—He relied upon the rulings of the Calcutta High Court referred to above.

JUDGMENT.

SARGENT, C. J.—The question in this case turns upon the proper construction of s. 135, Transfer of Property Act, which says : " Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it." After giving the section the best consideration in our power we have come to the conclusion that the view of the Calcutta High Court as expressed in *Grish Chandra* v. *Kashisauri Debi* (3) and *Khoshdeb Biswas* v. *Satar Mondol* (4) is the correct one.

In *Nilakanta* v. *Krishnasami* (1) the learned Chief Justice remarks that " if the debtor is wholly discharged in law by payment of a certain sum, it seems to follow that the creditor is only entitled to recover that sum." But if that were intended, surely the learned compilers of the Act might be expected to have said so ; for the two propositions are quite distinct from a legal point of view. In *Jani Begam* v. *Jahangir Khan* (2) Mr. Justice Straight arrived at the same conclusion by discussing the mischief at which he considered the section was aimed, and the impossibility of distinguishing, " as regards morality, between the status of the assignee after suit and decree than before."

But whatever truth there may be in the above remarks, we cannot, as Mr. Justice Willes says in *Fuentes* v. *Montis* (6) in discussing the

(1) 19 M. 225 (229). (2) 9 A. 476. (3) 13 C. 145.
(4) 15 C. 486. (5) 18 C. 510. (6) L.R. 3 C.P. 268 (283).

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Factors' Act in England, which gave rise to so [293] much difference of opinion, "from any notions of expediency" (or morality we may add) "which I may entertain, to go beyond that which I find written." We are "compelled to deal with the Acts of Parliament according to the expressions" we "find there." Applying this rule of construction we cannot, in the proper exercise of our function as a Court of construction, do more than give effect to the plain and unambiguous language of the section. We may add, however, that we agree with the Chief Justice of the Madras High Court in his opinion that cl. (*d*) in the section applies only to a state of facts existing at the time of the purchase of the actionable claim. We must, therefore, discharge the rule, with costs.

Rule discharged.

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19 B. 293.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Farran.

W. G. MAYHEW (*Petitioner*) *v.* SARAH ANNA MAYHEW (*Respondent*).* [4th November, 1894.]

Divorce—Husband and wife—Suit against wife—Costs of wife—Practice—Procedure.

In a suit for a divorce instituted by a husband against his wife the Court has a discretion to make the husband pay the wife's costs already incurred, and to give security for her future costs.

Rule 158 (as amended 14th July, 1875) of the English Rules and Regulations in divorce cases which govern the practice of the Court in England (1), ought, having regard to s. 7 of the Indian Divorce Act IV of 1869, to govern the practice of Indian Courts.

[F., 29 C. 619; Cons., 41 C. 963; R., 13 Bom.L.R. 920=12 Ind.Cas. 554; D., 21 B. 77.]

[294] SUMMONS in chambers. This was a suit brought by the petitioner against his wife for dissolution of marriage on the ground of her alleged adultery. The petition was filed in August, 1894. The respondent denied the charge against her, and prayed for a judicial separation on the ground of the petitioner's cruelty.

The co-respondent also filed a written statement denying the alleged adultery.

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* Suit No. 407 of 1894.

(1) Rule 158.—After direction given as to the mode of hearing or trial of a cause or in an earlier stage of a cause by order of the Judge Ordinary, or of the Registrars, to be obtained on summons, a wife who is petitioner, or has entered an appearance as respondent in a cause, may file her bill or bills of costs for taxation as against her husband, and the Registrar, to whom such bill of costs are referred for taxation, shall, when directions as to the mode of hearing or trial have been given, ascertain what is a sufficient sum of money to be paid into the Registry, or what is sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the Registrar; provided that in case the husband should by reason of his wife having separate property or for other reasons, dispute her right to recover any costs pending suit against him, the Registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability (see Browne and Powles on Divorce (5th ed.), p. 588).

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On the 19th of November, 1894, the respondent obtained a summons calling on the petitioner to show cause why her costs "should not be taxed from time to time as her attorneys may think fit, and why the petitioner should not be ordered to pay such costs when so taxed to the respondent's attorneys, and why the petitioner should not be ordered to secure to the satisfaction of the Prothonotary of this Honourable Court the due payment of such sums to the extent of Rs. 1,000 and such further sums as the Taxing Master of this Honourable Court may from time to time certify to be sufficient to cover the costs of the respondent of and incidental to, and up to and including the hearing of this suit, and why until such security be given all proceedings herein should not be stayed, and why the petitioner should not pay the costs of and incidental to this application."

The petitioner filed an affidavit in which he stated that he had come to India in 1849, and that he intended to pass the remainder of his life here, and that at the date of his marriage with the respondent and at the date of suit he was domiciled in Bombay. He further stated that the respondent was born in Bombay, where her father had long been resident, and that he and his wife (the respondent's mother) were Eurasians and were both domiciled in India. He further stated that his salary was Rs. 500 a month, out of which he had to pay income-tax, insurance, &c., and that he was not possessed of any property.

[295] *Turner*, for the respondent, in support of the summons.—He cited Macrae on the Indian Divorce Act, pp. 151—154; *Proby* v. *Proby*(1); *Natall* v. *Natall* (2); *Thomson* v. *Thomson* (3); *Allen* v. *Allen* (4); Civil Procedure Code (Act XIV of 1882), s. 220, &c.

Brown, for the petitioner, showed cause.—The parties are domiciled in India, and no such order as the summons asks for can be made—Macrae on the Indian Divorce Act, p. 154; Act IV of 1869, ss. 7, 34, 35, 45; *Broadhead* v. *Broadhead* (5).

JUDGMENT.

FARRAN, J.—This is an application by the respondent that the petitioner may be ordered to pay her costs hitherto incurred, and to lodge in Court sufficient money to cover her costs likely to be incurred. The application is resisted by Mr. Brown, who has appeared for the petitioner, and has contended that (1) the Court has no power to make the order; (2) the Court ought not to make the order under the special circumstances of this case.

Upon the unanswered affidavit of the petitioner I assume that his domicile, as well as that of the respondent, is in British India, and was so at the time of the marriage in 1882, and that the provisions of s. 4 of the Succession Act (X of 1865) are applicable to the parties to this suit. It does not appear to me that these provisions affect the rule as to costs which ought to be applied to the case. The rule has always been that an order as to costs pending the hearing ought not to be made against the husband, if the wife is possessed of means (technically styled separate property) sufficient to enable her to pay her own costs in the first instance. The reason for the continuance of the rule (whatever may have been its origin) being "that it is not considered just either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for

(1) 5 C. 357. (2) 9 M 12. (3) 14 C. 580.
(4) L. R. (1894) Pr. 134. (5) 5 B.L.R. App. 9.

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his labours if he take up a case which he honestly believes to be genuine, but which may after all turn out to be unfounded" (Browne and Powles on Divorce, 5th ed., p. 342). It is a rule of public policy.

[296] Section 4 of the Succession Act (X of 1865) enlarges the possibilities of the wife possessing means to pay her own costs, but (if she does not possess such means) does not do away with the advisability of the rule. The passing of the Married Women's Property Act in England, even that of 1882 (45 and 46 Vict., c. 75), has not produced any alteration in the rule of the Divorce Court there. Rule 158, as amended in 1875, still continues to govern the practice of the Court in England (see *Allen* v. *Allen*(1)), and ought, I think, having regard to s. 7 of our Act (IV of 1869), to govern the practice of Indian Courts.

This view is in accordance with the practice hitherto followed in this Court and with the judgment in *Natall* v. *Natall* (2), and *Broadhead* v. *Broadhead* (3), but opposed to the decision in *Proby* v. *Proby*(4), which was recognized in *Thomson* v. *Thomson* (5). Too much stress seems to me to have been placed on the origin of the rule in *Proby* v. *Proby*(4), and too little upon the real reason for its continuance (see *Allen* v. *Allen* (1). The general rule is, therefore, I hold, applicable to the parties in this case.

The Court has, however, a discretion in the matter, and the further question which arises is whether there are sufficient grounds shown in this case to induce me to depart from the usual practice. The circumstances bring it near the border line, but I have come to the conclusion that the petitioner has not shown enough to exempt him from the operation of the general rule. It is manifestly a case in which the costs of the respondent ought to be kept within the narrowest possible limit consistent with her being able to place her case fairly before the Court. No extravagances in the way of costs can be allowed against the petitioner.

The order will be that the respondent's costs be taxed as between party and party down to the 8th day of January, 1895, other than the costs of the issuing of the commission to Madras, of which I have reserved the costs, and that such first mentioned costs be paid by the petitioner to the attorneys of the respondent, and that the Taxing Master fix a sum sufficient to cover the [297] respondent's further costs, and that the petitioner give security for the same, or at his option pay the same into Court.

Costs to be costs in the cause.

Attorneys for petitioner: Messrs. *Brown and Moir.*
Attorneys for respondent: Messrs. *Turner and Hemming.*

(1) L. R. (1894) Pr. 134.
(2) 9 M. 12.
(3) 5 B.L.R. App. 9.
(4) 5 C. 357.
(5) 14 C. 580.

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INSOLVENT JURISDICTION.

Before Mr. Justice Farran.

IN THE MATTER OF HORMARJI ARDESIR HORMARJI, AN INSOLVENT.

[5th December, 1894.]

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vict., c. 21), s. 86 (1)—Entering up judgment against insolvent—Final discharge.

Under s. 86 of the Insolvent Act (Stat. 11 and 12 Vict., c. 21), the Court has a discretion to grant or refuse an application to enter up judgment against an insolvent for the amount of his debts. In exercising this discretion the Court must be guided by the circumstances of the insolvency.

[Rev., 19 B. 778].

APPLICATION for discharge under s. 60 of the Insolvent Act (Stat, 11 and 12 Vict., c. 21).

[298] The insolvent had filed his petition on the 1st May, 1891. In August, 1892, at the hearing of his application for discharge under s. 47 of the Act he was found guilty of reckless speculation and other offences, and was sentenced to a term of imprisonment under ss. 50 and 51 of the Insolvent Act (Stat. 11 and 12 Vict. c. 21). The case is reported in I. L.R. 17 Bom. 313.

Lang (Advocate General) for the insolvent now applied for his discharge under s. 60 of the Act.

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(1) Section 86 of the Indian Insolvent Act (Stat. 11 and 12 Vict., c 21):—

"86. Provided always, and be it enacted, that in all cases where any Insolvent shall not have obtained his discharge in the nature of a certificate as aforesaid under this Act, the said Court for the Relief of Insolvent Debtors may, if in the circumstances of the case it shall think fit, before making such order for such discharge, direct a judgment to be entered up against such Insolvent in the Supreme Court of the Presidency within which such Court for the Relief of Insolvent Debtors shall be situate in the name of the Assignee or Assignees, or of such Official Assignee as the Court shall think fit, for the amount of the debts or demands stated in the schedule of such Insolvent as due or claimed, and of such as shall be established in the said Court against the said Insolvent's estate, or so much thereof as shall appear at the time of such order to be due, which said order shall be filed in the said Court for the Relief of Insolvent Debtors in India; and the production of such order, or of a copy of such order, under the seal of the said Court, of which order, copy and seal no proof shall be requisite other than the production of such order or copy, shall be sufficient authority to the proper officer for entering up the said judgment; and then in every such case, and notwithstanding the provisions hereinbefore contained, if at any time it shall appear to the satisfaction of the said Court that such Insolvent is of ability to pay such debts or demands, or any part thereof, or that he is dead, leaving assets for such purpose, and that under the circumstances the same is reasonable and proper, the said Court may, if it shall think fit, order execution to be taken out upon such judgment against the property of such Insolvent, whether the same may or may not be by law vested in his Assignee or Assignees, for such sum of money as under all the circumstances of the case the said Court shall order, such sum to be distributed rateably amongst the creditors of such Insolvent according to the mode hereinbefore directed in the case of a dividend; and such further proceedings may be had upon such judgment as the Court may from time to time order until the said debts or demands shall be fully paid and satisfied, and no *scire facias* shall be necessary to revive or execute such judgment on account of any lapse of time or change of parties, or otherwise, but execution shall at all times issue thereon by virtue of the order of such Court for the Relief of Insolvent Debtors from time to time: Provided always, that in case any application against any such Insolvent for the purpose aforesaid shall appear to the Court vexatious or oppressive, it shall be lawful for the said Court not only to refuse to make any order on such application, but also to dismiss the same, with such costs against the party making the same as to the said Court shall appear reasonable."

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Macpherson, for the Official Assignee (1).—On behalf of the Official Assignee, who is put in motion by some of the opposing creditors, I apply, before the order of discharge is made, that judgment be entered up against the insolvent under s. 86 of the Insolvent Act for the amount of his debts.

This application, it is understood, will be opposed on behalf of the insolvent. Undoubtedly the Court has, under the section, a discretion to grant or refuse the application; but hitherto the practice has been to make the order as a matter of course, and this is certainly not the instance in which the practice should be altered. This is not a vindictive application by the creditors. Their losses have been enormous. The insolvent was found guilty, at the hearing, of concealing property. To that property they are certainly entitled, and judgment should be entered up for it. But there is no provision for entering up judgment for [299] less than the full amount of the scheduled debts, and therefore, judgment must go for the whole. It must be remembered that even with judgment for this large amount against him the insolvent is fully protected, for s. 86 does not allow such judgment to be executed without application to the Court, and the Court, before ordering it, must be satisfied that execution is reasonable and proper. In ordering execution the Court would adopt the English practice as stated by Jessel, M. R. in *In re Clagett's Estate* (2), and see also *In re Pain* (3). Counsel also referred to *In re Coorlawalla* (4); *In the matter of Candas Narrondas* (5), and Stat. 1 and 2 Vict. c. 110, s. 87.

Lang, for the insolvent, *contra*.—To grant this application would be to inflict a further punishment upon an insolvent already sufficiently punished. The English Act (Stat. 1 and 2 Vict., c. 110. s. 87), which has been cited as corresponding to our Indian Act only applied to non-traders who were insolvents, and not bankrupts. Under the Bankrupt Acts which applied to traders, after-acquired property was always protected. To enter up judgment against the insolvent would be to punish him a second time. He should only be punished once.—*In re Marks* (6); *In re Huggins* (7).

Macpherson in reply.—Until the Indian Act is repealed it is that Act which is to be enforced, and not the English Act. But, if the English Act were in force here, the insolvent would be much more severely dealt with than he can be under the Indian Act; *e.g.*, see s. 31 of the Bankruptcy Act of 1883. Further, s. 28 of that Act seems to give the English Court the same power as is given by s. 86 of the Indian Act. The result of this application is only to compel an insolvent to do that which (if he is an honest man) he would do of his own accord.

JUDGMENT.

FARRAN, J.—I am glad that the order which I am about to make is one which, if I am wrong in making it, may be corrected by the Court of appeal. As far as I am aware, this is the first time that an application of this kind has come before the Court. The practice hitherto has been to enter up judgment against the [300] insolvent as a matter of course in every case. That is a practice which does not appear to be in accordance with the Act, for the 86th section, under which it is done, directs the

(1) The Official Assignee represented the opposing creditors.
(2) 20 Ch. D. 637 (650).
(3) L. R. 3 Ch. 639.
(4) 9 B H.C.R. 14 (17).
(5) 11 B. 138 (148).
(6) L. R. 1 Ch. 334.
(7) 22 Q. B. D, 277.

Court before making the order to exercise its discretion as to whether the order shall be made or not. A practice which precludes the exercise of that discretion is erroneous. It does not appear how it originated, but it has probably arisen from a mis-reading of rule 42 of the rules of this Court.

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The Court, however, has now to exercise its discretion in this case, and the question is by what circumstances it ought to be guided in deciding whether to grant or to refuse an application of this kind. On the best consideration I can give to the matter I cannot but think that those circumstances must be found in the conduct of the insolvent previously to his insolvency. The Court must ask, what occasioned his insolvency? Was it his own misconduct? Was there recklessness or fraud in carrying on his business, or is it clear that the insolvency has been caused by unexpected misfortune, or by circumstances which he could not foresee or which were beyond his control? It is, I think, such considerations as these which must guide the Court in exercising its discretion under s. 86 of the Act.

Applying this test to the present case I am obliged to say that, in my opinion, the insolvency of Hormarji was not in any way due to unexpected misfortune, but was the result of recklessness and want of ordinary foresight and care in the conduct of his business. Being of this opinion I must grant this application. I do so with regret, for it is obvious that the insolvent must begin life again at great disadvantage. If I am wrong, the matter can be taken to appeal.

Order to enter up judgment.

Attorneys for insolvent.—Messrs. *Chalk, Walker and Smetham.*
Attorneys for Official Assignee.—Messrs. *Craigie, Lynch and Owen.*

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19 B. 301.

[301] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

MOROBA RAMCHANDRA (*Plaintiff*), *Applicant*, *v.* GHANASHAM NILKANT NADKARNI (*Defendant*), *Opponent.**

[10th December, 1894.]

Privy Council—Appeal to Privy Council—Time to appeal—Limitation — Limitation Act (XV of 1877), ss. 5 and 12, and sch. II, art. 177—Civil Procedure Code, s. 598.

An application for leave to appeal to the Privy Council must be made within six months from the date of decree. Such an application is not an appeal, and in computing the period of limitation, the time required for obtaining a copy of the decree cannot be excluded.

[F., 28 A. 391=3 A.L.J. 165=26 A.W.N. 55; R., 16 Ind. Cas. 845=6 S.L.R., 86; 18 C.W.N. 1066=24 Ind. Cas. 273.]

APPLICATION under s. 598 of the Civil Procedure Code (Act XIV of 1882) for leave to appeal to the Privy Council.

The applicant (plaintiff) had obtained a decree in the lower Court(1). The defendant appealed, and the appeal Court varied the decree on the 16th

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* Suit No. 282 of 1892.

(1) 18 B. 474.

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March, 1894. The applicant (plaintiff) now desired to appeal to the Privy Council, and a petition for leave to appeal was now presented on his behalf. He had obtained a copy of the decree for the purpose of this appeal on the 9th July, 1894.

Macpherson objected.—This application is too late, and cannot now be granted. The application must be made within six months from the date of the decree (sch. II of the Limitation Act, XV of 1877, art. 177). The time, therefore, expired on the 16th September, 1894. The period cannot be extended, for ss. 5 and 12 of the Limitation Act do not apply. This is not an appeal, and, therefore, in computing the period of limitation we cannot exclude the time requisite for getting a copy of the decree —*Anderson* v. *Periasami* (1); *Lakshmanan* v. *Peryasami* (2); *Jawahir Lal* v. *Narain Das* (3); *Sita Ram Kesho's* case (4).

Scott, for the applicant, (*contra.*).—This petition is the first step in an appeal, and is an appeal just as a memorandum of appeal is part of the appeal. This is evident from the words of **[302]** s. 603 of the Code. Sections 5 and 12 of the Limitation Act, therefore, apply.

JUDGMENT.

SARGENT, C. J.—The question arising here is whether ss. 5 and 12 of the Limitation Act apply to an application for leave to appeal to the Privy Council. In deciding it we think we should read the Act as a whole and not confine our attention merely to the sections referred to. The point is whether the petition now presented is to be regarded as an appeal or an application. If it is an appeal, it comes within the twelfth section, and its presentation is within time, and it is also within the fifth section, under which the period for its presentation may be extended. But reading the Act as a whole we must be guided in some degree by what we find in the schedule; and the schedule deals with an application of this kind as an "application," and as somthing different from an appeal. The third division of the schedule is headed "Applications," as distinguished from the second division, which is headed "Appeals." We cannot treat as an appeal under the fifth or twelfth sections what would fall into the class of "Applications" in the schedule. We must give the Act as a whole its plain meaning, and reading the sections and the schedule together we must hold that this is not an appeal but an application, and that there is no provision which enables us to exclude from the period of limitation the time required for obtaining a copy of the decree or for extending the period of limitation under special circumstances.

We think that the petition is too late, and this application must be refused with costs.

Attorney for applicant (plaintiff).—Mr. *Khanderao Moroji.*

Attorneys for opponent (defendant).—Messrs. *Chitnis, Motilal and Malvi.*

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(1) 15 M. 169. (2) 10 M. 373. (3) 1 A. 644. (4) 15 A. 14.

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[303] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

BAI SHRI MAJIRAJBA (*Original Defendant*), *Appellant v.* MAGANLAL BHAISHANKAR AND ANOTHER (*Original Plaintiffs*), *Respondents.** [4th April, 1894.]

Civil Procedure Code (Act XIV of 1882), ss. 53, 562 and 582—Remand—Amendment of plaint in appeal—Appellate Courts power to amend plaint—Suit for rent converted into one of ejectment.

When a suit is not disposed of on a preliminary point it is not competent to a Court of appeal under s. 562 of the Code of Civil Procedure (Act XIV of 1882) to remand the case for a fresh trial.

The section, moreover, contemplates a remand back to the Court which first disposed of the suit, and to no other Court.

An amendment of a plaint, which materially transforms the nature of the claim, cannot be made under s. 53 of the Code, and certainly not in appeal. Section 53 permits amendment of the plaint before judgment, and not after. The larger powers conferred on appellate Courts by s. 582 do not authorize such a material transformation of a suit in appeal.

[F., L.B.R. (1893—1900), 518 ; R., 18 A. 131 ; 2 L.B.R. 4.]

APPEAL from an order of remand passed by G. McCorkell, District Judge of Ahmedabad, in appeal No. 134 of 1893.

The plaintiffs sued to recover Rs. 2,150 on account of arrears of rent, alleging that they had let the house in dispute to the defendant at a monthly rent of Rs. 50, and that she had passed to them a promissory note for Rs. 600 for a portion of the rent due.

The defendant denied both the letting and the execution of the promissory note, and pleaded that the house in dispute belonged to her and not to the plaintiffs.

The suit was filed in the Court of the Joint Subordinate Judge of the Second Class, who raised the following (among other) issues :—

(1) Are the plaintiffs owners of the house mentioned in the plaint, and have they let it to the defendant on the terms stated therein ?

(2) Is the promissory note proved ?

(3) What amount are the plaintiffs entitled to recover ?

[304] The Subordinate Judge found that the plaintiffs were not owners of the house in suit, that they had not rented it to the defendant, and that the promissory note was not proved. He, therefore, rejected the plaintiff's claim.

On appeal the District Judge was of opinion that in a rent suit like the present the question of ownership of the house in dispute could not be raised, and that only two issues could properly arise : (1) as to attornment, and (2) as to the amount due. He, therefore, refused to hear the appellants on the question of title and possession.

The appellants thereupon applied for leave to amend the plaint, by converting the suit into one for a declaration of their ownership of the house in dispute, and for possession, together with arrear of rent due.

The District Judge allowed this amendment, and remanded the case to the lower Court for a fresh trial.

* Appeal No. 1 of 1894 from order.

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19 B. 303.

Against this order of remand the defendant appealed to the High Court.

Ganpat Sadashiv Rao, for appellant.—The order of remand is opposed to the provisions of s. 562 of the Code of Civil Procedure (Act XIV of 1882). The Court of first instance did not dispose of the suit on a preliminary point. Evidence was taken and findings were recorded on all the issues involved in the case. The appellate Court was not, therefore, competent to reverse the decree and remand the case for a fresh decision. Nor had it the power to allow an amendment of the plaint. Section 53 of the Code of Civil Procedure, as amended by Act VII of 1888, allows a plaint to be amended *before* judgment, and not after. The plaint cannot, therefore be amended in appeal. The amendment in the present case is bad for another reason. It has changed the character of the suit altogether. Plaintiffs having failed to prove the lease sued upon, cannot be allowed to fall back on their general title—*Lakshmibai* v. *Haribin Ravji* (1); *Ramchandra Bapuji* v. *Vasudev Morbhat* (2); *Gavrishankar* v. *Atmaram* (3). The amendment has further the effect of ousting the jurisdiction of [305] the Second Class Subordinate Judge who originally tried the case. The house in dispute is worth nearly Rs. 15,000. A suit to recover possession of such a house must be brought in the Court of the First Class Subordinate Judge. That being so, the remand order in the present case can only be enforced by transferring the suit to another Court. This cannot be done under s. 562 of the Code. That section clearly contemplates a remand to the same Court which had originally decided the case. The remand order is, therefore, illegal.

Viccaji (with him Messrs. *Gulabchand M. Damania* and *Kharsedji D. Shroff*) for respondents.—The real point in the present case is whether the amendment can be allowed. Section 53 of the Code of Civil Procedure must be read with s. 582. The latter section confers on appellate Courts all the powers exercised by Courts of original jurisdiction, including the power of amending plaints. The amendment in the present case does not alter the nature and character of the suit as originally framed. The main question at issue between the parties relates to the ownership of the house in suit. A distinct issue on this question was raised and decided by the first Court. The appellate Court was of opinion that this issue could not be properly dealt with in a mere rent suit. It, therefore, allowed the suit to be amended so as to enable the Court to decide the question of title in a satisfactory manner. The amendment was, therefore, proper, and even necessary, to prevent a multiplicity of suits. The amendment does not materally alter the nature of the suit. In such cases regard is to be had "not to the mere wording of the plaint, but to the issue which was settled for trial, and to the manner in which the case was treated by the lower Courts"—*Rajah Rup Singh* v. *Rani Baisni* (4).

JUDGMENT.

RANADE, J.—The only point of law involved in this case is, whether the lower appellate Court was right in remanding the case back to the lower Court, after allowing plaintiff to amend his plaint.

The original suit was brought by plaintiffs Nos. 1 and 2 to recover Rs. 2,150 on account of the rent of a house alleged to [306] have been

(1) 9 B.H.C R. 1.
(2) 10 B. 451.
(3) 18 B. 611.
(4) 11 I.A. 149 (155).

leased by plaintiffs to defendant in May, 1888. Defendant denied the alleged lease, and contended that she was not plaintiffs' tenant, but owner of the house. There was admittedly no written lease, and plaintiffs relied chiefly on oral evidence, and on a promissory note for a portion of the rent claimed, which note, defendant contended, was a forgery.

The issues laid down for inquiry included one about the ownership of the house. On this issue, evidence was given, and a finding recorded, although the Second Class Subordinate Judge remarked that this question could not be gone into in the present case, and that the inquiry must be confined to the question of the alleged lease, and the arrears of rent claimed. He held that the alleged lease was not proved, and that the promissory note, on which plaintiffs relied, was not passed by the defendant. He accordingly rejected plaintiffs' claim.

In appeal, the District Judge was of opinion that the issue about ownership ought not to have been laid down, and that the Second Class Subordinate Judge was right in confining the inquiry to the issues decided by him. At the same time, as the dispute between the parties related chiefly to the question of ownership, the Disrict Judge permitted plaintiffs to amend the plaint, and remanded the case back to the lower Court for fuller investigation and fresh decision.

The procedure adopted by the District Judge in this case is certainly open to the objection urged by the appellant's pleader. If the District Judge was at one with the Court of first instance, there was obviously no scope for a remand under s. 566, and he should have in appeal disposed of the case upon his appreciation of the evidence on the narrower issues decided by the Second Class Subordinate Judge, and referred plaintiffs to a separate suit on their general title. The suit was not disposed of on a preliminary point, and there was thus no proper occasion for a remand under ss. 562, 564 and 578—*Lingammal* v. *Venktammal* (1) ; *Farzand Ali* v. *Yusuf Ali* (2). Section 562, more over, contemplates a remand back to the Court which first disposed of the suit. In this case, as the value of the property in dispute exceeds [307] Rs. 5,000, the remand inquiry could not possibly be conducted in the Second Class Subordinate Judge's Court, and the suit would have to be inquired into by the First Class Subordinate Judge of Ahmedabad. An amendment, which transforms so radically the nature of the claim, cannot be made under s. 53, and certainly not in appeal. Section 53 requires and permits amendment of the plaint before judgment, and not after. The large powers conferred on appellate Courts by s. 582 do not authorize such a transformation of a suit in appeal.

We accordingly reverse the order of remand, and direct the District Judge to dispose of the appeal on the evidence in respect of the issues decided by the Court of first instance. The respondents should pay the costs of this second appeal.

Remand order reversed.

(1) 6 M. 239.

(2) 2 A. 669.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

MAHARAJADHIRAJ MAHARANA SHRI MANSINJI (*Original Plaintiff*), *Appellant v.* MEHTA HARIHARRAM NARHARRAM (*Original Defendant*), *Respondent.** [5th April, 1894.]

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), ss. 2 and 136—Order dismissing a suit—Decree—Appeal.

An order dismissing a suit under s. 136 of the Civil Procedure Code (Act XIV of 1882) is a decree under the definition contained in s. 2 of the Code, and as such is appelable.

[F., 6 C.L.J. 374, R., 4 L.B.R. 17; 121 P.R. 1907=51 P.W.R. 1907.

SECOND appeal from the decision of J. B. Alcock, District Judge of Surat.

The plaintiff sued to recover Rs. 4,521 due on a mortgage.

The defendant denied the plaintiff's claim.

After issues had been framed the defendant put interrogatories to the plaintiff on material points. The plaintiff evaded replying to them, and several adjournments took place to enable him to reply. Finally the Judge dismissed the suit under s. 136 of the Civil Procedure Code (Act XIV of 1882), the plaintiff not having replied to the defendant's interrogatories.

[308] The plaintiff appealed but the Judge held that the order of the Subordinate Judge was not appealable, and dismissed the appeal.

The plaintiff preferred a second appeal.

Kalabhai Lallubhai, for the appellant (plaintiff).—We submit that the order of dismissal passed under s. 136 of the Civil Procedure Code is appealable—*Ramchandra* v. *Mdhav* (1), *J. R. Williams* v. *T. A. Brown*, (2) *Chunni Lal* v. *Chimman Lal* (3), *Lalla Dabee Pershad* v. *Santo Pershad* (4), and *Prem Sukh* v. *Indro Nath*, (5).

Chimanlal H. Setalvad, for the respondent (defendant).—There was no adjudication, by the Court, on the plaintiff's right to recover the money, and there being no adjudication there was no decree in the suit which could be appealed against—*Lucky Churn* v. *Budurrunnisa* (6).

JUDGMENT.

SARGENT, C. J.—The question in this case is, whether the order of the Subordinate Judge dismissing the plaintiff's suit under s. 136 of the Civil Procedure Code was appealable. It has been contended for the respondent that such an order is not a decree under the definition contained in s. 2 of the Civil Procedure Code, because it does not adjudicate on the "merits" of the right claimed. In *Lucky Churn* v. *Budurrunnissa* (6) the Court was "disposed" to take that view of the section, but did not decide it, being of opinion that in any case the appeal must be dismissed on the merits. However, we think that, having regard to the numerous authorities the other way, it is too late to reopen the question, although had it been *res integra* it must be admitted that

* Second Appeal, No. 987 of 1892.

(1) 16 B. 23. (2) 8 A. 108. (3) 7 A. 159.
(4) 10 C. 505. (5) 18 C. 420. (6) 9 C. 627.

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there is force in the argument for the respondent based on the words of the section and also on the circumstance of there being a special provision for an order rejecting the suit. In *Ramchandra* v. *Madhav*(1) the cases were reviewed, and the conclusion come to by Birdwood, J., that an order dismissing the appeal under s. 556 was appealable. In *J.R. Williams* v. *T.A. Brown*(2) it was held by a Full Bench that the definition of decree in s. 2 shews that when the procedure of the Court finally disposes of the suit it is a decree. In *Lalla Dabee* **[309]** *Pershad* v. *Santo Pershad*(3) and *Prem Sukh* v. *Indro Nath*(4) it was apparently assumed that an appeal would lie against an order made under s. 136. We ought, therefore, we think, in this state of the authorities, to hold that an appeal does lie against the order in question, and must discharge the order of that Court, and remand the appeal for decision according to law. Costs to be costs in the cause.

Order discharged.

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19 B. 309 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Jardine, Mr. Justice Farran and Mr. Justice Ranade.

VIRUPAKSHAPPA (*Original Opponent No.* 1), *Appellant v.* NILGANGAVA (*Original Applicant*), *Respondent.** [5th April, 1894.]

Guardian and Wards Act (VIII of 1890)*—Minor—Minor co-parcener in a joint Hindu family governed by the Mitakshara law—Guardianship—Hindu law.*

Under Act VIII of 1890 a guardian cannot be appointed to the property of a minor who is a member of a joint Hindu family governed by the Mitakshara law, and possessed of no separate property. A guardian of the person of such a minor may be appointed under the Act.

[F., 20 B. 659 ; **Appl.,** 32 B. 259 = 10 Bom. L.R. 279 ; **R.,** 17 A. 529 ; 17 Ind. Cas. 473 = 23 M.L.J. 706 = 12 M.L.T. 585 = (1913) M.W.N. 79 ; **D.,** 21 M. 402.**]**

APPEAL from the order of Venkatrao R. Inamdar, Assistant Judge of Bijapur, in application No. 30 of 1891 under Act VIII of 1890.

The petitioner Nilgangava applied under Act VIII of 1890 for a certificate of guardianship to the persons of her minor sons. She also prayed that a certificate of administration, in respect of the minor's property, be issued either to the Collector or to the opponents Virupaksha and Siddappa, the former of whom was the step-brother and the latter the first cousin of her minor sons. She alleged that the minors were entitled to property worth Rs. 55,000 ; that the minors and the opponents were members of a joint Hindu family; that the whole of the family property was **[310]** in the possession of the opponents ; and that the opponents were given up to vicious habits and had been wasting and mismanaging the common property.

Opponent No. 1, Virupaksha, contended (*inter alia*) that the minor's property being an undivided share in joint family property, the Court had no power under Act VIII of 1890 to appoint a guardian in respect of such property.

Opponent No. 2, Siddappa, stated that he was not in possession of the minor's share of the family property.

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* Appeal, No. 145 of 1893.

(1) 16 B. 23 (2) 8 A. 108. (3) 10 C. 505. (4) 18 C. 420.

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The Assistant Judge ordered that a certificate of guardianship should be issued to the petitioner with respect to the persons of her minor sons, and to the Collector with respect to all the family property in the possession of opponent No. 1 in which the minors had shares.

Against this order, opponent No. 1 appealed to the High Court.

The appeal was at first heard by a Divisional Bench (Jardine and Ranade, JJ.) and then re-argued before a Full Bench (Jardine, Farran and Ranade, JJ).

Shamrao Vithal, for appellant.—The question in the present case is, whether a guardian can be appointed under Act VIII of 1890 for a minor who is a member of a joint Hindu family and possessed of no separate property. Under the Bombay Act XX of 1864 as well as under the Bengal Act XL of 1858 it was settled law that a guardian could not be appointed to take charge of the minor's undivided share in family property, the reason being that one member of a joint Hindu family has not such an interest in the joint property as is capable of being taken charge of and managed separately—*Shivji Hasam* v. *Datu Mavji* (1) *Guracharya* v. *Svamirayacharya* (2); *Narsingrav Ramchandra* v. *Venkaji Krishna* (3); *Lakshmibai* v. *Govind* (4); *Sakharam* v. *Motiram* (5); *Bhagirathibai* v. *Sadashivrav* (6); *Kalidas* v. *Pranshankar* (7); *Chhagan* v. *Ramchandra* (8); *Ram Chunder Chuckerbutty* v. *Brojonath* (9); *Sheo Nundun Singh* [311] v. *Mussamut Chunsam Koeree* (10). No doubt the decison of the Privy Council in *Doorga Persad* v. *Kesho Persad Singh* (11) would seem to show that the Court has the power to appoint a guardian for a minor co-parcener. But, as pointed out by this Court in *Narsingrav* v. *Venkaji* (3), the Privy Council did not consider, in *Doorga Persad's* case (11), the general principle of the Act with reference to the estate of an undivided Hindu family, and their observations must be read in connection with the particular case then under consideration. If the Legislature had intended to alter the law as interpreted by our Courts, it would have said so in express terms. On the other hand, the provisions of ss. 28, 29 and 34 of Act VIII of 1890 clearly show that the Act does not contemplate the appointment of a guardian in the case of a minor co-parcener governed by the Mitakshara law. See also the report of the Select Committee on the Bill (*Gazette of India*, January to June, 1890. Part V, p. 77). The ruling in *Sham Kuar* v. *Mohanunda Sahoy* (12) completely supports my contention.

N. G. Chandavarkar, for respondent.—Under the Hindu law the sovereign as *parens patrioe* is the legitmate and supreme guardian of the property of all minors—1 Strange's Hindu Law, 71; MacNaughten's Principles and Precedents of Hindu Law, p. 104; West and Buhler's Digest, p. 672. The sovereign delegates his authority in this respect to the minor's nearest relatives. No text has been cited showing that the sovereign, or the Court as representing the sovereign, has no jurisdiction to guard the property of a minor who is a member of a joint Hindu family. Very strong authority would be needed to exclude such jurisdiction. The report of the Select Committee regarding the omission of s. 17 in the original Bill does not imply that the Legislature meant to deprive the Courts of their jurisdiction in such matters. Specific words are required to exclude their jurisdiction. Section 7 of Act VIII of 1890 is wide enough to cover a case like the present, while

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(1) 12 B.H.C.R. 281. (2) 3 B. 431. (3) 8 B. 395. (4) P.J. (1874), p. 143.
(5) P. J. (1881), p. 24. (6) P.J. (1881), p. 155. (7) P. J. (1884), p. 8.
(8) P.J. (1886), p. 275. (9) 4 C. 929. (10) 21. W. R. 143.
(11) 9 I. A. 27. (12) 19 C. 301.

s. 19 does not exclude it. The cases cited do not show that the Court is not competent to appoint a guardian for a minor member of a joint Hindu family. [312] They merely show that it is not expedient to appoint a guardian for such a minor. As to the argument that in a joint Hindu family a minor co-sharer has no property to be taken charge of, I submit that he has some interest at least in the family property, and that interest the Court can, and will, protect by appointing a guardian. Take the case of a Hindu family consisting of a father, uncle and a minor son. Suppose the father and uncle collude and dissipate the estate, how is the minor's interest to be protected? The minor cannot enforce a partition against the will of his father and uncle—*Apaji Narhar* v. *Ramchandra* (1), and his interests may be seriously jeopardized if the Courts do not step in and appoint a guardian to protect his share of the joint estate. If the cases cited for the appellant proceed on grounds of expediency, is it not highly expedient, in a case like this, to appoint a guardian: Refers to *Doorga Persad* v. *Kesho Persad* (2); *Babaji* v. *Sheshgiri* (3); *Saroda Soonduree Dossee* v. *Tarinee Churn Chowdhry* (4); *Shridhar* v. *Hiralal* (5).

JUDGMENT.

The judgment of the Full Bench was delivered by

FARRAN, J.—We are of opinion that the order of the Assistant Judge, F.P., appointing the Collector guardian of the property of the minors, must be set aside.

The Act, the applicability of which to the case of a minor forming one of the members of an undivided Hindu family governed by the Mitakshara law we have to consider, is a consolidating and amending Act, and in order to understand its scope we ought, we think, to have before us a clear view of the state of the law at the time when it was passed. That law, so far as Bengal was concerned, was contained in Bengal Act XL of 1858, and for the Bombay Presidency in Act XX of 1864. Both acts have been, in regard to their application to joint Hindu families, the subject of a long series of judicial decisions. The Bengal Act, s. 2, was as follows:—"The care of the persons of all minors (not being European British subjects) and the charge of their property shall be subject to the jurisdiction of the Civil [313] Court." The reason of this provision, not at first sight apparent, is explained in *Ram Chunder* v. *Brojonath* (6) to be that prior to the passing of that Act, by the Regulations then in force, the Courts were restricted from dealing, except by regular suit, with the estates of minors. The Act gave them a general jurisdiction over such estates. The Bombay Act was similar. Section I was this: "The care of the persons of all minors (not being European British subjects) and the charge of their property shall vest in the Civil Courts." Under these Acts, now repealed, no person was entitled to institute or defend a suit connected with a minor's estate of which he claimed charge until he had obtained a certificate of administration, except in the case of very small estates or when there was special cause for allowing it. Any person having the right to have the charge of a minor's estate under a deed or will was entitled to such a certificate, and the nearest relative of the minor had the next claim to it. Failing these, the Court was enjoined (if it thought it necessary for the interest of the minor that provision should be made by the Court for the charge of his property) to grant a certificate of administration to

(1) 16 B. 29. (2) 9 I. A. 27. (3) 6 B. 593.
(4) 6 W. R. Mis. Rul. 28. (5) 12 B. 480. (6) 4 C. 929.

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the Public Curator or other public officer, or in the case of land, to direct the Collector to take charge of it. The result of these provisions, therefore, was that it became as a general rule incumbent on the Court on application made to it by any relative or friend of a minor, or, in the case of land, by the Collector, to grant a certificate of administration to the person having a preferential claim to it. The Court had also a discretion, in the absence of a preferential claimant, to entrust the estate of the minor to the care of the Public Curator or of the Collector if it considered it to be for the interest of the minor that such a course should be adopted.

Under s. 8 of Act VIII of 1890, the same persons have the right to apply to the Court for the appointment of a guardian to a minor as under the repealed Acts, XL of 1858 and XX of 1864, and by s. 7 the Court is directed to appoint or declare a guardian if it is satisfied that it is for the welfare of a minor that such an order should be made, but the appointment of a guardian is not necessary for the purpose of bringing or defending a suit **[314]** (section 53). The Court has now a discretion as to the appointment of a guardian. Under the last mentioned Acts it was in most cases obligatory upon it to appoint one.

It was early held in Bengal, and the ruling has been generally followed there, that one member (although an infant) of an undivided family governed by the Mitakshara law had not such an interest in the joint property as was capable of being taken charge of and managed by the Civil Court or by a guardian appointed under Bengal Act XL of 1858 : *Sheo Nundun Singh* v. *Mussamut Ghunsam* (1). The same view of the law was adopted in Bombay. The earliest reported case is to be found in the Printed Judgments for 1874, and the same proposition has been affirmed, but in different and it must be admitted not always quite consistent language, in a long series of decisions ever since. (See *Lakshmibai* v. *Govind* (2), *Shivji Hasam* v. *Datu Mavji* (3), *Govind* v. *Moro Ragunath* (4), *Narayan* v. *Balvant* (5), *Gurachrya* v. *Svamirayacharya* (6), *Sakharam* v. *Motiram* (7), *Bhagirthibai* v. *Sadishivrav* (8), *Kalidas* v. *Pranhankar* (9) and *Chhagan* v. *Ramchandra* (10). It was at one time assumed that a different view of the law on this subject had been taken by the Judicial Committee of the Privy Council in *Doorga Persad* v. *Kesho Persad* (11). See *Babaji* v. *Sheshgiri* (12); but in a subsequent case, *viz. Narsingrav* v. *Venkaji* (13), it was pointed out that their Lordships of the Privy Council were not considering the question of the applicability of the Act of 1858 to a minor under Mitakshara law ; and the Court concluded that their Lordships' remarks must be taken to be confined to circumstances of the case actually before them which were of a special nature. We are ourselves, after a careful examination of the language of their Lordships' judgment, inclined to adopt the same view.

[315] It must, we think, be admitted that the difficulties in the way of applying the provisions of the Acts to which we have referred in the case of a minor governed by Mitakshara law owning no property, but having a co-parcener's interest only in undivided family estate, were very great. The Courts had held them to be insuperable. From the report of

(1) 21 W. R. 143. (2) P. J. (1874) p. 143. (3) 12 B. H. C. R. 281.
(4) Appeal No. 1 of 1875, decided 4th July 1876.
(5) Miscellaneous Appeals 15 and 18 of 1875, decided 28th February 1876.
(6) 3 B. 431. (7) P. J. (1881) p. 24. (8) P.J. (1881) p. 155.
(9) P. J. (1884) p. 8. (10) P. J. (1886) p. 275. (11) 9 I. A. 27.
(12) 6 B. 593. (13) 8 B. 395.

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the Select Committee on the Bill, which eventually became Act VIII of 1890, it is clear that these difficulties, and the current of decisions upon the subject, were present to the minds of the Legislature when they passed the Act (VIII of 1890). The Mitakshara law remains unchanged. The difficulties of placing a minor's interest in family property under the charge of a guardian appointed by the Court continue as great as ever. The Legislature has not made any special provision to meet these difficulties. The question which we have to consider under these circumstances is whether the interest of a minor in such property comes within the scope and intention of the Act as it at present stands worded.

Now a guardian is defined to be a person having the care of * * the property of a minor: and we think that the Act does not contemplate the appointment of a guardian of the property of a minor unless the minor is possessed of property and of property capable of being taken care of by an appointed guardian. The application for the appointment of a guardian must state the nature, situation and approximate value of the property (if any) of the minor. The words "if any" are necessarily introduced because the application may be for the appointment of a guardian of the person only. The appointed guardian of the property of a minor has certain defined privileges and powers and duties over and in respect of such property granted to him and prescribed by the Act.

1. He is entitled to such an allowance (if any) as the Court thinks fit; or in the case of an officer of Government to fees to be paid to Government out of the property of the ward. There is no provision in the Act for obtaining such allowance or fees from the managing member of the joint family.

2. He is bound to deal with the property as a man of prudence would deal with his own. In the case of a Collector being [316] appointed, he can mortgage or charge it or lease it for a term exceeding five years without the leave of the Court, and in other cases the guardian has the same powers with the leave of the Court. The Court can no doubt define and restrict the powers of an appointed guardian in dealing with property of the minor (s. 32), but this only in cases where the Collector is not the guardian.

3. The duties prescribed by s. 34, cls. (*a*), (*b*), (*c*), and (*d*), are no doubt rendered optional with the Court to impose, and might be dispensed with in the case of a minor whose only property is an interest in an undivided family estate, but the provisions of cl. (*e*) are obligatory, and are wholly inconsistent with the position of a minor in a joint family of the kind we are considering. So, too, are the provisions for the guardian accounting (ss. 35 and 36) and delivering up the property of the ward (s. 41 (3)). In truth, if any of the powers or duties prescribed by the Act are exercised or performed by the guardian of a minor having only an interest in joint family property of this kind, they would be exercised not over the property of the minor, but over the property of the family in which the minor is an unit. If the Legislature, having their attention called to this subject, had intended to make provision for the case of a guardian who should have power merely to watch over and safeguard the interest of a minor in joint family property, they would, we think, have introduced special provisions on the subject and given him special powers. As a matter of history we know from the report of the Select Committee that they did so in the original Bill, but omitted the clause in deference to the weight of authority.

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The conclusion we have arrived at from a consideration of the provisions of the statute would, therefore, seem to be in accordance with the intention of its framers as declared when it was passed. It is true that there is no special exemption in s. 19 of the case of a minor having only this species of interest in property from the provisions of the Act relating to appointed and declared guardians; but if the Legislature adopted the view judicially declared by the Courts that an interest of this kind is not property of which a guardian appointed by the Court [317] can take care, there would, we apprehend, be no need for the expression of su h an exemption. There would be nothing on which the Act could operate. We cannot doubt but that they did adopt that view. This decision does not, in any way, prevent the interest of the minor in joint family property being protected, in the only way in which if imperilled by corrupt or bad management, it can be efficiently protected, by separation. See *Mahadev* v. *Lakshman* (1). The Collector or any one interested in the welfare of the minor can, if the circumstances warrant that step, as next friend of the minor, file a suit on his behalf for partition, and on establishing a case for partition can have himself appointed guardian of the property, which may on partition fall to the infant's share. To appoint a guardian for the purpose of considering whether or not such a suit should be filed, does not, we think, fall within the purview of the Act. It certainly does not fall within its words. We are confirmed in the conclusion at which we have arrived by the judgments in the case of *Sham Kuar* v. *Mohanunda* (2) where the question was fully examined.

The appointment of the minors' mother as guardian of their persons has not been seriously objected to, and under Act VIII of 1890 we see no legal difficulty in making the appointment. Under the repealed Acts the appointment of a guardian of the person seems to have been dependent on, or ancillary to, the appointment of a guardian of the property. Under the present A t this is not the case. That portion of the order appealed against will, therefore, stand affirmed, as the circumstances of the case fully warrant the appointment being made. The parties to pay their own costs throughout.

Order varied.

(1) 19 B. 99.

(2) 19 C. 301.

19 B. 318.

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[318] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

BHAGIRATHIBAI, *Applicant v.* HARI RAVJI CHIPLUNKAR (*Opponent*).*

[10th April, 1894.]

Dekkhan Agriculturists' Relief Act (Act XVII of 1879), s. 15-B†—Decree for redemption—Order for the payment of money within a certain period—Application for payment by instalments—Order to be made in the course of proceedings under the decree, that is, by the Court which carries out the decree.

In a redemption suit under the Dekkhan Agriculturists' Relief Act (Act XVII of 1879), the Court having passed a decree for the payment of the mortgage amount within a certain period, and the decree being confirmed in second appeal, the mortgagor after the expiration of the time for redemption specified in the decree applied to the High Court for an order for the payment of the amount by instalments under s. 15-B of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

Held, that such an order could only be made in the course of the proceedings under the decree, that is, by the Court which carries out the decree.

Gulabpuri v. *Pandurang* (1) referred to.

[R., 5 Bom. L.R. 643 ; D., 9 O.C. 1.]

THIS was an application made to the High Court under the following circumstances :—

The applicant as an agriculturist sued for the redemption of certain property, and obtained a decree. The decree directed her to pay the sum of Rs. 2,800 to the opponent within six months from the date of the decree, or, in default, to be for ever foreclosed. The decree was confirmed in second appeal by the High Court.

[319] The applicant failed to procure funds to satisfy the decree, and the period of six months expired. She now applied to the High Court to extend the period for six months more, or, in the alternative, to make the decree payable by annual instalments of Rs. 400 each under the provisions of s. 15-B of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879). A *rule nisi* was granted calling upon the opponent to show cause why the prayer in the application should not be granted.

Daji Abaji Khare, for the opponent showed cause.—The application was not made until the six months given by the decree had expired. It could not, therefore, be entertained. Once the period had elapsed, there were no proceedings " in the course of which " the order could be made. Such an application ought to be made pending proceedings under the

* Civil Application No. 12 of 1894.

† S. 15-B of the Dekkhan Agriculturists' Relief Act(Act XVII of 1879):—

15-B. (1) The Court may in its discretion, in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section three, cl. (*y*) or cl. (*z*), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.

(2) If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum.

(1) P. J. (1886), p. 142.

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decree. The period given by the decree having expired, the mortgage is foreclosed—*Ladu Chimaji* v. *Babaji Khanduji* (1); *Daito Narayan* v. *Balvant Narayan*(2). An application for instalments should be made in the course of execution proceedings to the Court which executes the decree. A separate application like the present cannot be entertained—*Gulabpuri* v. *Pandurang*(3).

Shivram V. Bhandarkar, for the applicant, in support of the rule.—The period of six months mentioned in the decree expired during the Christmas vacation, and we presented the application on the first day on which the Court re-opened. The application is, therefore, within time—*Peary Mohun Aich* v. *Anunda Charan* (4). The applicant is an agriculturist, and as such she is entitled to the benefits conferred by the Dekkhan Agriculturists' Relief Act under which there is no foreclosure.

[SARGENT, C. J., referred to *Shankarapa* v. *Danapa* (5). The decree being exhausted by efflux of time, there are no proceedings under the decree before the Court.]

The decree had not exhausted itself when we made the application, because it was made on the day the Court re-opened after the vacation. We submit that, if an order for instalments be now made, it will be a proceeding under the decree. It is not **[320]** necessary that the proceeding should be a proceding in execution. Under the provision of s. 20 of the Dekkhan Agriculturists' Relief Act an order for instalments can be made at any time.

[SARGENT, C. J.—Such an application must be made to the Court which carries out the decree.]

We made an application to that Court. but it referred us to this Court, as the final decree was passed by this Court in second appeal.

JUDGMENT.

SARGENT, C. J.—The applicant in this case asks for an order under s. 15-B of the Dekkhan Agriculturists' Relief Act that the amount payable by the mortgagor shall be payable by instalments. Such an order, if it can be made at all under the circumstances of this case, as to which we express no opinion, can only be made as being one in "the course of proceedings under the decree," *i. e.*, by the Court which carries out the decree. Such is the view taken by West and Nanabhai, JJ., in *Gulabpuri* v. *Pandurang* (3). I must, therefore, discharge the rule, and dismiss the application with ccsts.

Rule discharged.

(1) 7 B. 532.
(2) P. J. (1885), p. 248.
(3) P. J. (1886) p. 142.
(4) 18 C. 631.
(5) 5 B. 604.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Fulton.

PATEL MAFATLAL NARANDAS (*Original Plaintiff*), *Appellant v.* BAI PARSON *alias* BAI ITCHA AND OTHERS (*Original Defendants*), *Respondents.** [16th April, 1894.]

Will—Certificate—Regulation VIII of 1827 *—Amendment of plaint—Limitation—Limitation Act* (*XV of* 1877), *sch. II, art.* 144.

A plaintiff can sue to establish his title under a will without producing a certificate under Regulation VIII of 1827.

Mulchand v. *Motichand* (1) distinguished.

For the purposes of limitation a suit must be considered to have commenced from the date on which the plaint was originally presented, and not from the date of its amendment.

[R., 25 Ind. Cas. 439=62 P.R. 1914=255 P.L.R. 1914=161 P.W.R. 1914; 8 S.L.R. 69 (76).]

[321] SECOND appeal from the decision of J. J. Heaton, Acting Joint Judge of Ahmedabad, confirming the decree of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

One Mansukh Nanabhai died on the 25th November, 1878, having made a will appointing the plaintiff his executor. He left him surviving a widow (defendant No. 1), two daughters (defendant No. 2 and another who was not a party to the suit), and his son-in-law (defendant No. 3).

The plaintiff applied for a certificate under the will according to Reg. VIII of 1827, and his application was granted by the District Court on the 26th July, 1879, but he did not take out the certificate.

On the 12th October, 1881, the plaintiff served the defendants with a notice calling on them to deliver up to him Mansukh's property which was in their possession, and they having failed to do so, he filed the present suit in 1890 to recover possession from them of a house and for an injunction restraining them from obstructing him in erecting a building on a certain piece of land. Subsequently, on the 15th August, 1891, the plaintiff amended the plaint by limiting his claim for possession to the upper story of the house only, as under the will the first defendant had a right to reside on the ground floor for her life.

Defendants Nos. 1 and 2, the widow and daughter respectively of Mansukh, replied (*inter alia*) that the claim was time-barred; that the plaintiff could not sue without producing a succession certificate, and that as the first defendant was already in possession of the site on which the plaintiff wanted to erect a building, the claim for injunction would not lie.

Defendant No. 3 disclaimed any interest in the property in suit.

The Subordinate Judge dismissed the suit, holding that the claim was not time-barred; that under the will the plaintiff was not entitled to obtain possession of the upper story of the house; that the suit could not be maintained without a certificate under Reg. VIII of 1827; and that as the plaintiff was not in **[322]** possession of the building-site, the claim for injunction would not lie.

* Second Appeal No. 727 of 1892.

(1) 9 B.H.C.R. 37.

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On appeal by the plaintiff the Judge confirmed the decree on the grounds (1) that the claim to the upper story was time-barred under art. 144, sch. II of the Limitation Act (XV of 1877), the suit being held to have been instituted on the day the plaint was amended,— that is, after the lapse of twelve years from the death of Mansukh; (2) that, according to the ruling in *Mulchand* v. *Motichand*(1), the suit would not lie without a certificate of heirship or executorship; and (3) that the claim for injunction with respect to the building site could not be granted, as the site was in the possession of the first defendant. With respect to the injunction, the Judge stated as follows:—

"There is no doubt, on the evidence, that the defendant widow is in possession of the building site in respect of which an injunction is sought. Therefore an injunction cannot be granted."

The plaintiff preferred a second appeal.

Ganpat Sadashiv Rao, for the appellant (plaintiff).—We contend that no certificate under Reg. VIII of 1827 is necessary for the maintenance of the suit. This is not a suit to recover a debt due to the testator. Next, we say that it is not necessary for an executor appointed under a will to obtain a probate.

The suit is not barred. The time of limitation must be reckoned up to the date on which the suit was filed, and not up to the day on which the amendment of the plaint was made—*Ram Lal* v. *Harrison* (2); *Khem Karan* v. *Har Dayal* (3); *Mengar Munder* v. *Baboo Huree Mohun* (4).

Motilal M. Munshi, for the respondent (defendant).—In the plaint as it was originally filed the plaintiff did not set up a title under the will. Subsequently by the amendment he sought to recover the property as a legatee under the will. The amendment changed the original nature of the suit. The Judge was, **[323]** therefore, right in holding that the suit was instituted on the day the plaint was amended.

JUDGMENT.

SARGENT, C. J.—We think that the Joint Judge was in error in holding that the plaintiff could not establish his title under the will without producing a certificate under Reg. VIII of 1827. The decision in *Mulchand* v. *Motichand* (1) was in a case in which the plaintiff was suing to recover *debts* due to the estate of the deceased, and is not applicable to the present case.

We are also of opinion that the Joint Judge was wrong in holding that for purposes of limitation the suit commenced from the date of the amendment of the plaint and not from the date on which the plaint was originally presented. Taking the latter date as the one on which the suit was instituted, it is clear that it was within time under art. 144 of sch. II of the Limitation Act.

We are unable to accept as a sufficient finding the Joint Judge's statement that there is no doubt, on the evidence, that the defendant is in possession of the building site in respect of which an injunction is sought. The fact is disputed, and the Joint Judge should have given the reasons which led him to the conclusion at which he has arrived.

We must now reverse the decree of the lower appellate Court and remand the appeal for a fresh decision, having regard to the above remarks. Costs of this appeal to follow the result.

Decree reversed and case sent back.

(1) 9 B.H.C.R. 37 (38). (2) 2 A. 832. (3) 4 A. 37. (4) 23 W.R. 447.

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Before Mr. Justice Jardine and Mr. Justice Ranade.

NINGAPPA AND ANOTHER (*Original Plaintiffs*), *Appellants v.* SHIVAPPA AND OTHERS (*Original Defendants*), *Respondents.**

[16th April, 1894.]

Practice—Procedure—Plaint—Alternative reliefs—Partition—Findings of fact unaccompanied by reasons—Not conclusive in second appeal—Second appeal.

The plaintiff sued to recover possession of the northern half of a certain plot of land, alleging that it had fallen to his share at a partition made in 1887, and [324] that he was illegally dispossessed thereof by the defendant in 1890. He also prayed, in the alternative, that if the alleged partition were not proved, the land should be partitioned, and his share awarded to him. The suit was dismissed by the lower Courts on the ground that the alleged partition was not proved, and that no order for partition could be made in the face of the plaintiff's distinct allegation that it had already taken place.

Held, that the plaintiff's allegation of partition did not preclude him from seeking the alternative relief on the strength of his general title.

Held, also, that where no reasons are given by a lower appellate Court for the conclusions arrived at, such conclusions cannot be accepted as legal findings of fact in second appeal.

[R., 12 C. L. J. 357; 7 Ind. Cas. 166; 1 O.C. 174; 91 P.R. 1901=113 P.L.R. 1901.]

SECOND appeal from the decision of C. G. W. Macpherson, District Judge of Belgaum, in appeal No. 61 of 1891.

The plaintiffs sued to recover possession of the northern half of certain land (Survey No. 42), alleging that this northern half had fallen to their share at a partition between them and defendants' father in 1887, and that they had been dispossessed in 1890 in execution of a Mamlatdar's decree in a possessory suit. The plaintiffs also prayed, in the alternative, that if the alleged partition were not proved, the land should be partitioned, and a moiety thereof awarded to the plaintiffs.

The Court of first instance rejected the plaintiffs' claim, holding that the alleged partition of 1887 was not proved, and that the land, being service vatan land, was not liable to partition.

This decision was confirmed, on appeal, by the District Judge, whose judgment was as follows :—

"The points for determination appear to be—

(*a*) Have plaintiffs proved that the land in dispute fell to them on a partition?

(*b*) If not, should a partition be ordered?

(*c*) Apart from the alleged partition, have plaintiffs proved a title to the land in dispute.

"My finding on all the three points is in the negative.

"Exhibit A, the partition-deed relied on by plaintiff, is unregistered, and there can be no doubt that the property to which it refers is worth upwards of Rs. 100.....This being so, it follows that the deed, which may or can be genuine, is inadmissible for want of registration, and oral evidence of its terms is likewise inadmissible. Plaintiff, therefore, cannot prove partition.

"As regards point (*b*), a Court could not order partition in the face of plaintiff's distinct allegation that it had already taken place.

* Second Appeal, No. 666 of 1892.

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"As regards point (*c*), there is no satisfactory evidence that plaintiff was ever in possession of the land in dispute, or that he has any title to it."

[325] Against this decision the plaintiffs preferred a second appeal to the High Court.

Mahadev BhaskarChaubal, for appellants.—Our allegation of partition does not estop us from claiming partition in the alternative. We put forward the alternative case from the beginning. Having failed to establish the alleged partition, we are entitled to fall back on our general title, and claim the alternative relief—*Lakhshmibai* v. *Hari bin Ravji* (1); *Maidin Saiba* v. *Nagapa* (2) *Raj Kishore Bhuddur* v. *Huree Mohun* (3); *Shivram* v. *Narayan* (4). The lower Court's finding on the question of possession is not accompanied by any reasons. It is, therefore, not conclusive in second appeal—*Kamat* v. *Kamat* (5).

Mahadev Chimnaji Apte, for respondents.—Plaintiff alleges that a partition took place in 1887. If this be true, then he is not entitled to demand a fresh partition except on the ground of mistake or fraud. He does not rest his case on this ground. Nor does he say that the land in dispute was left undivided at the time of the alleged partition. His case is that he got possession of his share, and was then ousted. Such ouster does not entitle him to claim a fresh partition. If he were allowed to say that there was no partition, then the present suit is defective. He must seek partition of all the joint property, and not merely of the land in dispute. He must bring into hotchpot the family property which is in his possession. The plaint contains two inconsistent reliefs neither of which can be granted—*Mahomed Buksh Khan* v. *Husseini Bibi* (6); see O'Kinealy's Notes on Civil Procedure Code, p. 97, 4th edition.

JUDGMENT.

RANADE, J.—In this case, the appellants (original plaintiffs) brought this suit to recover possession of the northern half of Survey No. 42, which was admittedly *shetsanadi* service land and which plaintiffs claimed had fallen to their share in a partition effected in 1887 between plaintiffs and defendants' father. The defendants dispossessed the plaintiffs in execution of a Mamlatdar's decree in a possessory suit in 1890. Plaintiff claimed Rs. 100 as profits of their share of the land for three years, and the [326] plaint contained an alternative prayer that, in case the partition alleged were not proved, the claim might be treated as one seeking a partition of the land. Defendant No. 1 denied the alleged partition of 1887, and contended that separation had taken place twenty five years ago. Plaintiffs obtained no share in the land in dispute, which was, moreover, service land, and as this service was rendered by the defendant No. 1, he alone was entitled to the possession of the land. The Court of first instance held that the partition deed of 1887 was inadmissible in evidence, as it was not registered. It further held that as the land was service land, it was not subject to partition. This decree was confirmed, in appeal, by the District Court, which held that the partition deed was inadmissible in evidence, and that no oral evidence could be received also on the point. It further held that as plaintiffs admitted a previous partition, no fresh partition, could be ordered; and, finally, that plaintiff had failed to prove his title or his alleged possession of the land.

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(1) 9 B.H.C.R. 1.
(2) 7 B. 96.
(3) 19 W. R. 195.
(4) 5 B. 27.
(5) 6 B. 368.
(6) 15 I. A. 81.

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In the appeal before us, the appellants' pleader contended that the partition-deed was improperly held to be inadmissible in evidence, and that it could be at least used to prove plaintiffs' alleged possession. It was further contended that as plaintiffs' plaint had contained an alternative prayer, the lower Court of appeal was in error in holding that partition could not be ordered in this suit. Lastly, it was urged that as the lower Court had summarily disposed of the last two points, the judgment was defective.

To take up the last point first, there can be no doubt that it would have been far more satisfactory if the lower Court of appeal had decided the points (*b*) and (*c*) in a less summary manner, and had given reasons for its conclusions. This Court has laid down in *Kamat* v. *Kamat* (1) and *Raghunath* v. *Nilu* (2) that when no reasons are given for the conclusions arrived at such conclusions cannot be accepted as legal findings of fact in second appeal. In the present case, plaintiff's allegation of a partition effected in 1887 was held by the lower Court to preclude him from seeking an order for partition under the alternative prayer contained in his plaint. We do not think plaintiff's [327] allegation of partition was necessarily attended by any such consequence. In a similar case, *viz.*, *Raj Kishore* v. *Huree Mohun* (3), where plaintiff alleged that a partition had been effected of his third share, and failed to prove it, the Courts allowed him to recover joint possession as before. In the present case, defendant No. 1 expressly admitted the fact of the double partition in his deposition, Ex. 34. He stated therein that plaintiffs had separated twenty-five years ago, and that afterwards there was a reunion, and as plaintiffs were minors, defendants' father managed the shares both of plaintiffs and defendants; and that finally there was a division of house and lands about four years ago. Defendant No. 1 thus virtually admitted the statements in the plaint in respect of all the other property, and his contention was limited solely to the land in dispute, which he stated had never been divided, but had been held by his family in lieu of service, as representing the eldest branch. It was, therefore, necessary for the lower Court of appeal to discuss the evidence about plaintiff's alleged possession and general title to the land, and it erred in disposing of the case on the ground that the plaintiff's admission of partition precluded him from seeking the alternative relief on the strength of his general title.

That relief, it may be mentioned, is not inconsistent with the prayer for recovery of possession. In Story's Equity Pleadings (s. 41, p. 37) the rule has been stated as follows:—"It has been said that a prayer of general relief, without a special prayer of the particular relief, to which the plaintiff thinks himself entitled, will be sufficient, and that the particular relief which the case requires may at the hearing be prayed at the bar. This as a general rule may be true; but it is not universal. Thus, for example, an injunction will not ordinarily be granted under a prayer for general relief; but it must be expressly prayed, because the defendant might, by his answer, make a different case under the general prayer from what he would, if an injunction were specifically prayed. So a writ of *ne exeat regno* will not ordinarily be granted unless expressly prayed for in the bill." It has been accordingly ruled that inconsistent assertions of fact cannot be permitted either in the plaint or in the pleadings, but that [328] on the same basis of facts, two distinct titles may be put forth—See *Chova Kara* v. *Isa bin Kahlifa* (4) and *Mahomed Buksh Khan* v. *Husseini Bibi* (5).

(1) 8 B. 368 (370).
(2) 9 B. 452 (454).
(3) 19 W.R. 195.
(4) 1 B. 209.
(5) 15 I. A. 81.

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Plaintiff's principal claim was for a share of the land, a definite northern share if the alleged partition was held proved, or an equal share if no such partition was admitted. In the present case the fact of the second partition is not denied by the defendant. His contention relates solely to the impartible character of the land in dispute by reason of its being service land. There was, therefore, no inconsistency in plaintiff's claim.

The partition-deed on which plaintiffs relied, was very properly held to be inadmissible in evidence, as both the value of the entire property and of plaintiffs' share in it exceeded 100 rupees. The questions of plaintiffs' alleged title to the land independently of the partition of 1887, and the impartibility of the land as being service land (on which latter point the Court of first instance rejected plaintiffs' claim), were not at all considered by the lower Court of appeal. It virtually disposed of the case on a preliminary point which did not cover the whole of plaintiffs' claim. Under these circumstances we think that the ends of justice will be best served by a remand of the case back to the lower Court of appeal under s. 566, with directions that it should record its findings with reasons on the question of possession and title, and the impartibility or otherwise of the land in dispute. It should return these findings in the course of three months.

Case remanded.

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19 B. 328.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

TRIMBAK RAMRAO DESHPANDE (*Original Plaintiff*), *Appellant* *v.* GOVINDA (*Original Defendant*), *Respondent.** [18th April, 1894.]

Civil Procedure Code (Act XIV of 1882), *s.* 244 *(c)—Claim to attached property—Order in execution proceedings—Separate suit—Execution of decree.*

In execution of a decree passed against the plaintiff certain property in his possession was attached. Thereupon he laid claim to the property, on the ground [329] that it was his service vatan. This claim was rejected. The plaintiff then filed a regular suit for a declaration that the property was not liable to attachment and sale.

Held, that the suit was barred under s. 244 of the Code of Civil Procedure (Act XIV of 1882). The Court which originally rejected the plaintiff's claim in the execution proceedings had jurisdiction to investigate the claim under cl. (c) of s. 244 of the Code.

[R., 8 O. C. 405; D., 22 B. 475.]

SECOND appeal from the decision of A. Steward, District Judge of Khandesh, in Appeal No. 203 of 1891.

The property in dispute was attached in execution of a money decree obtained by one Govinda Vyankoba against Trimbak Ramrao Deshpande.

Thereupon Trimbak applied to have the attachment raised, alleging that the property was service vatan property, and as such not liable to attachment and sale.

This application was rejected.

Trimbak thereupon filed a regular suit to have it declared that the property in dispute was not liable to attachment and sale in execution of any decree, on the ground that it was service vatan.

* Second Appeal, No. 718 of 1892.

The Court of first instance dismissed this suit, holding that it was barred under s. 244 of the Code of Civil Procedure, as the order passed on plaintiff's application to set aside the attachment was one relating to the execution of a decree and made between the parties to the suit in which the decree was passed :

This decision was confirmed, on appeal, by the District Judge.

The plaintiff thereupon preferred a second appeal to the High Court.

Mahadev C. Apte, for the appellant (plaintiff).—The decree in execution of which the property was attached was passed against the present plaintiff personally, and not in his capacity as vatandar. When the property was attached, he claimed it as his service vatan. The order rejecting his claim fell within s. 280 and not 244 of the Code of Civil Procedure. The present suit will, therefore, lie as expressly provided by s. 283 of the Code—*Roop Lall Dass* v: *Bekani Meah* (1). Section 278 of the Code does not exclude the case of a judgment-debtor claiming the **[330]** property attached, not on his own account, but as a trustee for and on behalf of a third party. In the present case the plaintiff, a vatandar, claimed the property in dispute, not as his own private property, but as property belonging to Government and held by him as remuneration for service. The case, therefore, does not fall under s. 244.

Daji Abaji Khare, for respondent (defendant).—All questions between the parties to a suit in which a decree is passed, and relating to execution of the decree, fall within s. 244 of the Code of Civil Procedure. The claim made by the plaintiff in the execution proceedings was one between the parties to the suit, and relating te execution. It was, therefore, cognizable under s. 244, and could not be made the subject of a separate suit—*Punchanun Bundopadhya* v. *Rabia Bibi*(2). Section 278 contemplates the case of a claimant who is not a party to the suit ; the law, therefore, provides in his case that if he fails in the summary proceedings, he may bring a separate suit to establish his right. The present is not a case of this kind—*Chowdhry Wahed Ali* v. *Jumaee* (3).

JUDGMENT.

JARDINE, J.—A decree having been passed against the plaintiff, an inam jaghir village in his possession was attached ; whereupon he claimed that, as this property being service vatan was not liable to attachment of sale, the attachment should be removed. This claim was rejected. The plaintiff thereupon sued for a declaration that the property was not liable to attachment and sale. This suit has been rejected by the two lower Courts on the ground that the order was made under s. 244, and that no suit would lie.

Mr. Apte has urged the analogy of the mutawali of wakf, who was the judgment-debtor in *Roop Lall Dass* v. *Bekani Meah*(1), in which at p. 445 it was held, after a review of the cases, that where the judgment-debtor claims to hold the property which is sought to be attached as a trustee for third parties the order passed on the claim must be held to be a decision under s. 280, and not under s. 244. The present claim is not based on such a ground ; and following the decisions of the **[331]** Privy Council in *Chowdhry Wahed Ali* v. *Mussamut Jumaee*(3) and *Abedoonissa* v. *Ammerooniss*(4), as interpreted in *Punchanun Bundopadhya* v. *Rabia Bibi*(2) and *Kuriyali* v. *Mayan*(5), we are of opinion that the Court which

(1) 15 C. 437. (2) 17 C. 711. (3) 11 B.L.R. 149. (4) 4 I.A. 66 (75).
(5) 7 M. 255.

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originally rejected the claim made in the execution proceedings had jurisdiction under the words of s. 244, cl. (*c*). We, therefore, confirm the decree with costs.

Decree confirmed.

19 B. 331.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

GAVDAPPA AND ANOTHER (*Original Defendants*), *Appellants v.* GIRIMALLAPPA (*Original Plaintiff*), *Respondent.**

[19th April, 1894.]

Hindu law—Adoption—Adoption by a mother after the death of her son who has left neither child nor widow—Adoption by a grandmother without the consent of her daughter-in-law—Objection taken for the first time in appeal—Practice.

Under the Hindu law a mother is competent to adopt when her son dies leaving no widow or other heir nearer than herself.

A Hindu of the Shudra class died, leaving him surviving his mother and a paternal grandmother. After his death his grandmother adopted the defendant. Subsequently to this adoption the deceased's mother adopted the plaintiff. Thereupon both plaintiff and defendant claimed the deceased's estate.

Held, that the plaintiff was entitled to succeed. The deceased's mother having succeeded as heir to her son, her mother-in-law could not by any adoption divest her of her rights as such heir without her consent. The defendant's adoption was, therefore, invalid.

An objection based upon a point of law may be made in second appeal, provided it does not involve the taking of any additional evidence on matters of disputed facts.

[R., 23 B. 327 ; 25 B. 202 ; 25 B. 306 ; 28 B. 461 ; 4 Ind. Cas. 599=3 S.L.R. 106 ; 1 N. L.R. 1 ; 1 S. L.R. 142.]

SECOND appeal from the decision of Venkatrao R. Inamdar, Acting Assistant Judge of Sholapur-Bijapur, in appeal No. 78 of 1891.

The property in dispute belonged to one Giriappa Jennappa.

Giriappa died leaving behind him his mother Rachava and a paternal grandmother also called Rachava.

[332] After Giriappa's death his grandmother adopted defendant No. 2. Subsequent to this adoption, Giriappa's mother adopted the plaintiff in 1879.

In 1888 the plaintiff's adoptive mother sold the property in dispute to defendant No. 1, and put him in possession on 1st April, 1889.

In 1890 the plaintiff filed the present suit to recover possession of the property in question, alleging that it had been illegally sold by his adoptive mother to defendant No. 1.

Defendant No. 1 denied the plaintiff's adoption, and contended that the plaintiff had obtained the adoption deed by fraud and misrepresentation, and that the sale to him of the lands in suit was valid and binding on the plaintiff.

Defendant No. 2, who was added on defendant No. 1's application, contended that he had been adopted by Giriappa's grandmother with the consent of Giriappa's mother, and that after his adoption plaintiff could not be validly adopted.

* Second Appeal No. 768 of 1892.

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The Court of first instance rejected the plaintiff's claim.

On appeal, the Assistant Judge held that on Giriappa's death his mother succeeded to his estate; that she was competent to take the plaintiff in adoption; that the parties being Shudras the plaintiff's adoption was valid; that the plaintiff's adoptive mother did not give her consent to the adoption of defendant No. 2 by her mother-in-law; that the adoption of defendant No. 2 was, therefore, invalid; that the sale to the defendant No. 1, having been effected after the plaintiff's adoption, was not binding on the plaintiff. He, therefore, awarded the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Ghanasham Nilkanth Nadkarni, for appellants (defendants).—The mother of the deceased Giriappa had no authority to adopt the plaintiff. It appears that Giriappa left a widow behind him; and though the widow was dead at the time of the adoption, that circumstance would not render the adoption valid. The mother's power of adoption was at an end when the estate passed from the son to the son's widow—*Krishnarav Trimbak Hasabnis* **[333]** v. *Shankarrav* (1). Even if the son had left no widow, the mother would not have been in a better position. The ownership of the estate together with the right of adoption having once descended to the son, the right to adopt could not go back to the mother. If she were allowed to adopt under such circumstances, the son would be placed in a worse position as regards the performance of his *shradhas* than if there had been no adoption at all—West and Buhler (3rd Ed.), p. 984; *Piddappa* v. *Gurawa*(2). If the mother can adopt, why cannot the grandmother? The plaintiff's adoption is, therefore, invalid.

B. A. Bhagvat, for respondent (plaintiff).—The objection now taken to the validity of the plaintiff's adoption was not raised either in the Court of first instance or even in the memorandum of appeal presented to the District Court. It must, therefore, be taken to have been waived. Nor is there any finding of either of the lower Courts that the deceased Giriappa left a widow behind him or ever had a wife. It is not open to the appellant to make a new case in second appeal. The case should, therefore, rest on the same footing here as it did in the Courts below, namely, that Giriappa died leaving his mother as his only heir. Dealing with the case on that footing, I contend that the mother was competent to adopt a son. In adopting a son she divests no estate but her own, and she may do so when she likes—*Raja Vellanki Venkata* v. *Venkata Rama*(3). The ruling in *Hasabai's*(1) case does not apply, as in that case the son's widow had survived him; while in the present case the son left no widow behind him. The bar created by the *upanayan* ceremony in the case of the higher classes does not affect the Shudras. The parties to this suit are Lingayet Shudras.

JUDGMENT.

RANADE, J.—In this case the respondent (original plaintiff) brought his suit, as the adopted son of Rachava, to recover possession of certain lands which Rachava had sold to appellant (defendant No. 1) in October, 1888. The appellant No. 1 denied the alleged adoption, and contended that respondent had obtained an adoption-deed by fraud and misrepresentation. There was a **[334]** further complication introduced by joining the

(1) 17 B. 164. (2) P. J. (1889), p. 341. (3) 4 I.A. 1.

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name of appellant No. 2 (original defendant No. 2), who claimed to have been adopted by Rachava's mother-in-law, and who stated that Rachava had sold the land to appellant No. 1 with his consent. The chief grounds on which respondent's adoption was questioned in the first Court were (1) fraud on respondent's part, (2) his neglect to maintain Rachava, who, therefore, repudiated the adoption, and alienated the land for her own maintenance, and, (3), the prior adoption by Rachava's mother-in-law of appellant No. 2.

The Court of first instance held that respondent's adoption-deed, as also the sale-deed in favour of appellant No. 1, were both proved. It held further that as the land in dispute was acquired by Giriappa, the son of Rachava, and her husband Jennappa, and Rachava succeeded to it as mother and heir of Giriappa, she was absolute owner of the land, and respondent had no right to it, as it did not form part of Jennappa's estate. Neither had appellant No. 2 any right to the land, as it formed no part of his adoptive father's estate. The sale was effected for a legitimate necessity, and was, therefore, binding on respondent, whose claim was, therefore, rejected.

In appeal, the Assistant Judge, while agreeing with the Court of first instance on the question of respondent's adoption, held (1) that appellant No. 2's adoption was invalid, (2) that Rachava did not acquire an absolute interest in Giriappa's land, and (3) that, as there was no legal necessity for the alienation, he held that the sale to appellant No. 1 did not bind the respondent. The Assistant Judge held finally that the adoption of respondent by Rachava, as mother and heir of Giriappa, was not invalid, inasmuch as the ruling in *Krishnarav Trimbak Hasabnis* v. *Shankarrav* (1) applied to Brahmins only, and could not apply to Shudras, and this objection was not pressed by the appellants, who were, therefore, held to have waived it. Respondent's claim was accordingly decreed in full.

The appellants' pleader before us chiefly rested his contention on the ground that, as Rachava's husband Jennappa had left his son Giriappa behind him, Rachava, succeeding as Giriappa's [335] mother and heir to the land, could not adopt the respondent under the ruling referred to above, which applied both to Brahmins and Shudras alike. It was also contended on behalf of appellant No. 2 that his prior adoption by Rachava's mother-in-law was valid. Lastly, it was urged that appellants had never waived their principal objection to the validity of respondent's adoption. The other objections were not seriously pressed in the course of the argument, and need not be noticed here.

As regards the allegation about waiver, it appears from the record of the suit that the appellants did not urge their principal objection in the Court of first instance, but rested their defence solely on the ground of fraud and breach of agreement in respect of Rachava's maintenance. In the lower Court of appeal, however, this objection appears to have been pressed in the course of argument, and as it was an objection based on a point of law, there could be no bar to the lower Court's taking notice of it, even though it was not pointedly urged. It is certainly open to the appellants to raise the point in second appeal, and we must take notice of it, if it does not involve the taking of any additional evidence on matters of disputed facts.

The next question we have to consider is, whether respondent's adoption by Rachava was valid as against the appellant No. 2, who claims to have been previously adopted by Rachava's mother-in-law, and, secondly,

(1) 17 B. 164.

whether it was valid as against appellant No. 1, who claims as purchaser from Rachava, who repudiated the adoption, and alienated the land in her right as sole and absolute owner. In so far as the contest lies between the relative claims of the two adoptions, we entertain no doubt that the finding of the lower Court of appeal is correct. It is true there is no clear finding as to the constitution of the family at the time of the death of the last full owner Giriappa, the son of Jennappa, by his wife Rachava, and the grandson of Maharudra. It is in evidence that Jennappa died before Maharudra, and that, on Maharudra's death, Giriappa was the sole owner of the property. It is plain that as between Maharudra's widow, the adoptive mother of appellant No. 2, and Jennappa's widow, the adoptive mother of respondent, the latter as mother succeeded as heir to Giriappa, who had himself acquired the land in dispute, and her mother-in-law **[336]** could not by any adoption divest her of her rights as such heir, unless she consented. There has been an express finding that Rachava did not give her consent. Appellant No. 2's claim, therefore, was very properly disallowed—*Annammah* v. *Mabbu Bali* (1); *Rupchand* v. *Rakhmabai* (2); *Kally Prosonno* v. *Gocool Chunder* (3); *Bhoobun Moyee* v. *Ram Kishore* (4).

As regards the validity of respondent's own adoption, it was contended before us that it was similarly invalid, inasmuch as Giriappa, the natural son of Rachava, had left a widow behind him, who was his heir, and this widow, and not Rachava, had the right of adoption.

The allegation that Giriappa was married and had left a widow behind him was made for the first time in second appeal. The judgments of both the lower Courts are silent on this point. If Giriappa had left a widow as his heir, the appellant No. 1 would not have failed to press the point in the lower Courts. We cannot, under these circumstances, take notice of this allegation, as it involves a question of fact, in respect of which there has been no issue and no distinct finding. We must, therefore, hold that Giriappa left no other nearer heir save his mother Rachava at the time of his death.

The appellants' pleader Mr. Ghanasham, however, contended that even if Giriappa had left no widow, and his mother was his only heir, yet the ownership of the land, together with the right of adoption, having once descended to Giriappa, the right to adopt could not ascend to his mother Rachava, and her adoption of respondent was, therefore, invalid under the authority of the ruling in *Hasabnis'* case (5). In that case, however, the widow of the last heir survived her husband, and it was accordingly held that, under the circumstances, the mother could not adopt even after that widow's death. The facts of this case clearly distinguish it from the authority cited above. Mr. Mayne in his Hindu Law, s. 104, recognizes a distinction between a mother adopting after her infant son's death, and adopting **[337]** after the death of that son's widow, and the ground of this distinction apparently rests on the decisions of the Privy Council that an adoption by the mother after the estate has vested in her son's widow is invalid—*Bhoobun Moyee* v. *Ram Kishore* (4); *Pudma Coomari* v. *The Court of Wards* (6); *Thayammal* v. *Venkatarama* (7). If it had been found in the present case that Giriappa had left a widow behind him, Rachava's adoption of the respondent would clearly have been invalid. The larger proposition which the appellants' pleader asks us to affirm derives no

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(1) 8 M.H.C.R. 108. (2) 8 B.H.C.R. A.C.J. 114. (3) 2 C. 295.
(4) 10 M.I.A. 279. (5) 17 B. 164. (6) 8 I.A. 229. (7) 14 I.A. 67.

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support from the authorities cited before us. If a widow cannot adopt after the death of her natural or adopted son under any circumstances, half the adoptions that take place would have to be declared invalid. Even the learned Editors of the Digest of Hindu Law admit that the widow can exercise her authority to adopt when her son, natural or adopted, dies unmarried, or leaves no child or widow behind him. If this were not so, the husband could not authorize his widow to make successive adoptions, and this power has been expressly recognized by the Courts in India—*Raja Vellanki* v. *Vankata Rama* (1) and *Ram Soondur* v. *Surbanee Dossee* (2). In this Presidency no express authorization by the husband is necessary, but the widow's power to adopt, when there are no other vested rights which would be defeated by it, has been fully recognized in *Ramji* v. *Ghamau* (3). In the higher caste, it is usual to permit such an exercise of power when the son dies before he attains full ceremonial competency, and cases of a second and third adoption under such circumstances have occurred. In this view of the law, we feel satisfied that Rachava could validly adopt the respondent after Giriappa's death without leaving any other heir nearer than his own mother.

The lower appellate Court was, therefore, not right in the way it distinguished the present case from the ruling in *Krishnarav* v. *Shankarrav* (4) ; but its view can be supported on other grounds, and we, therefore, see no reason to distrub its finding. Rachava **[338]** or her assignee, appellant No. 1, was certainly estopped by her own act from questioning respondent's adoption. She had, at the most, no more than a Hindu widow's estate in the land as heir to Giriappa, and she could not, after adopting the respondent in 1879 alienate the land without any proved necessity.

We accordingly confirm the decree of the lower appellate Court, and dismiss the appeal with costs on appellants.

Decree confirmed.

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19 B. 338.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

JAGMOHANDAS KILABHAI (*Original Plaintiff*), *Applicant v.* ALLU MARIA DUSKAL (*Original Defendant*), *Opponent.** [19th April, 1894.]

Succession Certificate Act (VII of 1889), *s.* 4—*Joint family—Suit for family debt—No necessity for certificate—Hindu law—Evidence—Presumption as to nature of property where the family is joint.*

Under the Succession Certificate Act VII of 1889 a plaintiff does not require a certificate where his claim is for family property by right of survivorship.

Where a plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by the plaintiff, the presumption is that it is a family debt.

[F., 17 A. 578 ; 38 C. 182=13 C.L.J. 203=15 C.W.N. 49=7 Ind. Cas. 806; 18 Ind. Cas. 228; R., 33 A. 677=8 A.L.J. 723=10 Ind. Cas. 543 ; 21 B. 53 ; 9 C.P.L. R. 65 ; 4 L.B.R. 99 ; U.B.R. (1892—1896) 204.]

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* Application No. 177 of 1893 under extraordinary jurisdiction.

(1) 4 I. A. 1.
(2) 22 W. R. 121.
(3) 6 B. 498.
(4) 17 B. 164.

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APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb G. V. Saraiya, Subordinate Judge of Bassein, in a Small Cause Court suit.

The plaintiff sued to recover Rs. 48-4-0 on a money-bond passed by defendant in favour of plaintiff's father on 22nd July, 1891. Plaintiff alleged that he and his deceased father were members of a joint Hindu family, and that the family business was transacted in the name of his deceased father.

Defendant did not appear.

The Subordinate Judge of Bassein with Small Cause Court powers found the bond proved, and that plaintiff and his deceased father were members of a joint family, but following the ruling of the Madras High Court in *Venkatramanna* v. *Venkayya* (1) **[339]** held that as the bond did not show on the face of it that the debt claimed was due to the joint family, it was necessary for the plaintiff to produce a certificate under the Succession Certificate Act (VII of 1889), s. 4, before a decree could be given in his favour. No such certificate being produced, the Subordinate Judge dismissed the plaintiff's suit with costs.

The plaintiff applied to the High Court in its extraordinary jurisdiction, contending that as he and his father were members of a joint family, no certificate under Act VII of 1889 was necessary to entitle him to recover the debt.

G. M. Tripathi, for the applicant.

The opponent did not appear.

JUDGMENT.

SARGENT, C. J.—The Subordinate Judge has found that a certificate under Act VII of 1889 is necessary on the authority of *Venkatramanna* v. *Venkayya*(1), where it was laid down that a certificate is necessary, unless it appear on the face of the bond passed to the plaintiff's father that the debt claimed was due to the joint family consisting of the father and son. The Madras Court would appear to have held that the plaintiff could not in such a case raise the question that the debt was a family debt. However, we have already decided in *Raghavendra Madhav* v. *Bhima* (2) that the necessity for the certificate upon the plain language of the Act depends on the question whether the debt was part of "the effects" of the deceased, or was in its nature a family debt and, therefore, "family" property. This does not of course prevent the defendant from insisting that all the members of the family be made co-plaintiffs. The Madras Court, however, would seem to have been influenced in its decision by a desire to give effect to the intention of the Act to protect debtors; but as the language of the Act is quite clear in showing that it is confined to the case in which the claim is to the "effects" of the deceased, and not to family property where the claim is by right of survivorship, it would, in our opinion, be contrary to sound principles of construction to adopt the view of the Madras Court.

Another question is also touched upon in the above case, *viz.*, whether the debtor is entitled to insist on a certificate when the **[340]** family is admitted or proved to be joint; but there is no direct evidence before the Court as to the nature of the debt. We gather from the Madras judgment, that the Court considered that in that case there would be no presumption that the debt was a family debt. But we think that view is

(1) 14 M. 377.

(2) 16 B. 349.

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irreconcileable with the decision in *Taruck Chunder* v. *Jodeshur Chunder* (1), which has always been followed in this Court.

We must, therefore, in the exercise of our extraordinary jurisdiction make absolute the rule *nisi* and reverse the decree of the Court below, and send back the case for a fresh decision having regard to the above remarks. Costs to abide the result.

Rule made absolute and case sent back.

19 B. 340.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Farran.

In re NAGARJI TRIKAMJI.* [12th November, 1894.]

Penal Code (Act XLV of 1860), s. 499, excep. 9—Defamation—Privilege of counsel—Good faith—Construction—Construction of statute.

A pleader, in addressing a Mamlatdar on behalf of his client, who was charged under s. 125 of the Bombay Land Revenue Code (Bom. Act V of 1879) with wilfully removing boundary marks, commented on some of the witnesses for the prosecution, and called them loafers. Thereupon one of those witnesses prosecuted the pleader for defamation. The Magistrate held that there was no justification for the language, and convicted the pleader, and sentenced him to pay a fine of Rs. 15 under s. 500 of the Indian Penal Code (XLV of 1860).

Held, reversing the conviction and sentence, that in the absence of express malice (which was not to be presumed) the pleader was protected by excep. 9 to s. 499 of the Indian Penal Code.

Held also that in considering whether there was good faith (*i.e.*, due care and attention) the position of the person making the imputation must be taken into consideration. In the case of an advocate, where express malice is absent, a Court having due regard to public policy would be extremely cautious before depriving him of the protection of excep. 9 to s. 499 of the Indian Penal Code.

Semble.—Section 499 of the Indian Penal Code should be construed without reference to the English law.

[F., 36 C. 375 (383)=9 C.L.J. 259=13 C.W.N. 340; R., 22 A. 234 (235); 29 A. 685=4 A.L.J. 605=27 A.W.N. 235; 25 B. 90 (96)=2 Bom.L.R. 653; 9 Bom L.R. 1287 (1288); 17 C.L.J. 105=17 C.W.N. 554=18 Ind. Cas. 737; 12 Cr L.J. 275=14 Ind. Cas. 659=23 M.L.J. 39=11 M.L.T. 416=(1912) M.W.N. 476; 3 L.B.R. 265 (270); 1 Weir 589 (591).]

[341] THIS was an application for the exercise of the High Court's revisional jurisdiction under s. 439 of the Code of Criminal Procedure (Act X of 1882).

The accused, who was a pleader practising in the district of Surat, was charged with defamation under s. 499 of the Indian Penal Code under the following circumstances:—

One Maneklal Pranshankar filed a complaint against Abdul Kadar under s. 125 of the Bombay Land Revenue Code (Act V of 1879) for wilfully removing certain boundary marks.

The Mamlatdar of Chorasi, who held a summary inquiry into this complaint, examined certain witnesses on behalf of the prosecution, one of whom was Narsiram Harderam, the complainant in the present case.

The accused, who defended Abdul Kadar, in commenting on the witnesses for the prosecution called them "loafers."

* Criminal Review No. 214 of 1894.

(1) 11 B.L.R. 193.

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Thereupon Narsilal filed the present complaint againt the accused, charging him with defamation.

The accused pleaded that the occasion was privileged.

The case was tried by the First Class Magistrate of Surat, who was of opinion that the accused was not justified in calling the complainant a loafer.

The accused was convicted of defamation under s. 500 of the Indian Penal Code, and sentenced to pay a fine of Rs. 15. The judgment was as follows :—

"The accused in his defence has raised two main issues, *viz.*:—

"1st, that as a pleader it was his privilege to comment on the evidence of witnesses, and if it be considered proved that the complainant was called a 'loafer,' he had not gone beyond the limit of his privilege. 2nd, that the word 'loafer' used by him was not intended for complainant, but a *dhed* witness.

"I have seen the authorities quoted *pro* and *con*, and I do not think a vakil has the privilege of calling a witness who gives evidence against his client a loafer without any justification. The complainant Narsilal is a respectable man and a Government servant, and it was certainly likely to make him look small in the eyes of his friends and acquaintances to call him a loafer. **[342]** It is not necessary that he should be actually degraded. It has been hinted that he has been spending several hours in the company of Maneklal in idle gossip, and as the word 'loafer' has been defined in Webster's Dictionary as an idle man, there was no harm in calling the complainant a loafer. Loafer really means a vagrant, one who has no means of subsistence. The complainant is not of that stamp. Every one has his friend or club to go to, where he spends his leisure in merry talk, and that does not make him a loafer.

"It appears clear, from the Mamlatdar's evidence, that the complainant was one of those who were called loafers.

"The head surveyor said nothing in favour of Maneklal, and, therefore, comments made by the vakil were intended for the three witnesses who gave evidence in favour of Maneklal. The Mamlatdar says the word 'loafer' was used more than once, and it had reference to the complainant, who gave evidence against the vakil's client. The vakil's evident object in calling him a loafer was either that he might be disbelieved, or to pay off some private grudge, as the complainant says on solemn affirmation that the vakil told him once that he would mark him.

"The defence also insinuate that the accused is prosecuted because there is ill-feeling between his family and the vakil Kirparam's family, by whom he has been instigated to lodge the complaint. This argument cuts both ways. It shows also the *mala fides* of the accused, who to take revenge on account of his animosity with Kriparam's family called complainant a loafer, as he has some connection with the latter family.

"I, therefore, convict Nagarji Trikamdas under s. 500 of the Indian Penal Code and sentence him to pay a fine of Rs. 15."

Against this conviction and sentence the accused applied to the High Court under s. 435 of the Code of Criminal Procedure (Act X of 1882).

Goverdhanram M. Tripathi, for accused :—Section 499 of the Indian Penal Code has no application to the present case. A counsel stands in the same position and is entitled to the same protection as a Judge, a witness, or a party to a judicial proceeding. **[343]** A counsel speaks not from his own knowledge, but under instructions. He is a mere mouthpiece of his client. It is his duty to argue his client's case to the best

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of his ability. An argument is, therefore, not an imputation within the meaning of s. 499 of the Penal Code. A counsel is often compelled in the discharge of his duty to make unfavourable comments or disparaging remarks on his adversary's case. But that will not make him liable to a civil suit or a criminal prosecution. For words spoken by him in his character as an advocate he enjoys an absolute privilege and this privilege is founded on public policy—*Munster* v. *Lamb* (1); *Rex* v. *Skinner* (2); *Dawkins* v. *Lord Rokeby* (3): Odgers on Libel and Slander (2nd Ed.). p. 436. The law on this point is the same here as it is in England—*Sullivan* v. *Norton* (4) *Queen-Empress* v. *Babaji* (5); *Queen-Empress* v. *Balkrishna* (6). I adopt (Fulton, J.'s) agrument in the last case and contend that the case does not fall under s. 499 of the Penal Code. I do not rely on any of the exceptions to that section. Even if the privilege be qualified, the *onus* lies on the prosecution to prove express malice. This has not been found in the present case.

Gokuldas Kahandas Parikh, for complainant :—The Magistrate has found that the accused made the imputation complained of without any justification whatever. I submit it is wrong to refer to English cases in construing the Indian Penal Code—*Abdul Hakim* v. *Tej Chandar Mukarji* (7). The English law is based on public policy. But public policy cannot override the plain language of an enactment like the penal Code. The language of s. 499 of the Code is wide enough to include the case of counsel. If his words amount to an imputation, the section would apply, no matter whether the imputation be in the form of an argument or not—*Reg.* v. *Kashinath Dinkar* (8); *Green* v. *Delanney* (9); *Queen* v. *Pursoram* (10); *Hinde* v. *Baudry* (11). The observations of Fulton, J., in **[344]** *Queen-Empress* v. *Balkrishna* (6) are, I submit with due deference erroneous. Even if they are correct, they do not apply to the present case. The case of a witness is different from that of a counsel. A witness is compelled by law to make a statement, whether defamatory or not, in answer to questions put to him in the witness box. A counsel does not speak under such compulsion. A witness is, moreover, liable to a prosecution for perjury if he makes a false statement. A counsel is exposed to no such risk. A counsel is, therefore, bound to speak with due care and caution. If he makes reckless imputations, he will be liable to a prosecution for defamation. In a case like this the *onus* lies on the accused to prove good faith; and he is bound to show that his case falls within one or another of the exceptions to s. 499 of the Penal Code. The case of *Sullivan* v. *Norton* (4) is not in point, as it was not a case of defamation under the Indian Penal Code.

JUDGMENT.

Per Curiam :—The facts found are that the accused's pleader, in addressing the Mamlatdar on behalf of his client accused under s. 125 of the Land Revenue Code, of removing boundary marks, commented on some of the witnesses on the other side and called them loafers. One of them accused the pleader of defamation under the Indian Penal Code.

The Magistrate has convicted and fined him, holding that the word means a vagrant or one who has no means of subsistence; that it was used either to discredit the witness or to pay off some private grudge; and that the authorities cited did not extend the protection of privilege to

(1) 11 Q.B.D. 588 (603). (2) Lofft. 55. (3) L.R. 7 H.L. 744.
(4) 10 M. 28. (5) 17 B. 127. (6) 17 B. 573.
(7) 3 A. 815. (8) 8 B.H.C.R. Cr. Cas. 126.
(9) 14 W.R. Cr. Rul. 27. (10) 3 W.R. Cr. Rul. 44. (11) 2 M. 13.

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the accused. Mr. Govardhanram has argued that the conviction is bad. A counsel or advocate of any sort speaks, he says, not from knowledge but instructions, is thus a mere mouthpiece as regards assertions, and as regards comments is bound to duty to his client. Therefore an argument is not "imputation" within the s. 499 of the Indian Penal Code defining the offence of defamation. Without relying on any of the exceptions, the learned pleader adopts fully the reasoning applied in *Queen-Empress* v. *Balkrishna* (1) by Fulton, J., about a witness. He relies also on the reasoning in [345] *Sulivan* v. *Norton*(2) and the *dictum* at p. 35 that an advocate in this country cannot be proceeded against criminally for words uttered in his office as advocate. He contends that an advocate stands in the same position as a witness and that s. 499 should be interpreted so as to accord with the public policy affirmed by the law of England which has always treated witnesses and advocate as alike exempt from suit for what of a defamatory nature they may say in the course of their advocacy or evidence.

The case of *Dawkins* v. *Lord Rokeby* (3) in the House of Lords is cited as conclusive upon the question as to witnesses, and the cases of *Seaman* v. *Nethercliff* (4) and *Goffin* v. *Donnelly* (5) referred to as examples of the application of the rule. This principle has been extended, it is said, to advocates for the same reason, and the case of *Munster* v. *Lamb* (6) is relied on as establishing that proposition. We think there can be no doubt that these cases do establish the propositions for which they are cited. Brett, M. R. (Lord Esher,) says, p. 603: "Of the three classes—Judge, witness and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of an argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that [346] rule covers a counsel even more than a Judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting *bona fide* may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and, therefore, it is better to make the rule of law so large that an innocent counsel shall never be troubled, although, by making it so large, counsel are included who have been guilty of malice and misconduct.

"In *Rex* v. *Skinner* (7), Lord Mansfield, a Judge most skilful in enunciating the principles of the law, treated a counsel as standing in

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(1) 17 B. 573.
(2) 10 M. 28.
(3) L.R. 7 H. L. 744.
(4) 1 C.P.D. 540=2 C.P.D. 53.
(5) 6 Q. B. D. 307.
(6) 11 Q.B.D. 588.
(7) Lofft 55.

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the same position as a Judge or a witness. In *Dawkins* v. *Lord Rokeby*(1) a most careful judgment was delivered on behalf of all the Judges in the Exchequer Chamber, and the opinion of Lord Mansfield was cited and adopted. If the authority of these two cases is to be followed, counsel are equally protected with Judges and witnesses. I will refer to *Kennedy* v. *Hilliard* (2), and in that case Pigott, C.B., delivered a most learned judgment, in the course of which he said, at p. 209: 'I take this to be a rule of law, not founded (as is the protection in other cases of privileged statement) on the absence of malice in the party sued, but founded on public policy which requires that a Judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a Court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel.' Into the rule thus stated the word *counsel* must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to counsel, the question of malice *bona fides* and relevency cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution **[347]** can be maintained against a defendant when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any Court of justice into any matter concerning the administration of the law."

We have now to consider, in connection with the case before us, how far the above interpretation of the common law of England has been adopted in India. In *Baboo Gunnesh* v. *Mugneeram* (3) the rule that a witness is not liable to a civil action for defamatory words spoken in the course of his evidence has been laid down as applicable to India; this has been followed in *Nathji* v. *Lalbhai* (4), where the rule is extended to pleadings. In *Manjaya* v. *Sesha Shetti* (5), these views of public policy as interpreting the common law are adopted in regard to prosecutions under the Indian Penal Code for defamation; the only proper prosecution is held to be that for giving false evidence. This case is followed by Birdwood and Parsons, JJ., in *Queen-Empress* v. *Babaji* (6); and in *Queen-Empress* v. *Balkrishna* (7), Fulton, J., (Telang, J., *dubitante*) held that the case of a witness lay outside the scope of s. 499, on the ground that it was not the intention of the Legislature to bring statements made in the witness-box within the definition of defamation. The impolicy and the hardship on the witness as also other considerations were relied on in support of that view. We are inclined to share the doubts expressed by Telang, J. The case of *Green* v. *Delanney* (8) shows that this section of the penal statute must be construed without reference to the English law (based on public policy). The *Queen* v. *Parsoram* (9) is to the same effect. *Sullivan* v. *Norton* is not an interpretation of s. 499; although as to the extent of an advocate's privilege in England the learned Judges had *Munster* v. *Lamb* to guide them.

The extent of the witness's privilege is not as yet so clearly settled—see Lord Bramwell's *dictum* in *Seaman* v. *Netherclift* (10); and in *Queen-*

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(1) L.R. 8 Q B. 255 (263, 264, 268).
(2) 10 Ir. C.L.R. 195.
(3) 11 B. L. R. 321 (P.C.).
(4) 14 B. 97.
(5) 11 M. 477.
(6) 17 B. 127.
(7) 17 B. 573.
(8) 14 W.R. Cr. Ca. 27.
(9) 3 W.R. Cr. Ca. 44.
(10) 2 C. P. D. 53 (60).

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Empress v. *Balkrishna*, Fulton, J., refrains from laying [348] down that wholly irrelevant statements of a witness may not come within the scope of the enactment we are now considering. It would then be difficult, in the present state of the authorities, to state with reference to these decisions the limits of the privilege they concede to witnesses charged criminally for defamation. It would, however, in our opinion, be beyond the province of mere interpretation to engraft a new exception on the definition.

The Legislature has enacted a general exception in favour of Judges,—to wit, s. 77 of the Penal Code, and in s. 132 of the Indian Evidence Act has gone a certain length in protecting witnesses against the criminal law; it may be assumed that it had no intention of going further. As stated in Macaulay's Report on the First Draft of the Penal Code, the requirement of "good faith" was intentional in s. 499. Without, however, importing into this carefully considered statute the rules of the common law of England based on public policy, we are of opinion that a witness in India is adequately protected by the exceptions 1 to 9 in s. 499, where the defamatory statement is not untrue to the knowledge of the person making it. If, however, it be untrue to his knowledge, the real offence committed is, as pointed out by the Privy Council in *Baboo Gunnesh* v. *Mugneram* (*supra*), that of false evidence; and the Court would not, when such is the offence, allow the *onus* of proof to be shifted by the prosecution having recourse to s. 499, as that would be tantamount to dispensing with the salutary provisions of s. 195 of the Code of Criminal Procedure, which are clearly based on public policy. It has been pointed out in *Queen-Empress* v. *Gundya* (1) that it is an invasion of the law to treat an aggravated as an ordinary offence, and thus introduce a different jurisdiction or a lower scale of punishment. This applies as between defamation and the various givings of false evidence, all more severely punishable under ss. 193 to 195 of the Penal Code; it applies to the making of the charge under ss. 210 and 254 of the Procedure Code. In the present case it is unnecessary to decide whether advocates have or have not the unqualified privilege from criminal prosecution which the case of *Sullivan* [349] v. *Norton* would accord to them. We only follow the practice of the Court by interfering in revision, *Queen-Empress* v. *Slater*, per Candy, J. (2), where there is sufficient reason, as *e.g.*, where the lower Court has approached the case from a wrong point of view. The record does not show what authorities were cited to the Magistrate. There is no discussion in it of the peculiar duty of an advocate. The judgment does not determine the motive, and there is no finding of express malice, and we have not to consider such a case.

The present case is, in our opinion, covered by exception 9 to s. 499. In considering whether there was good faith, *i.e.*, under s. 52, due care and attention of the person making the imputation must be taken into consideration. That of an advocate is well expressed by the Master of the Rolls in the passage cited above. He speaks from instructions; he reasons from facts sometimes true, sometimes false. He draws inferences from these facts sometimes correct, sometimes fallacious. He does not express his own inferences, his own opinions or his own sentiments, but those which he desires the tribunal, before which he appears, to adopt. This duty the law allows, almost compels him to perform. Such being his duty, it seems to us that where express malice is absent (and it ought not to be presumed) a Court having due regard to

(1) 18 B. 502.

(2) 15 B. 351 (365).

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public policy would be extremely cautious before it deprived the advocate of the protection of exception 9. In the present case we do not doubt that this protection applies. We, therefore, set aside the conviction and sentence.

Conviction set aside.

19 B. 350.

[350] ORIGINAL CIVIL.

Before Mr. Justice Farran.

NATHMULL NARSINGDAS, (*Plaintiff*) *v.* MALHARRAO HOLKAR, AN INFANT, AND ANOTHER. (*Defendants*)* [1st December, 1894].

Practice—Procedure—Inspection—Affidavit of documents—Minor.

An affidavit of documents may be required from a minor defendant.

[R., 23 B. 100; D., 22 C. 891.]

SUMMONS for inspection. The plaintiff sued the defendants, who were both minors, as the legal representatives of their father Yeshwantrao Holkar, who died on the 22nd July, 1890. The plaintiff claimed payment of a large sum of money which he alleged to be due by the said Yeshwantrao Holkar, and also specific performance of a certain agreement, or damages.

On the 15th November, 1894, the plaintiff took out a summons calling on the defendants to "show cause why they should not produce, for the inspection of the plaintiff, all books, papers, &c., in their possession, power or control, or in the possession, power or control of any person or persons on their behalf, &c."

On behalf of the defendants it was objected that an infant defendant could not be required to make an affidavit of documents.

Scott, for the defendants, showed cause.

Macpherson, for the plaintiff, *contra*.

JUDGMENT.

FARRAN, J.—This is a summons taken out by the plaintiff seeking production of the documents in the defendants' possession for the purpose of inspection. The defendants are the minor representatives of their deceased father, and according to the practice hitherto observed in this Court, no affidavit of documents has been required to be made by them or on their behalf, and no such affidavit has been, in fact, made. It is not denied that there are documents in the possession of the defendants, or of their guardian *ad litem*, relating to matters in question in the suit.

Section 129 of the Civil Procedure Code (Act XIV of 1882) provides that the Court may order any party to the suit to declare by affidavit all the documents in his possession or power relating **[351]** to the suit; and any party to the suit may apply to the Court for a like order. Section 130 enables the Court to make an order for the production of documents. These sections follow the wording of O. XXXI, rr. 12 and 14 of the Rules of the Supreme Court in England framed under the Judicature Act; and under these rules it has been held

* Suit No. 182 of 1894.

that an infant party to a suit should not be called on to make an affidavit of documents—*Curtis* v. *Mundy* (1). The hardship, not to say injustice, arising from that rule was pointed out in *Mayor* v. *Collins* (2), but the Judges there felt that they were bound by the established practice of the Court of Chancery, which had not been abrogated by the new rules, and was binding upon the Courts—*Redfern* v. *Redfern* (3). That practice has of itself no binding force on this Court, which is governed by the Civil Procedure Code, though it is followed as a guide in cases where the path is unmarked. The practice of not requiring an affidavit did not prevail in the Divorce Court, as appears from the judgment of Lindley, L.J., in *Redfern* v. *Redfern* (3), where the Lord Justice speaks of it as applied in Courts of Equity, as in his opinion "too rigid." It appears from the same case that it had been the practice to order infants to make affidavits of documents in the Queen's Bench Division, until in *Mayor* v. *Collins*(2) it was decided that the practice was opposed to the rules. Now by r. 29 of O. XXXI the old practice of the Court of Chancery has been swept away in this respect, and an affidavit may be required, in the Supreme Court in England, from an infant or from his guardian or next friend. The practice here has not been crystalized into a rule, or established by the decision of an appellate Court; nor has it, I believe, been laid down after argument. There is, therefore, no reason for retaining it, if it is an incorrect practice. To me it appears to be incorrect. Written statements are required from infant defendants, and are constantly filed on their behalf. I can see no reason why an affidavit of documents should not be similarly required. It would in many cases amount to a denial of justice to refuse to allow a plaintiff inspection of his opponent's documents vouched by affidavit.

[352] I shall, therefore, make the order that the defendants do produce upon affidavit the documents in their possession relating to the suit in the usual form. As to how it is to be obeyed, or what will be the consequence if it is not obeyed, I need not now determine. I understand that there will be no difficulty in complying with it in the present case. The guardian will, I understand, make the affidavit. To the order the proviso asked for by counsel for the defendants will be added that inspection need not be given until the plaintiff has made his affidavit of documents.

I do not by this order decide that the next friend or guardian of an infant can be directly ordered to make an affidavit of documents. Different difficulties stand in the way of the making of such an order, such as are pointed out in *Waghji Thackersey* v. *Khatao Rowji* (4), *Ingram* v. *Little* (5) and *Dyke* v. *Stephens* (6), which the alteration of the Supreme Court Rules in England does not get rid of, and which apparently the Legislature only can remove; but I give no opinion upon this point. Costs to be costs in the cause.

Attorneys for plaintiff: Messrs. *Dikshit and Hiralal.*
Attorneys for defendants: Messrs. *Tyabji, Dayabhai & Co.*

(1) L. R. (1892) 2 Q. B. 178.
(2) 24 Q.B.D. 361.
(3) L. R. (1891) P. 139 (143).
(4) 10 B. 167.
(5) 11 Q.B.D. 251.
(6) 30 Ch. D. 189.

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Before Mr. Justice Candy.

DORABJI JEHANGIR RANDIVA (*Plaintiff*) *v.* MUNCHERJI BOMANJI PANTHAKI (*Defendant*).* [11th December, 1894.]

Limitation—Limitation Act (XV of 1877), sch. II, art. 60—Deposit—Loan.

The plaintiff claimed to recover from the defendant, who was his grandfather, the sum of Rs. 4,917, which was the amount standing to his credit in an account in the defendant's books. In November, 1869, the plaintiff being then one year old, his mother (the defendant's daughter) paid over to the defendant the sum of Rs. 650, **[353]** and at her request the money was credited in the books of the defendant's firm in the name of her son the plaintiff. A further sum was similarly paid over by her in December, 1871, and at her request was credited to the same account. The plaintiff alleged, and the Court found, that these sums were presents which had been made to him on his birthday and other auspicious occasions. The said sums had been carried over from year to year in the firm's books, the interest being added each year, but no payment had ever been made to the plaintiff, or on his behalf, out of the sum so standing to his credit. Compound interest had been allowed in the account, and on the 9th November, 1893, the amount standing to the credit of the plaintiff was Rs. 4,917.

The plaintiff contended that the money had been paid to, and accepted by, the defendant as a deposit to be held in trust for him. The defendant alleged that the money in question had been lent to him by the plaintiff's mother, and contended that the plaintiff's claim was barred by limitation.

Held, that the plaintiff's claim was not barred. The defendant stood in a fiduciary position to the plaintiff, and, therefore, there was a "deposit" within the meaning of art. 60 of the Limitation Act (XV of 1877), and limitation did not commence to run until demand.

[Conf., 19 B. 775 ; **F.**, 5 Bom. L.R. 511; **R.**, 29 A. 773=4 A.L.J. 628=27 A.W.N. 263; 20 B. 8 ; 15 C.P.L R. 147.]

THE plaintiff was the grandson of the defendants and was at the date of suit twenty-six years of age. He alleged that at the time of his birth, and subsequently on ceremonial occasions, presents of money had been made to him, which were received by his mother (the defendant's daughter) and were deposited by her on his behalf with the defendant, who accepted the same as a deposit and in trust for the plaintiff, opening an account in the plaintiff's name in the books of his firm, of which he was the sole proprietor. The said moneys were credited to the said account, and interest was credited to the said account every year, and the balance carried forward.

The plaint stated that the defendant had a similar account with him as trustee for the plaintiff's sister. She died in 1877 an infant, unmarried and intestate, and on her death the plaintiff's mother presented the said moneys to the credit of the plaintiff's account, and got the amount transferred to the plaintiff's account, and ever since such transfer the said moneys had been held by the defendant as depositary and trustee for the plaintiff.

The plaint also stated that the defendant from time to time furnished the plaintiff's father with statements of accounts of the moneys belonging to the plaintiff; that the account of the plaintiff **[354]** in the defendant's books was carried forward and appeared in the books for 1893; that nothing had ever been drawn from the account, and that the whole amount

* Suit No. 368 of 1894.

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received by the defendant and interest was due to the plaintiff, who believed that the sum due was about Rs. 4,900.

The plaint prayed for full discovery of the amount standing to the plaintiff's credit, and for payment thereof with interest.

The defendant denied the alleged deposits, but alleged that on 18th November, 1869, the plaintiff's mother, Virbaiji, had lent to his defendant's firm a sum of Rs. 650, and directed that it should be credited in the name of the plaintiff, which was duly done in the defendant's book. A further loan of Rs. 942 was made by her to the defendant's firm on 6th December, 1871, which was at her request credited to the same account. He further stated that the said account in the plaintiff's name had been carried over from year to year in the firm's books, the interest being added each year, but that no payment, either of principal or interest, had been made to the plaintiff or on his behalf out of the moneys standing to the plaintiff's credit. He contended that the plaintiff's claim was barred by limitation, and that in any case he was entitled to set off the sum of Rs. 1,080, being the cost incurred by him in maintaining the plaintiff for three years prior to the suit.

Virbaiji, the plaintiff's mother, died in 1889.

Starling and *Badrudin Tyabji*, for the plaintiff.

Lang (Advocate-General) and *Macpherson*, for defendant.

The following authorities were cited :—*Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (1); *In the matter of T. Agabeg* (2) ; *Ishur Chunder* v. *Jibun Kumari* (3) ; *Ichha* v. *Natha* (4) ; *Tidd, In re* ; *Tidd* v. *Overell* (5) ; Limitation Act (XV of 1877), sch. II, arts. 57, 62.

JUDGMENT.

CANDY, J.—Defendant is a Europe shopkeeper. Plaintiff is the son of the defendant's daughter, Virbaiji, who died in 1889. It is not denied that plaintiff was born on 16th November, 1868. **[355]** It is admitted that on 18th November, 1869, when plaintiff was just a year old, Rs. 650 were credited in defendant's book in the name of the plaintiff, to bear interest at 5 per cent. On 6th December, 1871, a further sum of Rs. 942 was credited to the same account, which has evidently been carried forward from year to year, bearing 5 per cent. compound-interest. On 9th November, 1893, the balance stood at Rs. 4,917.

As stated by the learned Advocate-General, for the defendant, the question simply is, did this money reach defendant's hands under circumstances which show "a deposit" within the meaning of that term in art. 60, sch. II, Act XV of 1877 ? If it did, then the claim is not barred, for the only demand on the part of the plaintiff which is proved is within three years of the filing of the suit.

Defendant stated in his deposition that the plaintiff made an oral demand in 1889, but this is not proved. He contradicted himself more than once on the point. He said that neither Virbaiji nor plaintiff had ever demanded the money. I am not satisfied that plaintiff did make such a demand in 1889. At that time apparently, the members of the family were living in harmony, and were all content to leave the money standing in their names in the books of the firm invested in the business.

The question then is, what were the circumstances under which the money shown in the books in the name of the plaintiff came into

(1) 6 C. L. R. 470. (2) 12 C. L. R. 165. (3) 16 C. 25.
(4) 18 B. 388. (5) L. R. (1893), 3 Ch. 154.

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defendant's hands? It is common ground that it was Virbaiji, the plaintiff's mother, who paid the cash or caused it to be paid, and that it was at her request that the money was credited in the name of her son. But while plaintiff says that he always understood that the money belonged to him, being presents on his birthday and other auspicious occasions, defendant says that he always understood the money to be Virbaiji's own, and advanced as an ordinary loan to her father. I have no hesitation in holding that plaintiff's story appears to be the true one. He himself can have no personal knowledge of the circumstances under which the money was paid, but he called his grandmother, defendant's wife, who deposed to the first payment of Rs. 650 being a birthday present given by plaintiff's father, and [356] by her advice handed to defendant. The learned Advocate-General, for defendant, dwelt on the fact that plaintiff's father, though present, was not called as a witness; but the argument cuts both ways. The plaintiff says that he is on bad terms with his father, and so he refrained from calling him. Why did the defendant not call him if he (plaintiff's father) could have sworn that he had no knowledge of the money, or that he was aware that the money belonged to Virbaiji? it is clear that, in Parsi families, presents are sometimes given to infant children on birthdays and such like occasions, and nothing would be more natural than that the infant's mother should invest such money in her father's business for the infant's benefit. Whether she added to the fund, which commenced with the item of Rs. 650, by paying other sums given similarly as presents to the infant, or by payments from her own pocket or otherwise, it is clear that the moneys mounting up each year by compound-interest, were treated as one fund for the benefit of the infant. Since Virbaiji's death in 1889, her husband apparently never put forward any suggestion that the money was Virbaiji's to which he has a claim. It was argued that Ruttonbai (the witness called by plaintiff) is on such bad terms with her husband, the defendant, that no reliance can be placed on her statements. But the same argument would hold good against the evidence of defendant and his son and partisan, Dinshaw. The family quarrel is evidently so fierce that the evidence of one member against another should be carefully scrutinised.

We must look at the surrounding circumstances and judge of the general probability. Directly this is done, it is seen that defendant's story cannot be true. It is that being in want of money, he asked his daughter for a loan which was given by her just as any ordinary banker would have done. As to further payments, he asked for loans and she made them. He admitted that he had similar accounts in the names of various members of his family, and he alleges that these are all ordinary loans. In fact, he stated that he never borrowed from outsiders. But his son Dinshaw contradicted him, and said that they did borrow from outsiders and repaid after intervals, when convenient. If the sums credited to the various members of the family are ordinary [357] loans, how is it that repayments have not been continually made? The only repayment mentioned in this case was in regard to a sum paid by Virbaiji and credited in the name of her infant daughter, Pootlibai, who died while still an infant, and so the money was subsequently repaid to Virbaiji. This is just what might have happened had the money been invested by the mother in her father's business for the benefit of the infant. At present we are only concerned with the moneys paid to the credit of the plaintiff; and looking at all the circumstances, I cannot regard them as ordinary loans made by Virbaiji to her father, but must regard them as moneys invested by her for

her son's benefit in her father's business. They did not bear the ordinary mercantile interest of 9 per cent., which would probably have been the case had they been ordinary loans, but they carried 5 per cent. interest, which was calculated at compound rate, the intention apparently being that a fund should be accumulated for the benefit of the infant, invested in the business of which defendant is the sole owner, and which should so remain in the business till plaintiff, after he came of age, should demand the same.

These being the facts which I find, it only remains to consider whether such a transaction is a deposit within the terms of art. 60 of sch. II of the Limitation Act, 1877? The authority quoted of our own High Court (*Iccha* v. *Natha* (1))is not of much assistance in the present case. The judgment shows (p. 342) that, in the case of a loan payable on demand, the Act of 1871 made the time run from the date of the demand, but by the present Act of 1877 it is made by art. 59 to run from the date of the loan, and a new art. 60 has been introduced, applicable to suits to recover money deposited under an agreement that it shall be payable on demand, in which case the time runs from demand being made. But, whatever may be the cases to which this article is intended to apply, it is at any rate not applicable where the transaction is regarded by the law as a loan, and which is the case in the ordinary banking dealings between a native savkar and his customers. It may be remarked that this judgment was delivered in October, 1888, though not **[358]** reported till the middle of 1889. In July, 1888, (reported in January, 1889) Wilson and O'Kinealy,JJ., held in *Ishur Chunder* v. *Jibun Kumari* (2) that money paid to a man's credit with his banker is a deposit within the meaning of art. 60. But it should be remarked that, in the last quoted case, no reference was made to any authorities, while in the judgment of the Bombay High Court (3) mention is made of the authorities which show that both in England and in India all money paid to a man's credit with his banker is nothing but an ordinary loan, and not a deposit. So far, therefore, the Calcutta case can be disregarded, but I agree with the remark in the judgment that the question is not whether a particular case is covered by the words of art. 59 or any other article, but whether art. 60 applies to it; for if it does, the more specific provision must prevail. In the present case the learned Advocate General sought to apply not only art. 59, but also art. 57 or 62. The words of these articles may, in a general sense, cover the facts of the present case, but those facts may also show that there was a "deposit" as that term is used in art. 60, and if so, the more specific provision must prevail.

There is another remark in the Calcutta judgment with which I wish to express my concurrence. In my judgment in suit No. 179 of 1894, which was a suit by a son (and his wife) of the present defendant against the present defendant(3) to recover certain sums credited in the books of defendant in the name of the plaintiff, under circumstances somewhat similar to the present case, I held that it was not a case of an ordinary loan or a transaction between banker and customer, but, adopting the language of White, J., in *Ram Sukh Bhunjo* v. *Bhrohmoyi Dasi*(5), that the money was lodged under an express trust or under circumstances from which a trust could be implied. On consideration, I am of

(1) 13 B. 338. (2) 16 C. 25. (3) An appeal is now pending in this suit.
(4) 6 C.L.R. 470.

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opinion that this language must be qualified and explained. I agree with the judgment in *Ishur Chunder* v. *Jibun Kumari*(1) (at p. 31) that it is impossible to apply art. 60 to those trusts which are covered by s. 10 of the Limitation Act, but it is to be remarked that there is no mention of [359] "express" trusts in s. 10, which speaks of property vested in trust for any "specific" purpose. The marginal heading of the section speaks of "express" trusts, but it does not follow that the word "specific" in the Indian Act of Limitation corresponds exactly to the word "express" in the English Act (see remarks of Markby, J., in *Kherodemony Dossee* v. *Doorgamoney Dossee*(2). However that may be, it is clear that art. 60 cannot apply to suits to recover property vested in trust for any specific purpose, for to them s. 10 would apply. But there are many cases of implied trusts or trusts which the law would infer merely from the existence of particular facts or fiduciary relations. These would not come under s. 10 (see the case just quoted, pp. 465, 469 and 470, and see also in the same volume the remarks of White, J, and Garth. C.J., (in *Greender Chunder Ghose* v. *Mackintosh*, pp. 918, 919, 923). These, in my opinion, would come under art. 60. There must be some definite distinction between money lent under an agreement that it shall be payable on demand, and money deposited under an agreement that it shall be payable on demand. That distinction between a loan and a deposit I take to be that, in the latter case, there must be something partaking of the nature of a trust, or at any rate fiduciary relations. Story on Bailments (7th Ed. Boston), s. 84, describes an irregular deposit as when a person having a sum of money which he does not think safe in his hands, confides it to another, who is to return him, not the same money, but a like sum when he shall demand it. Here the mother wanting to create a fund which would be of use to her son when he grew up, instead of letting the money lie idle, placed it with her father in order that he might use the same for the purpose of his business, and credit it in his accounts in his grandson's name with compound interest every year. There was no trust for any specific purpose. Defendant could have buried the money in the ground if he liked. But it was evidently intended that he would be at liberty to use the money in his business, and in any case the balance, to the grandson's credit was to accumulate at compound interest. There was, in short, a trust which made the transaction something more than a loan. It was a deposit. In *In re Tidd*; [360] *Tidd* v. *Overell* (3), the plaintiff Charles Tidd handed certain money to his brother, George Tidd, saying "you may as well take care of it, till I want it," or words to that effect. The Judge inferred from the evidence that it was in the minds of the parties present that the money might be useful to George in his business, and held that the transaction was not only a loan, but that George stood in a fiduciary position to Charles Tidd, and, therefore, the case fell within the principle enunciated by Pothier, that "where a man deposits money in the hands of another to be kept for his use, the possession of the custodee ought to be deemed to be the possession of the owner, until an application and refusal, or other denial of the right; for until then, there is nothing adverse, and I conceive that upon principle, no action should be allowed in these cases without a previous demand; consequently, that no limitation should be computed further back than such demand (4)."

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(1) 16 C. 25. (2) 4 C. 455 (470). (3) L. R. (1893), 3 Ch. 154.
(4) Pothier on Contracts by Evans Vol. II, p. 126.

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In the well-known case of *Foley* v. *Hill* (1), a banking firm who on opening an account with a customer had agreed to allow him interest at 3 per cent. on the balance, which should from time to time be standing, to his credit, set up the statute of limitation as a defence to a bill filed against them by the customer for an account; but their Lordships ruled that money in the hands of a banker is merely lent. Accordingly in *Tidd's* case (*supra*), North, J., drew a distinction between money deposited in a bank to provide for a current account, and money paid in on a deposit account, quoting the remark of the Master of the Rolls in *Atkinson* v. *Bradford Third Equitable Benefit Building Society* (2), that the one transaction is very different from the other, and he came to the conclusion that the person to whom the money was paid stood in a fiduciary position to the person paying the money, and thus time did not begin to run under the statute of limitation (21 Jac. 1, c. 16) till demand. So here I must hold that defendant stood in a fiduciary position to the plaintiff, and, therefore, there was a deposit, and limitation did not commence to run till demand. It is to be regretted that there is no trace to be found in any public document, of the reason which induced the Indian Legislature [361] to insert art. 60 in the second schedule of the Limitation Act of 1877. When the Bill was first published (*Gazette of India*, 28th February, 1877), art. 57 (now art. 59) stood as it ran in Act IX of 1871, "for money lent under an agreement that it shall be payable on demand three years from when the demand is made." No change was made in the wording of the art. (No. 59) in the Bill published with the report of the Select Committee (*Gazette of India*, 31st March, 1877). Nor is there any mention of the point of the report. On the 28th June, 1877, a further report of the Select Committee was presented (Abstract of the Proceedings of the Legislative Council, 1877, Vol. 16, p. 462). But I can find no trace of any such report having been published. When the Honourable Mr. Stokes moved that the reports of the Select Committee should be taken into consideration (*Idem*, p. 464), the only reference which the honourable member made to the subject was that the time from which limitation was to run in the case of money lent under an agreement that it should be payable on demand, was changed from the date of the demand to the date of the transaction. This was in accordance with the ruling in *Norton* v. *Ellam* (3), and made the law in England and in India in accord; but at the same time art. 60 was inserted, and no reason was given for the insertion, nor was any indication offered as to the difference between a loan and a deposit. In the absence, then, of any such indication, I hold that a deposit is a loan and something more, *i. e.*, the depositee stands in a fiduciary position to the depositor. I, therefore, hold that the plaintiff is entitled to the relief claimed with all costs, *i.e.*, Rs. 4,917 with costs and 6 per cent. interest on judgment.

Decree for plaintiff.

Attorney for plaintiff.—Mr. *M. N. Sakhlatwalla.*
Attorneys for defendant.—Messrs. *Bicknell, Merwanji and Motilal.*

(1) 1 Ph. 399, 2 H.L.C. 28. (2) 25 Q.B.D. 377. (3) 2 M. & W. 461.

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[362] CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

In re JIVAN AMBAIDAS.* [29th March, 1894.]

Criminal Procedure Code (Act X of 1882), s. 195—Sanction to prosecute—Requisites of a proper sanction.

A sanction to prosecute for giving false evidence should specify clearly the statement alleged to be false, so that the person sought to be charged may be definitely informed what is the criminal act alleged against him.

[R., 36 C. 808=9 C.L.J. 690 (693)=13 C.W.N. 942=10 Cr. L.J. 150; D., 9 C.P. L.R. 27 (29).]

THIS was an application for the exercise of the High Court's revisional jurisdiction under s. 439 of the Code of Criminal Procedure (Act X of 1882).

One Bai Divali made a complaint of rape against Narsi Bhaichand, whereupon he was committed for trial to the Court of Session at Surat.

Narsi was acquitted of this charge by the unanimous verdict of the jury, and he thereupon applied to the Sessions Judge of Surat for sanction to prosecute the complainant, Bai Divali, and her witnesses, Kila, Jivan and Parshotam, for giving false evidence.

The Sessions Judge granted sanction to prosecute Bai Divali under cl. 3 of s. 211, and Kila and Jivan under s. 195 of the Indian Penal Code (Act XLV of 1860). His reasons were as follows—

"The petitioner prays for a sanction to prosecute Bai Divali for making a false complaint of rape against him and the other opponents for giving a false evidence against him. He was tried before this Court and acquitted by the unanimous verdict of the jury.

"The charge appears to be a false one, made by Divali to revenge herself on applicant for assisting her last husband in his litigation against her. The evidence of the witnesses, opponents Nos. 2 and 3, is incredible. It is physically impossible that the woman could have been violated in the manner she describes without receiving any injury, if, as she says, she resisted. Sexual intercourse could only have been had with her in the manner she describes, if at all, then with her full consent and co-operation.

"Applicant now set up an *alibi*, but his witnesses were not examined in this Court and there is nothing on the record to prove that opponent Parshotam's evidence is false. The application is, therefore, refused in his case. I grant the application against the other three. Divali may be prosecuted under s. 211, cl. (3), Indian Penal Code, and Kila and Jivan under s. 195."

[363] Jivan thereupon applied to the High Court to set aside the sanction, as it did not refer to any specific portion of his deposition as being untrue.

Govardhan M. Tripathi for the accused.

JUDGMENT.

JARDINE, J.—Section 195 of the Code of Criminal Procedure ought to be used in such a way as to give the person, against whom the sanction

* Criminal Revision, No. 43 of 1894.

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for prosecution is given, some means of knowing definitely in what the criminal act consists—*In re Balaji Sitaram*(1); *In re Har Dial*(2). In the present case the sanction relates to the giving of false evidence in a long deposition; but not the very slightest indication is given in the proceedings as to what story or statement was in the opinion of the Sessions Judge false. The Judge issuing a sanction for a prosecution ought to apply his mind closely to the facts with a view to ascertain whether they really constitute an offence, and also to prevent a sanction issued with one purpose or design being abused to the furtherance of some other—*Chintaman Dev* v. *Chintaman Dev* (3).

We, therefore, on the petition of Jivan Ambaidas revoke the sanction for his prosecution.

Sanction revoked.

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APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* JAVECHARAM.* [2nd April, 1894.]

Evidence Act (I of 1872), ss. 25 and 26—Confession—Confession made to a police officer by accused while in police custody—Accomplice—Spy—Distinction between a spy and an accomplice—Evidence of an accomplice—Evidence.

A statement made to a police officer by an accused person while in the custody of the police, if it is an admission of a criminating circumstance, cannot be used in evidence under ss. 25 and 26 of the Indian Evidence Act (I of 1872).

The action of a spy and informer in suggesting and initiating a criminal offence is itself an offence, the act not being excused or justified by any exception in the Indian Penal Code (XLV of 1860) or by the doctrine which distinguishes the spy from the accomplice.

[364] But the act of a detective in supplying market money for the detection of a crime cannot be treated as that of an accomplice.

Distinction between a spy and an accomplice pointed out.

Rex v. *Despard* (4), *Reg.* v. *Mullins* (5), *Queen-Empress* v. *Mona* (6), referred to and followed.

[F., 4 Cr. L.J. 177=16 P.R. 1906 (Cr.)=111 P.L.R. 1906=1906 P.W.R.p. 2 Cr; 11 Cr.L.J. 153=4 Ind. Cas. 1028=5 L.B.R. 131; R., 37 C. 467=14 C.W.N. 1114 =11 Cr. L.J. 453=7 Ind. Cas 359; 38 C. 96=15 C.W.N. 171=11 Cr. L.J. 560 =8 Ind. Cas. 119]

APPEAL from the decision of W. R. Hamilton, Presidency Magistrate.

The accused Javecharam, who was a ticket collector at the Grant Road Station in the service of the B. B. & C. I. Railway Company, was charged, under s. 408 of the Indian Penal Code (XLV of 1860) with criminal breach of the trust as a servant for selling certain railway tickets and appropriating the sale-proceeds to his own use. He was also charged with abetment of the offence of criminal breach of trust under s. 116.

Accused No. 2, Ahmed Hussein, was charged with dishonestly receiving stolen property, knowing the same to be stolen, under ss. 411 and 414 of the Penal Code.

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* Criminal Appeal, No. 57 of 1894.

(1) 11 B.H.C.R. 34. (2) 6 A. 105. (3) P. J. (1878), p. 253.
(4) 28 State Trials, 346 (489). (5) 3 Cox C. C. 526. (6) 16 B, 661.

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The Presidency Magistrate convicted both the accused of the offences charged, and sentenced accused No. 1 to eighteen months' rigorous imprisonment, and accused No. 2 to one year's rigorous imprisonment.

His reasons for convicting, as stated in his judgment, were as follows :—

"There is no doubt that accused No. 2, Ahmed Hussein, was caught in the act of selling the second halves of certain railway return tickets to Mahomed Ali. The money he had received for 15 tickets was found on him, which was marked money, and the 15 tickets were in the hands of Mahomed Ali. Besides, 7½ other tickets were found on Ahmed Hussein which had not been sold. Mahomed Ali may be an informer, and may not have a good character, but the fact of buying and selling these tickets cannot be disputed.

"Ahmed Hussein explained how he got these tickets from one Javecharam and one Paul. This statement is not a confession, but is merely an explanation of a fact which may be innocent. For instance, a person might say 'I did not steal these things, but I got them from A.' This would not be a confession, but a denial of guilt and a simple explanation of the fact of possession. Therefore the admission of so much of Ahmed Hussein's statements as merely explained how he got the tickets, does not appear to be open to objection, although by itself it is of no value to prove that he did get them from Javecharam.

[365] "In consequence of this statement, the police laid a trap to discover if Javecharam had any connection with Ahmed Hussein. On the morning of the 30th January, 1894 (Ahmed Hussein was arrested on the evening of the 29th) they took Ahmed Hussein and others to the Grant Road Station, and it is proved that Ahmed Hussain had a short conversation with Javecharam, who is a ticket collector at the station, and that Ahmed Hussein with Mahomed Ali and Ali Aga, a police sepoy in plain clothes, went into a coffee shop at the foot of the Grant Road bridge, while the detectives placed themselves on the other side of the road. In an hour or more, Javecharam was seen to go to the coffee shop and speak to Ahmed Hussein for a few minutes. He went back to the station and returned to the coffee shop in half an hour. There he sat down with Ahmed Hussein and Mohomed Ali, and Ahmed Hussein asked him for some tickets. Javecharam asked him for the money for the tickets he had given to him the day before. Ahmed Hussein explained he had sold them and that Mahomed Ali wanted to buy two more. Javecharam replied that he had just been to the station, but had not been able to get any tickets; he would bring them the next day. It was then arranged that Mahomed Ali should pay for the two tickets he wanted, and that they should be sent to his address, which Javecharam wrote down on a piece of paper. This writing is proved to be the writing of Javecharam. He also gave Mahomed Ali a recipt for Rs. 4 for the price of the two tickets promised, and as Ahmed Hussein said he would pay Javecharam Rs. 10 for the 12 tickets already sold through him the day before, Javecharam included that in the receipt which was handed over to Mahomed Ali. The money Rs. 10 *plus* Rs. 4, which was marked money, was paid to Javecharam, and then on a signal the detectives crossed the road, entered the room, and found them all together in the back room of the shop.

"Mahomed Ali, who in fact is the informer in the case, at once told the police officer that the money had been paid to Javecharam, and Javecharam produced the money and cried that '*zulum*' had been committed on him. This is said to mean that Mahomed Ali had forced the

money into Javecharam's pocket against his will or without his knowledge. It is proved, however, that when the police came in, they were sitting happily together, and '*zulum*' therefore, does not imply any violence, but some trick. Mahomed Ali also said that a paper with his address would be found on Javecharam, and the paper was found. The receipt for the Rs. 10 *plus* Rs. 4 was produced by Mahomed Ali.

"It is contended that as the receipt is a receipt for 12 tickets only, and as 15 tickets were sold, besides 7½ taken from Ahmed Hussein, it is impossible that the 12 tickets could be the same as these 22½ tickets, and, therefore, that there is no connection between Javecharam and Ahmed Hussein which can be proved. Ahmed Hussein had stated that he had got the tickets from Javecharam and Paul, and the tickets were as likely to be those which Paul had supplied. The fact that the receipt refers to 12 tickets only, is not inconsistent with the fact that Javecharam gave the 22½ tickets to Ahmed Hussein or at least a part of them. It is consistent with the fact that Javecharam was told that 12 tickets had been sold and that Rs. 10 had been paid for them. It must be remembered that these statements were part of a plot. Mahomed Ali had only Rs. 10 in marked money, and he would know that Javecharam would accept Rs. 10 for 12 tickets, the balance being the share of **[366]** Mahomed Ali for selling these tickets. It may possibly be true that Paul had given some of the 22 tickets to Ahmed Hussein, but I think it to be clearly proved that 12 at least of these tickets were given by Javecharam for which he received Rs. 10.

"It is denied, however, that the receipt is in his writing. Unfortunately the prosecution have not been able to call any witnesses to prove the handwriting, in Gujarathi, of Javecharam. The fact that it is his writing must, therefore, rest upon the statement of Mahomed Ali alone. It is also noticeable that no pencil was found on Javecharam, or in the shop. It is not said that the pencil was searched for, but the fact that it was not found, tells in his favour.

"Javecharam was first charged with criminal breach of trust in respect of the tickets sold, but I have found it necessary to add another charge of abetment with reference to the conspiracy to sell 2 tickets to Mahomed Ali for Rs. 4. This rests on the evidence of Mahomed Ali and the fact that his address was written down by Javecharam and found upon him, and, further, that the receipt given by Javecharam refers to his having received the Rs. 4, and the fact that the Rs. 4 were found in his pocket. Ali Aga was an eye-witness to the payment of the money, although he did not see any writing being made, this having taken place in another room. I believe there is no reasonable doubt that the facts occurred as stated by Mahomed Ali, and I, therefore, conclude that he was engaged with Mahomed Ali and Ahmed Hussein in a conspiracy to obtain for the former 2 tickets of the company, and that he received Rs. 4, which is an act in pursuance of that conspiracy: see s. 107, cl. 2, Indian Penal Code. I presume it is not meant by that section that he must have done something to obtain the tickets, and that any collateral act is sufficient to satisfy the terms of the section, but this construction is open to question.

"I find Javecharam guilty, first, of criminal breach of trust as a clerk or servant, and, secondly, of abetment of criminal breach of trust as a clerk or servant, and I sentence him to eighteen months' rigorous imprisonment —Sections 116 and 408, Indian Penal Code; that is, to one year on the first charge and six months on the second charge.

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"I find Ahmed Hussein guilty of dishonestly receiving stolen property, knowing it to be stolen, and sentence him to suffer one year's rigorous imprisonment—Sections 411 and 414, Indian Penal Code."

The accused No. 1 appealed to the High Court.

Jardine and *Russell* (with *Motilal M. Munshi*) for accused.—The statement of accused No. 2, that he received tickets from accused No. 1, is an admission of an incriminating character, and being made to the police while accused No. 2 was in police custody, it is inadmissible under ss. 25 and 26 of the Evidence Act—*Imperatrix* v. *Pandharinath* (1). The witness Mahomed is an informer and the real instigator of the offence. **[367]** He was a tool in the hands of the police, whose object was to get the offence committed. This man and the detective who supplied the marked money, as well as the other police witnesses who laid a trap for the accused, are all tainted witnesses; they are accomplices, and as such their evidence is entitled to no weight unless it is corroborated in material particulars. There is nothing to corroborate their statements. The receipt which is produced, is a clear fabrication. The money found on the accused No. 1 was thrust on him against his will and in spite of his protest.

Lang (Advocate General) for the Crown.—The Magistrate rightly held that the statement of accused No. 2 was not incriminating. He does not say that he got the tickets from accused No. 1, knowing the same to be stolen property. He does not admit his guilt His statement does not amount to a confession. It is, therefore, admissible in evidence. As to the evidence of Mahomed Ali and of the police witnesses, it cannot be treated as accomplice evidence. Mahomed Ali's story is, moreover, amply corroborated by independent evidence. The accused is found in possession of the marked money. He also produced from his pocket the Rs. 10 note which was given him on account of the price of the tickets sold. His explanation that the note and the money were thrust on him by the police, is a lie and an afterthought. He did not protest against it at the time of the arrest. He does not account for his presence at the tea shop where he was arrested. He does not explain what he was doing there at the time. The receipt, Ex. 1, is conclusive proof of his guilt. There is nothing to show that it is forged.

JUDGMENT.

JARDINE, J.—Mr. Jardine, as counsel for the prisoner Javecharam, has raised several questions on the law of evidence, which we will consider before dealing with the facts. He objects to the Magistrate recording and using as evidence the statements made by the other prisoner, Ahmed Hussein, while in the custody of the police, *viz.*, that he had received the railway tickets from Javecharam and another. We are of opinion that this is an admission of a criminating circumstance on which the prosecution evidently rely, and which has weighed with the Magistrate **[368]** in his judgment on the facts. The ruling in *Imperatrix* v. *Pandharinath* (1), being applicable, we must hold that the admission of this statement as evidence was contrary to ss. 25 and 26 of the Indian Evidence Act.

Mr. Jardine then contended that the witness Mahomed Ali, as well as the detective Murar Rao, who supplied the marked money used as payment for the tickets, and the other two policemen, Mya Jan and Aga Ali, who were present as detectives when the alleged corrupt payment

(1) 6 B. 34.

for the tickets was made to Javecharam, are participators in the crime, and that, therefore, their evidence, being that of accomplices, must be weighed with caution and requires corroboration, as settled by a long series of judgments—*Queen Empress* v. *Maganlal* (1) ; *Queen Empress* v. *Chagan* (2). But we find in the evidence no suggestion of any criminal act as done by Mya Jan and Aga Ali.

With regard to Murar Rao's supplying the marked money, we are not able to pronounce that this act makes him an accomplice. We believe that in an unreported case a similar act was so treated here, following the principle of *Empress* v. *Umi* (3). The action of the spy and informer, Mahomed Ali, in suggesting and initiating the present offence of selling these tickets, by going to the prisoner. Ahmed Hussein, and offering to buy some used tickets, does appear to this Court to have been a criminal offence, the act not being excused or justified by any exception in the Indian Penal Code, or by the doctrine which distinguishes the spy from the accomplice, applied by Lord Ellenborough in *Rex* v. *Despard* (4), by Mr. Justice Maule in *Reg.* v. *Mullins* (5), and by this Court in *Queen-Empress* v. *Mona Puna* (6) and *Queen-Empress* v. *Shankar* (7). Mahomed Ali appears from his own account to have been the first instigator of the present offence ; not merely a spy, who knowing of criminal doings, or doings which will culminate in a crime, merely pretends to concur with the perpetrators. Mere good intention does not ordinarily excuse a criminal act. As remarked by Cockburn, C. J., in the case of **[369]** the Confessional Unmasked, *The Queen* v. *Hicklin* (8), whom we quote about illegal proclamations of indemnity to criminals in *Queen Empress* v. *Chagan* (2), honest objects may not be attained by breaking the law, and a man must be taken to have intended what was the natural consequence of his act.

The strictness of the law and the habit of the Courts not to allow exceptions not sanctioned by the Legislature have been illustrated in several important judgments of this Court, *e. g.*, in *Maganlal's* case (1), where we dealt with the excuse of fear as regards criminal acts done to avert supposed injury to the perpetrator, in *Queen-Empress* v. *Ganesh Khanderao* (9) as regards hoaxes and jokes carried too far. The reason may be found in the fact, that when an enterprise stamped as criminal by the law is once begun, the beginner, who without any immoral intention has started it, may soon find himself powerless to control the circumstances, the passions of others, or his own inclinations ; and so the very evil he sets himself to combat may result from his criminal act. He may set his trap to catch a habitual criminal, and the bait may be an enticement to a person who has not been tempted to the crime before. Therefore, as a safeguard to the temptor and the tempted, whose good faith may waver, as well as to other people put in peril, the law marks off certain acts as punishable. This discussion shows the need of appraising the action of Mahomed Ali, whom the learned counsel discredits as a breaker of the law and an accomplice.

We will now examine the authorities. At the trial of Colonel Despard for high treason, Lord Ellenborough says (p. 489) those persons do not partake of the criminal contamination of accomplices who enter into "communication with the conspirators with an orginal purpose of discovering their secret designs, and disclosing them for the benefit of the

(1) 14 B. 115.
(2) 14 B. 331.
(3) 6 B. 126.
(4) 28 State Trials, (489).
(5) 3 Cox C. C. 526, (531).
(6) 16 B. 661.
(7) Cr. Rul. 91 of 21st Dec. 1888 (Rat. Unrep. Cr. Cases 428).
(8) L. R., 3 Q. B. 360.
(9) 13 B. 506.

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public." In *Reg.* v. *Mullins*, Mr. Justice Maule defined two sorts of witnesses. Of one sort he said (p. 531): "They were persons who understanding, as they say, that there were dangerous designs entertained by certain Chartist societies, joined the meetings and pretended to sympathise with [370] the views of the conspirators in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it, and may be called spies." The others, he says, "were really Chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned upon their former associates and gave information against them. These persons may truly be called accomplices." The learned Judge afterwards gives the following direction:—"An accomplice confesses himself a criminal and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The Government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished, in fact and in principle, from accomplices, and although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration."

We have to apply these principles to such indications as the evidence affords of the conduct of Mahomed Ali; and treating him as the first instigator of the offence, we are inclined, but not without doubt, to hold him to be an accomplice.

But in the present case the sagacity of the Court has to be applied to the whole evidence. Turning to the merits, we find, as indeed the Magistrate points out, that Mahomed is not confirmed by any other person as to Javecharam having written the highly incriminating receipt, Ex. 1, which was found on Mahomed. Neither is any pencil produced. It is argued that Javecharam could not have been so foolish as to give so damning a writing as this receipt. It is clear that Mahomed might have brought such a writing with him, and that he has an interest [371] in procuring a conviction. But, on the other hand, all our experience shows that criminals are often very rash; were it otherwise, many more would escape. Again, as the spy may be a liar about this incident, it may be remarked that the receipt chimes in with the trap laid by giving a note of Rs. 10 value and four marked rupees. This note and money were found on the prisoner, who says they were thrust upon him, as also the paper containing Mahomed's address. A careful study of the evidence induces us to believe that these articles had not been thrust on Javecharam against his will. He made no reasonable vigorous protest at the time. His story is inconsistent with his actions that morning: he does not explain what he was doing at his visits to the tea shop. Moreover, the detective Ali Aga deposes to seeing Javecharam receive the marked money from Mahomed and the other prisoner. The whole story told by the prosecution witnesses, including the events of the 28th and 29th January and the capture of Ahmed Hussein, appears to hang together; and even the incident of the receipt, Ex. 1, becomes less improbable when we remember

that Javecharam was dealing with artful men, anxious to detect him and to produce good evidence in the Police Court. He got a large sum, considering his pay, *viz.* Rs. 10 for tickets received and Rs. 4 payment in advance; and it may well be that his avarice made him incautious and complaisant with these good paymasters. There appear to be no signs of falsehood in the evidence, which, moreover, the prisoner has not in any way rebutted. There is no reason to give more weight to his mere denial than to the evidence, which has been believed by the Magistrate who took it, and which contains much corroboration of Mahomed's story at all points. There being no rebutting evidence, the rule of the Privy Council, that when there are two conflicting stories the Court should believe the one which is the most probable, does not come into play.

For these reasons we confirm the sentence of one year's rigorous imprisonment awarded in respect of the first charge. We do not think the mere receipt of the Rs. 4 from the instigator, Mahomed Ali, and the promise of Javecharam to supply more used tickets, constitute the offence of abetment within the meaning of [372] s. 107 of the Indian Penal Code. We, therefore, acquit the prisoner of that offence and reverse the sentence of six months' rigorous imprisonment passed therefor.

Sentence varied.

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19 B. 372.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE RAGHUNATH MAKUND.* [4th April, 1894.]

***Municipal Act** (Bombay Act III of 1888), s. 353—Notice to a house-owner to reduce the height of his building given more than three months after its completion—"Completion"—Meaning of the word.*

One Raghunath Makund was served with a notice, under s. 353 of the City of Bombay Municipal Act (Bombay Act III of 1888), requiring him to reduce the height of a building which he had erected. The building was completed in June, 1893, and the notice was issued on 13th January, 1894. Raghunath was prosecuted for not complying with this notice. He contended that the notice was time-barred, as it had not been given within three months after the completion of the building. In answer to this plea it was urged, on behalf of the Municipality, that the building could not be said to have been completed, unless and until such accommodations as privies and cesspools had been executed in accordance with the requirements of the Health Department, and that therefore, the notice was within time.

Held, that the notice was time-barred. The word "completion" in s. 353 of Bombay Act III of 1888 must be taken in its ordinary sense, and the Court cannot read into the section "in accordance with sanitary regulations" or "sanitary officers' opinions."

THIS was a reference by P. H. Dastur, Fourth Presidency Magistrate, under s. 432 of the Code of Criminal Procedure (Act X of 1882).

The reference was in the following terms:—

"Mr. Raghunath Makund has built a new house at Girgaum Back Road. The width of the street on which it abuts is about 9' 7" and the height of this building from the ground level to the eaves is 47' 6."

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* Criminal Reference, No. 35 of 1894.

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"By by-law 30 of the building by-laws made by the Bombay Municipality it is provided that 'a person who shall erect a new building which abuts on a street of less than 50 feet in width. . . . shall not without the written permission of the Commissioner erect such a building to a greater height than one and a half times the width of that street.'

[373] "This building is, therefore, clearly in contravention of the by-law, and a notice dated 13th January, 1894, was issued to Mr. Raghunath requiring him under s. 353 of the Municipal Act to reduce the height of his building. This has not been done, and it is now contended on behalf of the defendant that the notice is time-barred.

"Now s. 353 above cited requires that the notice should be given within three months after the completion of the building, and as a matter of fact I find from the evidence that the house in question was completed in its physical sense in June last, and the only work then left undone was the connection of the sewer with the drains, which was also completed in September. I hold, therefore, that the notice issued on the 13th January is time-barred.

"It is, however, contended on behalf of the Municipality, that because all the requirements of the Health Department have not been complied with in the construction of this building, it can never be said to have been duly completed, and that, therefore, this notice is within time.

"The objections to this building are enumerated in a document filed in this case, and are briefly as follows:" (the reference then stated the defects in the pipes and cesspools connected with the privies).

"Now, it seems to me absurd to hold that because these defects exist in the building, therefore it is incomplete. I understand the word to mean physical completion, and not a completion as is desired by the officers of the Health Department. For, if such a construction were put on the word, there would practically be no limitation to the action of the Municipality under this section, and any house, no matter how long it has stood in this city, could be brought within the purview of the section, by the Health Department finding some flaws in its construction.

"Indeed, the matter seems to be so clear that I was reluctant to trouble the High Court about it, but Mr. Burder cites a case decided by the learned Chief Magistrate in which it was said an opposite view was expressed and as the point raised is of some importance to the public, I have found it desirable to make this reference."

The reference was heard by a Division Bench (Jardine and Ranade, JJ.).

Scott (with him *Bhaishankar* and *Kanga*), for Raghunath Makund.

Jardine (with him *Crawford* and *Burder*), for the Municipality.

JUDGMENT.

JARDINE, J.—The question referred by the Magistrate under s. 432 of the Code of Criminal Procedure relates to the meaning to be given to the words "completion thereof," in s 353 of Bombay Act III of 1888, used in regard to notice about "the erection of a building." The Municipality contends that a building is not completed, unless and until such accommodations [374] as privies and cesspools have been executed in accordance with sanitary regulations. In the present case, the building has been provided with these accommodations. It is so far complete. We are of opinion that the word "completion" must be taken in its ordinary meaning, and that the Court must not read into the section "in accordance with sanitary regulations" or sanitary officers' opinions."

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Before Mr. Justice Birdwood and Mr. Justice Jardine.

KUVERJI (*Original Plaintiff*), *Appellant v.* BABAI (*Original Defendant*), *Respondent*,* [12th May, 1890].

Estoppel—Indian Evidence Act (I of 1872), s. 115—Estoppel by conduct—Mistake of law—Adoption—Acknowledgment of adoption.

One Ganpatrav Raje Shirke was possessed of considerable property both in British territory and in the territory of His Highness the Gaikwar. He died in 1858, leaving three childless widows, Laxmibai, Savitribai and Babai. Shortly after his death, the plaintiff Kuverji, who was then a minor, was taken to Baroda by Laxmibai, and on her representations as well as those of her co-widows he was acknowledged by the Gaikwar as their adopted son, and as such entitled to succeed to all the estate and privileges enjoyed by the deceased Ganpatrav. For several years afterwards the widows treated the plaintiff as the legitimate heir and successor of Ganpatrav in respect of the Baroda property. With regard to the estate in British territory, the widows at first put forward Kuverji as the adopted son of Ganpatrav. On their application a certificate of heirship was issued under Reg. VIII of 1827, declaring that "the Bais were the widow heirs, and the minor Kuverji the son heir, of the deceased Ganpatrav." In one case the widows obtained a decree as guardians of the minor, on a bond executed in favour of Kuverji as heir to Ganpatrav. When the Bombay summary Settlement Act (II of 1863) was passed, the widows accepted the summary settlement in respect of the inam holdings of their deceased husband, and thereupon the holdings were entered in their names in the Government records. Finding themselves secure in the possession of their husband's estate, the ladies now dropped the allegation of adoption, and dealt with the property in British territory in their own right, and not as trustees or guardians of the minor Kuverji. In 1871 Kuverji sought to have part of the property in British territory transferred to his own name as the adopted son of Ganpatrav. The widows resisted this attempt and denied his adoption. In 1881, Kuverji made a similar attempt, but failed, the Revenue authorities having eventually resolved to leave the question of Kuverji's title by adoption to be determined by the Civil Court.

[375] In 1884 Kuverji filed the present suit against the widows of Ganpatrav for a declaration of his adoption by Ganpatrav and for possession of Ganpatrav's estate in British territory. The widows denied the *factum* of the adoption, and disputed its validity. They also contended that the suit was barred by limitation. The Agent for Sardars in the Dekkhan, who tried the case, dismissed the suit, holding that the plaintiff's adoption by Ganpatrav was not proved, and that the claim was barred by limitation, the widows having been in adverse possession of the property in British territory for more than twelve years.

The plaintiff appealed against this decision to the High Court, contending (*inter alia*) that the widows were estopped by their conduct from denying the plaintiff's adoption.

Held, that the widows were not estopped.

Per BIRDWOOD, J.—The fact that the plaintiff was put forward by the widows as *their* adopted son in the Baroda territory did not estop them from disputing the plaintiff's allegation that he was adopted by Ganpatrav. Nor was the circumstance that the widows and the plaintiff obtained a joint certificate of heirship to Ganpatrav in British territory conclusive as an estoppel.

Per JARDINE, J.—There was no estoppel, (1) because there was nothing to show that the plaintiff had been led to alter his position in life through belief in any misrepresentations made by the widows, and (2) because the widows might have been under the same mistake of law as the plaintiff, *viz.*, that the Gaikwar's recognition of his adoption created a status operative everywhere, as well in British territory as in the Gaikwar's territory.

APPEAL from the decision of E. T. Candy, Acting Agent for Sardars in the Dekkhan, in suit No. 3 of 1884. The plaintiff sued for a

* Appeal, No. 80 of 1886.

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declaration that he was the adopted son of one Ganpntrav Raje Shirke, and as such entitled to have his name entered in Ganpatrav's place in the Government records, and to recover possession of the whole of Ganpatrav's property in British territory, excepting a portion set apart for the defendant's maintenance.

Ganpatrav belonged to a Maratha family of high rank and position in the Dekkhan. He was related to His Highness the Gaikwar of Baroda, and owned a *paga* or the hereditary right to command a certain number of horse in the service of the Gaikwar. He was possessed of considerable property both in British India and in the Gaikwar's territory. He died in 1858, leaving three childless widows, *viz.*, Laxmibai, Savitribai and Babai. Within a few months after his death the plaintiff Kuverji, who was then a minor about twelve years old, was taken to Baroda by Laxmibai, and on her representations as well as those of her co-widows the Gaikwar publicly acknowledged Kuverji **[376]** as their adopted son, and as such entitled to succeed to all the honours and privileges enjoyed by the deceased Ganpatrav. Since that time the ladies treated the plaintiff as the legitimate heir and successor to the whole of their husband's estate in Baroda territory.

With respect to the estate in British India, the ladies at first put forward Kuverji as the adopted son of Ganpatrav. On their application the District Judge of Poona granted a certificate of heirship under Reg. VIII of 1827, declaring that "the Bais were the widow heirs, and the minor Kuverji, the son heir, of the deceased Ganpatrav." On one occasion they obtained a decree as guardians of their minor son on a bond executed in favour of Kuverji as heir to Ganpatrav.

In 1863, when the Bombay Summary Settlement Act (II of 1863) was passed, the widows accepted the summary settlement in respect of the inam holdings belonging to their deceased husband. And thereupon the holdings were entered in their names in the Government records. Finding themselves thus secure in the possession of their husband's estate, they dropped the allegation of Kuverji's adoption, and began to deal with the property in British territory in their own right, and not as trustees or guardians of the minor Kuverji.

In 1871 Laxmibai died. Thereupon Kuverji applied to the revenue authorities to transfer the property in the Satara District from her name to his own. Savitribai and Babai resisted this attempt, and utterly repudiated his status as the adopted son of Ganpatrav.

In 1881 Kuverji made a similar attempt to have the property in the Konkan transferred to his name, but failed, the revenue authorities having finally resolved to leave the question of Kuverji's title by adoption to be decided by the Civil Court.

In 1884 Kuverji filed the present suit against Savitribai and Babai to establish his adoption, and to recover his adoptive father's property in British India.

The suit was filed in the Court of the Agent for Sardars in the Dekkhan. Pending the suit, Savitribai died. Thereupon the suit was proceeded with against Babai alone.

[377] Babai in her written statement pleaded that the plaintiff was not adopted by her husband Ganpatrav, that Ganpatrav was not competent to adopt the plaintiff, and that the suit was barred by limitation.

The agent for Sardars held that the plaintiffs' adoption by Ganpatrav was not proved; that even if the ceremony of adoption was performed by Ganpatrav, it was invalid, as he was suffering from sanious leprosy;

that the widows of Ganpatrav held the property in British territory in their own right, and not on sufferance from the plaintiff in lieu of maintenance; that since 1873 they utterly repudiated the plaintiff's *status* as the adopted son of Ganpatrav; and that their possession having been adverse to the plaintiff for more than twelve years, the suit was barred by limitation.

With regard to the property at Baroda, the Agent for Sardars found as follows:—

"It is evident that some months after Ganpatrav's death (27th December, 1858) the eldest widow, Laxmibai, went to Baroda with the present plaintiff, Kuverji, who was then a boy about twelve or thirteen years old, and was related to the Gaikwar; and it is conclusively shown that Khanderav acknowledged Kuverji as the successor to all the estate and privileges enjoyed by the deceased Ganpatrav. I do not say that it is shown that Khanderav admitted Kuverji as a son *validly adopted by Ganpatrav*. The presumption is, I think, to the contrary. But it is clear that on Laxmibai's representations, Khanderav fully recognized Kuverji as the son and heir of Ganpatrav, whether as adopted by Ganpatrav or by Ganpatrav's widow Laxmibai. It may easily be understood that the authorities were not so particular in Baroda in recognizing an adopted son as they would be in British territory. Khanderav was closely connected with Ganpatrav. He would naturally listen to Laxmibai's request not to let Ganpatrav's important rank and estate lapse for failure of male successor; and so he recognized Kuverji as son of Ganpatrav, and a few years afterwards married him to Kamabai, the daughter of his brother Malharrav.

* * * * *

"In my opinion it is clear that for several years after Ganpatrav's death the three Bais (widows) fully recognized Kuverji as son and heir to Ganpatrav in respect of all the Baroda property; but the property in British territory was entered in their names, and they did not show by their conduct that they considered themselves trustees for Kuverji in respect of the property."

On these grounds the Agent for Sardars dismissed the plaintiff's suit.

Against this decision the plaintiff appealed to the High Court, contending (*inter alia*) that the widows of Ganpatrav were [378] estopped by their conduct from disputing either the *factum* or the validity of the plaintiff's adoption.

Jardine (with Rao Saheb *Vasudev Jagarnath Kirtikar*), for appellant.

Branson (with *Mahadev C. Apte* and *Vasudev G. Bhandarkar*), for respondents.

The facts of the case and arguments of counsel are fully stated in the judgment of Jardine, J.

JUDGMENTS.

BIRDWOOD, J.—The history of this case and the evidence relied on by the parties are fully and carefully set out in Mr. Candy's judgment. On a consideration of the evidence, and of the arguments presented to us at the hearing of the appeal, I am clearly of opinion that his decision is correct. The evidence relied on by the plaintiff to prove the alleged adoption is meagre; whereas, considering the rank of the Shirke family, an event of such importance would, in all probability, if it ever took place, have been established, even after the lapse of twenty-six years, by ampler and better evidence. It certainly weakens the case for the plaintiff that several persons who might have been called to prove it have not been

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called; while, on the other hand, the defendants call several witnesses who were so closely connected with the family that they would most probably have been able to give evidence regarding the ceremony if it was performed by the deceased Ganpatrav; and yet these persons distinctly deny that there was any adoption by Ganpatrav. The impression left on my mind by a perusal of the evidence is that either the alleged adoption never took place, or that, if it did, was not performed with such publicity as is claimed for it by one of the witnesses, and, moreover, that Ganpatrav must at the time (9 or 10 P.M, on the 26th December, 1858) have been so reduced in strength by the disease of which he died at 2 P.M. on the 27th December, that, if not unconscious, he was most probably incapable of understanding the nature of his act or indeed of performing any act "requiring the exercise of the powers of judgment and reflection." I have no difficulty, therefore, in holding with the Agent for Sardars that "the adoption is not proved and was invalid, even if the ceremony was performed."

[379] The argument of the learned counsel for the appellant was, however, mainly directed to the question whether the defendants were not estopped by their conduct from denying the adoption. There can be no question that the plaintiff was put forward by the defendant as an adopted son in the Baroda territory, and that he derived great personal advantage from the recognition by His Highness the Gaikwar of his status as an adopted son of the deceased Ganpatrav. But I see no reason to dissent from the conclusion arrived at by the Agent that it was as a son adopted by the widows of Ganpatrav, not by Ganpatrav himself, that the plaintiff was admitted to the honours and property of the Shirke family at Baroda. There is no evidence to warrant a finding, in the terms of s. 115 of the Evidence Act, that the respondent has, by her declaration, act or omission, intentionally caused or permitted the plaintiff to believe that he was adopted by Ganpatrav and to act upon such belief. No such plea was set up on behalf of the plaintiff in the Court below; and it is obvious that, even if the widows did not themselves adopt the plaintiff,—a matter which does not form the subject of inquiry in the present case,—any belief as to such an adoption which they may by their conduct have induced in the plaintiff's mind would not estop them from now denying that the plaintiff was adopted by Ganpatrav. It is not impossible that the plaintiff and the defendants were really acting in concert at Baroda. If that was so, then it would not have been in consequence of any conduct on the part of the respondent, or her co-widows, who are now dead, that the plaintiff consented to give up his rights in his natural father's family in order to secure wealth and position at Baroda.

Nor again, is the circumstance that the widows and the plaintiff obtained a joint certificate of heirship to Ganpatrav from the Poona District Court under Reg. VIII of 1827 conclusive as an estoppel. The circumstance is susceptible of the explanation suggested by Mr. Candy.

The decision of the Court below must, in my opinion, be upheld on the merits; and I think it unnecessary, therefore, to discuss the point of limitation arising in this case, which has also been decided by the Agent against the plaintiff.

[380] The decree of the Court below must be confirmed with costs.

JARDINE, J.—This suit was filed on the 2nd July, 1884, in the Court of the Agent for Sardars in the Dekkhan. The plaint sets forth that the plaintiff Kuverji was in 1858 adopted by Ganpatrav bin Waghojirav Raji Shirke before his death. The cause of action is dated as of the

10th October, 1881. The prayer among other reliefs claims a declaration that the plaintiff is the adopted son of Ganpatrav, and a decree for possession of certain property in the British territories under the Presidency of Bombay. The defendants Savitribai and Babai, widows of Ganpatrav, contested the whole claim, alleging that the plaintiff was not adopted by Ganpatrav, that Ganpatrav was not competent to adopt, and that the suit was barred by limitation. The learned Agent for Sardars rejected the claim with costs, for reasons fully set forth in his judgment, holding it to be time-barred and to fail on the merits.

The defendant Savitribai died before the decree was passed. Kuverji has appealed here, making Babai the sole respondent.

Towards the end of the hearing, Mr. Vasudev for the appellant faintly argued that if this Court were to hold the adoption by Ganpatrav unproved or invalid, the appellant is entitled to succeed on proof that, after the death of Ganpatrav, his widows or one of them adopted Kuverji at Baroda, which adoption had been recognized as valid by Khanderav Gaikwar of Baroda, the prince in whose territories this adoption occurred. This point is also taken in the petition of appeal. But in opening the case for the appellant, Mr. Jardine, his counsel, practically repudiated this ground, resting his client's case on the adoption by Ganpatrav and describing the Agent's finding about the acts done at Baroda as setting up a new case, his own being that these acts were not an adoption there and then, but evidence and recognition of the adoption made in Ganpatrav's lifetime. It appears to us clear, from the pleadings and proceedings, that the parties went to trial on the question of an adoption by Ganpatrav: and following the rule of decision *secundum allegata et probata* we must confine the appeal to that question.

The adoption by Ganpatrav is alleged to have been made at his house at Kadve, in the territory of the Pant Sachiv, which is [381] in the Dekkhan. It is not disputed that Ganpatrav died on the 27th December, 1858, in the day time. The adoption is said to have occurred during the previous night.

Ganpatrav was a man of high family and rank. He held a lucrative hereditary command of horse under the Gaikwars of Baroda and other property in the Gaikwar's territory, to which it is admitted Kuverji has succeeded without opposition. Ganpatrav had a sister married to Sayaji Gaikwar; and a daughter married to Khanderav Gaikwar. Khanderav admittedly recognized Kuverji as son of Ganpatrav and got him married in 1867 to the daughter of Malharrav, who succeeded to the *gadi* of the Gaikwar's State. It was Laxmibai, the senior widow of Ganpatrav, who soon after his death took Kuverji to Baroda. It is not denied for the respondent that all the widows assented to what the Gaikwar Khanderav did on Kuverji's behalf; but when we pointedly put the question to the appellant's pleader, he did not deny that what happened at Baroda was substantially to Kuverji's advancement in life, a matter important with regard to what was contended here, that the respondent is bound by estoppel.

In the Court of Agent for Sardars it was contended that the widows (defendants) had in documents and by acts and conduct admitted the status of plaintiff as Ganpatrav's adopted son; but although no issue about estoppel was raised below, it was urged in the appeal that these admissions and conduct amounted to estoppel under s. 115 of the Indian Evidence Act, precluding them from denying the fact or validity of the alleged adoption by Ganpatrav. Much of this evidence relates to Kuverji's time

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of residence at Baroda and to the affairs transacted there and the property in the Gaikwar's territory about which the Gaikwar had power to pass orders. The Agent states his opinion that the widows treated Kuverji as an adopted son, *qua* Baroda affairs and the property under the Gaikwar's power; but did not recognize Kuverji's rights, as adopted son, except for a short period, *qua* the property in British India, most or all of which was held of the British Government.

The Agent for Sardars may be expected to have a considerable acquaintance with the past policy of the Government as regards [382] the recognition of adoptions in families in hereditary possession of inams and allowances granted by the Peshwas and other predecessors of the British Government. I agree with the Agent in the surmise he puts forth after discussing the proceedings before the Inam Commission in Ganpatrav's time and his death—Exs. 262, 263, 49, 88, 264, 266, 82, and 241. The widows, he thinks, had reason to fear that the British authorities would refuse to recognize any alleged adoption of a son by Ganpatrav, because it had not been formally sanctioned by the Government. The previous policy was reviewed by the Government of Bombay and a strict practice directed for the future under the orders of the Court of Directors in 1855 as appears from the official records on Captain Cowper's minute about adoptions and the statement of Sir J. P. Willoughby, a distinguised member of the Bombay Government, in his discussion of the Ahmednagar State case—Bombay Government Selections, New Series, Vol. XII, p. 188, and Vol. XXVIII, p. 61.

In the absence of evidence regarding motive, the Court can only state it as a surmise that the widows or their advisers may also have had reason to apprehend that the Government might in the absence of a male heir resume then, or on the widows' deaths, all or some of the property held of the Government. Whether the allegations were true or false, they may have thought that it suited the family interests to put forward a male heir,—that is, by alleging that Ganpatrav had adopted a son. It may also be surmised that one reason for dropping action on the allegations made by the widows' agent Chimnaji in Ex. 88 and on the certificate of heirship, Ex. 82, in 1860 may have been the levity or indifference of the Government which refrained from resumption of the property as is shown by orders dated 1862 and 1863.

Turning from the state of affairs in British India at the time to that existing in Baroda, I am of opinion that the learned Agent is right in his view that what was done there must be considered in relation with the power of the reigning prince, a factor which could not but greatly influence the conduct of all the members of the family. The Gaikwars, in those days at least, were not governed by the restraints of constitutional monarchs. If any one [383] had been brave enough to tell the Gaikwar, as Coke did King James I (case of prohibitions del Rey. 6 Coke R.), that he was inferior to the law, it is likely enough that the Gaikwar would have been greatly offended and said, as King James did, that this was treason. Probably the maxim *rex nil potest jubere nisi per curiam legitime constitutam* did not apply. There is nothing to show that Khanderav Gaikwar made or caused to be made any inquiry into the fact of an adoption of Kuverji by Ganpatrav. The Agent for Sardars inclines to think that as his dispositions were favourable to the ladies of the Shirke family, he readily allowed them to adopt a successor to succeed to the valuable property in his territory, a male being required by custom. I coucur in the statement of the Agent that Khanderav acknowledged Kuverji

as the successor to all the estate and privileges enjoyed by the deceased Ganpatrav. The evidence relied on by the plaintiff shows that the recognition was made publicly at a Court ceremonial. It was most effectual in its consequences and advantageous to Kuverji, the widows, and probably to all the Shirke family. This solemn act of the Gaikwar cannot, therefore be treated as outside the range of jurisprudence. It may have led the widows into some mistake about its legal effect on Kuverji's status in British India and on the property in British India. It is necessary, then, to advert to its legal effect as well as to the views which the widows might naturally take of it in order to weigh the subsequent conduct of the widows and to estimate the meaning of their reference to Kuverji in the documents of later date for the purpose of seeing how far the Court can go in treating this conduct and these documents as estoppel or as admissions.

The Agent for Sardars has, I think, rightly estimated the force of the Gaikwar's act. He has practically treated it as according to Bar (Savigny's Private International Law, Guthrie's Translation, p. 263) the older writers treated legitimation bestowed *per rescriptum principis*, confining its effect to the territory of the grantor. See also the Note on Legitimation and Adoption in Story's Conflict of Laws, 8th ed., p. 142. I am inclined also to the opinion that in order to give a title to immoveable property in British India it is requisite that the adoption should be valid according to the *lex loci rei sitoe:* Wheaton's International Law, **[384]** Boyd's ed., p. 118. In applying the doctrine of estoppel where the parties may have been in doubt or under mistake as to the law, the peculiar circumstances must be kept in mind in order to explain the conduct. Here I think an illustration can be found in the law of legitimation. The interest of all parties coincided in getting the Gaikwar to treat Kuverji as a lawful son of Ganpatrav; exactly as the owner of landed estate in both England and Normandy at the time when the Statute of Merton was passed, having a bastard son, might advisedly marry the mother in order to legitimate the bastard *per subsequens matrimonium* under the canon law prevailing in Normandy, so that he might inherit the estate in that country. See *Birtwhistle* v. *Vardill* (1). There would be more motive for entering into wedlock if the legitimation of the *ante natus* saved those estates from confiscation; and parental pride would be still more deeply engaged if as a further result he were ennobled and admitted by marriage into the princely family. We would rather expect all future mention of the *ante natus* to be affectionate or at least respectful, and at any rate not such as would offend the susceptibilities of the despotic prince who had advanced the boy. In this way, ordinary allusions in letters and ordinary affectionate relations can be explained, and explained as existing, whether or not there was any acknowledgment of right of the son to the property in the other country where the law excluded him from inheritance.

Applying these principles to the facts, I would say that the widows' allusions to the plaintiff's heirship are almost irrelevant in the present suit, unless they distinctly relate to the property in British India: and as regards the law, the widows and their advisers may have been perplexed as to the legal effect of the acts of the Gaikwar. Similar questions as to the effect given by the comity of States have led to different opinions among Jurists and Judges, of which *In re Goodman's Trusts* (2) is an illustration. One reason why I would confine the effect of the Gaikwar's recognition to the territory of the Gaikwar is that it does not appear to

(1) 5 B. and C. 438; 6 Bing. N. C. 385.

(2) 17 Ch. D. 266.

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have been a judicial act. Its effect was that the property there enjoyed by Ganpatrav was not confiscated by the prince. [385] The domicile of the plaintiff appears to have been in the Pant Sachiv's country, until he went to Baroda after Ganpatrav's death.

After this endeavour to state the peculiar circumstances of the family, I now advert to the evidence on various questions of fact which have been fully argued.

As to the *factum* of the ceremony of adoption by Ganpatrav, I agree with the Agent for Sardars that it is not proved. The three eye-witnesses, Baherji (witness 135), father of the plaintiff, Tanaji (witness 107), brother of Baherji, and on his own statement next heir to Ganpatrav, and Vithal Narayan (witness 140), a family priest, are in some points discrepant with each other. This Vithal and Kashiram Khanvalkar (witness 134) live at Baroda and are dependents of the plaintiff. If, as one of these witnesses says, there were above hundred people present when the sugar was given, more witnesses ought to have been called. As the Agent notices, there is no trace of any letter to the Agent for Sardars announcing the adoption. There is also no written announcement suggested to the Gaikwar of Baroda, nor to the prince in whose territory at Kadve the alleged adoption occurred, the Pant Sachiv, nor to any of the relatives or acquaintances of rank.

The alleged ceremony is placed at Kadve during the night preceding the day of December 27th, 1858, during 8 to 10 P.M. During the appeal it was pointed out by Mr. Branson for the respondent, that it is also the plaintiff's case that Ganpatrav died on the 27th December at 2 P.M. This is admitted. He urges that the discrepancy changing the date of the adoption to the 26th December is designed with a view to leave a reasonable time of consciousness between the ceremony and the death. Mr. Vasudev, for the appellant, tried to explain the matter as follows:—The witnesses have adhered to one native date, Margashirsh, Vadya 8th; and he produced a native almanac of the year 1858 to show that this Vadya 8 begins according to native computation some time in the night following our day 26th December. But he did not show or argue that Vadya 8 began so soon as 10 P M. of the 26th December; and, therefore, I do not think the discrepancy is explained, nor is there any sufficient reason to [386] suppose that the witnesses compute time in the exact manner we were asked to presume.

On considering the meagre and discrepant evidence above noticed, the absence of the usual announcements to the British Government, the Gaikwar and the Pant Sachiv, the shortness of time before the death, and the serious illness of Ganpatrav, I incline to the opinion of the Agent for Sardars that it is not proved that Ganpatrav was of sufficient capacity at the time to understand the nature of such an act as adoption—*Tayammaul* v. *Sashachalla* (1).

The Agent for Sardars has recorded a finding that even supposing the plaintiff was adopted by Ganpatrav, the adoption was invalid because Ganpatrav was suffering from sanious leprosy. Evidence was taken on the subject, and the point was argued below and here. But it is contended for the appellant that this Court ought not to act on this finding, as there was no issue about sanious leprosy, nor any allegation in the pleadings; the only issue at all applicable being couched in these general terms. "Is the plaintiff the lawfully adopted son of the deceased Ganpatrav?"

(1) 10 M.I.A. 429.

If it were necessary to decide the question of sanious leprosy, I am of opinion that we would use a right discretion by referring an issue for trial, following the Judicial Committee of the Privy Council in the case cited to us, *Oolagappa Chetty* v. *Hon. D. Arbuthnot* (1), where their Lordships say of a general issue "that issue was too general; it involved several mixed questions of law and fact, and did not sufficiently direct the attention of the parties to the main question of fact necessary to be decided."

The evidence about what Khanderav Gaikwar did in regard to the plaintiff's status, is meagre. The plaintiff's witness, 137, Hari Vithal, makes statements to the effect that the Gaikwar assented to the senior widow Laxmibai returning to Dekkhan to adopt Kuverji and to obtain the sanction of the British Government. After consideration I agree in the view taken by the Agent for Sardars and stated in different paras. of his judgment. There is no evidence that the Gaikwar made inquiry about the [387] fact of the ceremony or its validity. There is evidence of what the British Resident, in 1871, calls a sanction; or what may be called a recognition of Kuverji's status as heir. Some accounts of May, 1860, show payments on account of an adoption already past "*dattak ghetlya badal*;" but the terms used are concise and ambiguous, as may be expected in mere accounts. The recognition and its results depended on the mere will of the prince: Kuverji was his relation, and his legitimation of Kuverji was tantamount to abstaining from confiscating the property to the benefit of his own exchequer. If Khanderav looked on Kuverji and his family with affection, it suited him and the friends of Kuverji as well as the widows who looked for maintenance that the property should be continued to Kuverji.

I now turn to the evidence relied on as admissions of the alleged adoption, and as constituting estoppel. It has been argued for the appellant that the respondent cannot urge that Kuverji has the status of adopted son in the Gaikwar's territory, and has not that status in British India. But the analogous case of the *ante natus* shows this argument to be unfounded. A large number of letters have been put in by the plaintiff in which he is mentioned by the widows in terms which it is said presume close relationship, *e.g.*, the word "*chiranjiv*" which is a diminutive with a mixed sense of respect and endearment like the Italian "*signorino*" There occur also a good many formal blessings. But considering that Kuverji was by birth a relation, and by status an adopted son at Baroda where he usually dwelt, these words might reasonably be used to him; they are not restricted to sons. It has been pointed out also by Mr. Branson that in none of them is he called their adopted son and seldom their son. It followed from the recognition of Kuverji by the Gaikwar that he should perform such family *shradhs* as were required to be done, he performing them at Baroda; while there is one document at least which suggests an inference that the widow meant to perform a *shraāh* herself.

As regards the plaintiff and the widows living and eating together, I take these facts as evidence of familiar relationship, but not as admissions that the plaintiff was entitled to the property in British India. I concur generally in the conclusions drawn by [388] the Agent for Sardars regarding the memorials and correspondence between Government, the Resident and the Darbar in 1871 and 1872 which are sufficiently set forth in the judgment below. I do not infer that the respondent admitted the

(1) 1 I. A. 268 (316).

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plaintiff's adoption by Ganpatrav or his title to the British India property; and to be relevant the admissions must relate to these facts.

I now turn to this part of the admissions. Exhibit 88, dated the 5th January, 1860, is a very plain admission in a petition to the Inam Commissioner of the alleged adoption. The certificate of heirship, Ex. 82, dated the 14th August, 1860, which is worded in extraordinary terms, coincides therewith. The Judge who issued it could only have supposed Kuverji to be a "son heir" by supposing him to be an adopted son. In 1862 the Government intimated that it would continue the estate: and so far as the widows are concerned, it may be assumed that they got what they wanted, and did not care to press for a recognition of the adoption. I see no reason to differ from the Agent's statement of this part of the case. It is clear that in 1860 the respondent relied on the fact of the adoption. This explains the filing a suit in 1863 in Kuverji's name on a bond executed in his favour in 1859. But this piece of evidence is slight and isolated: it is also neutralized by the fact of other proceedings being taken in the name of the widows about this time.

It is to be remarked about the money transaction, the petitions and other matters of business, that Babai and, doubtless, the other widows were *parda* ladies and must have relied on what their advisers told them. Their position was one of some difficulty, as they may have been informed that an unrecognized adoption would not avail either before the Government of Bombay or the Gaikwar: and we may not safely assume that all their statements have been true or always made in good faith. In *Tayammaul* v. *Sashachalla*, the Judicial Committee take into consideration the experience of our Courts, that the doings of Hindu females in matters of legal business are not always the results of personal knowledge.

The power of attorney (Ex. 49) is much relied on by the plaintiff in connection with the certificate of heirship. It is only [389] a copy of an uncertified copy of some original of the foreign State of the Pant Sachiv. I do not think it is proved, and even if it were, I would not draw any important inference from it.

In August and September, 1884, after this suit had been instituted, Savitribai seems to have made written admissions of the plaintiff's adoption —Exs. 100, 101 and 103—and to have been promised maintenance. It would appear from these papers that the plaintiff's status as adopted son has not yet been recognized by the Pant Sachiv or his officers. The value of these documents as admissions is reduced by the repudiation in Ex. 112, and by Savitribai giving no evidence about them, being too feeble when put in the witness box. The evidence about the mortgage in 1879 discloses a sort of admission by the respondent. But, as pointed out by the Agent for Sardars, *pardanishin* ladies are very much in the hands of their agents, and it is familiar experience that such people are very often induced to make statements or do things in order to get a present advantage, which statements and acts are used against them in later litigation as admissions, and complicate the evidence that comes before the tribunal.

I think the various admissions are capable of the explanations suggested, and that they do not impair the impression arising from the other evidence that there was no adoption. If there had been, there would have been plenty of written announcements and evidence of numerous eye-witnesses. The plaintiff has not even called his own brother, who is said to have been present. It is vain to ask the Court to infer an adoption of so public a kind from the vague allusions in letters written

about other matters, from forms of compliments, and such doubtful things.

It remains to deal with what the plaintiff's counsel relies on here more than on the evidence of the *factum*, *i.e.*, estoppel. Now this was not set up in the pleadings below. I do not think it is shown that the plaintiff has been led to alter his position in life through belief in any misrepresentations made by the widows or at least by Babai. He has not appeared as a witness or deposed to that effect. It is not clear that he has [390] left his natural family or lost any estate there. His going to Baroda must have been with the consent of his parents and relatives: his father has lived for years at Baroda. All that can be positively determined is that the Gaikwar Khanderav, being a sovereign prince whose will was law, determined to treat him as heir to Ganpatrav. He could have done this whether there was an adoption or not; he might have conveyed the property to the plaintiff by a new gift; such matters depended on the will of the Gaikwar, except so far as the British Government might in its mere grace interfere diplomatically. Malharrav followed the same line of conduct. The plaintiff has thus gained largely in wealth and rank. What he has done may, therefore, be referred to his self-interest and the advice of his natural family and the patronage of the princes. He made no attempt to get the alleged adoption by Gangatrav recognized by the British Government till 1871. He has not got his name entered in place of Ganpatrav as a sardar of the third class. He does not appear to have sought or obtained recognition by the Pant Sachiv. He appears to me very much in the position of an *ante natus* whom his family with natural pleasure might have seen recognized and advanced by the sovereign of Normandy or Aquitaine, and who might under bad advice set up those facts as estoppel to defeat the heir to real estate in England. The conduct of all parties can be accounted for without supposing that the plaintiff's advancement in life is due to any belief in misrepresentations of Babai; and on the view I take of the effect of the Gaikwar's recognition as a matter of comity, I do not see how the plaintiff's rights in his natural family can be adversely affected thereby, at least as regards British India and probably as regards the Pant Sachiv's State. If the plaintiff has suffered loss in either territory, he ought to have given evidence thereof. But then he did not rely on estoppel at the trial. It is also to be remembered that Babai may have been under the same mistake of law as the plaintiff. His pleader argues that the Gaikwar's recognition created a status operative everywhere, which is the effect given by the Courts in France and Germany to legitimation granted by a foreign sovereign—Savigny's Private International Law, p. 264. The widows may have [391] thought the same, and in such case there is no estoppel—*Gopee Lall* v. *Mussamut Sree Chundraolee Buhoojee* (1); *Vishnu* v. *Krishnan* (2); *Jhinguri Tewari* v. *Durga* (3). For these reasons, I would confirm the decree of the Agent for Sardars with costs.

Decree confirmed.

(1) 19 W. R. 12. (2) 7 M. 3. (3) 7 A. 878.

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Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

AHMEDBHOY HABIBHOY (*Original Defendant*), *Appellant v.* BALKRISHNA MUKUND AND OTHERS (*Original Plaintiffs*), *Respondents.**

[14th June, 1894.]

Vendor and purchaser—Landlord and tenant—Sale by landlord subject to rights of tenants—Notice to purchaser of such rights—Suit by tenants to enforce rights against purchaser—Civil Procedure Code (Act XIV of 1882), s. 30.

Section 30 of the Civil Procedure Code (Act XIV of 1882) authorizes some of the rayats of a village to sue the proprietor of it for themselves and the other rayats for a declaration of their general rights, and for an injunction restraining the proprietor from interfering with their enjoyment of those rights.

Phillips v. *Hudson* (1), *Smith* v. *Earl Brownlow* (2) and *Mayor of York* v. *Pilkington* (3), followed.

Hallows v. *Fernie* (4), referred to and distinguished.

In 1806 the East India Company granted a village to Ardeshir Dady, subject to the rayats' customary rights and privileges which were embodied in Reg. I of of 1808, but the deed of conveyance was not passed until 1819, and it was then executed to the executors of Ardeshir, who had died in the meantime. This deed made no reference to rights and privileges of the rayats. In 1868 the defendant purchased the village from its legal owners. In 1889, plaintiffs sued defendant for themselves and on behalf of the other rayats of the village to enforce their rights. The defendant pleaded that as the deed of conveyance of 1819 made no mention of these rights, he was not bound by them.

Held, that as at the time of the conveyance of the village to the defendant, the lands were in the occupation of the rayats, the defendaut ought to have made inquiry as to their rights. Having failed to do this he was bound by the rights of the tenants as much as if they had been specially mentioned in the conveyance to him.

[392] *Mancharji Sorabji* v. *Kongseoo* (5), followed.

Held, also, that as there had been no denial of plaintiffs' rights until shortly before the suit, it was not barred by limitation.

[R., 33 C. 905=10 C.W.N. 867.**]**

SECOND APPEAL from the decision of R. S. Tipnis, Acting Assistant Judge of Thana, amending the decree of Rao Saheb D. W. Bhat, Second Class Subordinate Judge.

The village of Malad in the Salsette Taluka of the Thana District was granted to one Ardeshir Dady by the East India Company, the original owner of the village, in exchange for other property situated in the Fort of Bombay conveyed by him to the East India Company. Before possession of the village was given, the rayats were consulted about their wishes in this respect, and the Patils, Mahtaras and rayats submitted certain stipulations with regard to their customary rights and privileges, and consented to the proposed transfer subject to those stipulations.

In 1806 Ardeshir Dady was put in possession of the village on the express condition of his maintaining the several Curumbis in the enjoyment of their respective pieces of land, and of his preserving the rights and privileges of the rayats in accordance with the above-mentioned stipulations. These stipulations have been embodied in Reg. I of 1808.

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* Second Appeal No. 570 of 1892.

(1) L.R. 2 Ch. 243. (2) L.R. 9 Eq. 241. (3) 1 Atk. 282.
(4) L.R. 3 Ch. 467. (5) 6 B.H.C.R.O.C.J. 59.

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There being some dispute with respect to the price of the land sold by Ardeshir to the East India Company, the deed of conveyance was not executed until 1819, when it was executed by the said Company to Kharshetji Ardeshir and Jahangir Ardeshir, &c., as executors of the will of the said Ardeshir, he having died in 1810. In this deed no reference was made to the stipulations made by the rayats when they agreed to become the tenants of Ardeshir.

In 1868 defendant puchased the said village from its then legal owners.

The defendant having interfered with the enjoyment of the said rights by some of the rayats, plaintiffs instituted the present suit in 1889, for themselves and on behalf of Patils, Mhataras, Curumbis and rayats of the said village, under s. 30 of the Civil Procedure Code (Act XIV of 1882), praying for a declaration **[393]** of their rights and privileges, and for a permanent injunction restraining the defendant from interfering with their exercise and enjoyment of the said rights and privileges.

They prayed for the following declarations :—

(1) That they are permanent tenants or sutidars of Malad.

(2) That the khot is not entitled to receive as assessment more than two-thirds of the measure of the land in faras at the rate of Rs. 20 per muda of rice.

(3) That the khot should remit the assessment in times of scarcity.

(4) That the khot should not force them to take his permission before cutting, threshing or taking home the rice.

(5) That the khot should allow them to sell, mortgage, inherit or otherwise alienate their suti lands, without imposing additional conditions upon the transferee at the time of change of name in the revenue records.

(6) That they are entitled to pay in instalments like Government rayats, and that the khot is not entitled to attach their crops at his own instance.

(7) That the khot is not entitled to levy any assessment on the grass and varkas lands, whether they grow grass only or any other crop is grown on them.

(8) That they are entitled to the free enjoyment of the produce of their grass and varkas lands, including trees, &c.

(9) That they are entitled to the free enjoyment of all ordinary wood and non-productive palms from the Sarkari lands for their building purposes.

(10) That they are entitled to the free enjoyment of fuel, bamboos, karvis and common wood for making agricultural implements, and mango and other trees at the time of marriages.

(11) That they are entitled to the complete ownership and enjoyment of their fazendari trees, whether on their own lands or Sarkari lands.

(12) That they are entitled to the use of gurcharan lands as mentioned in the plaint.

[394] (13) That the Patils, Mhataras and Devasthans should receive their haks and other rights from the khot without interruption.

(14) That they are entitled to the free use of the water and flowers from the tanks on the Sarkari land

(15) That they are entitled to the free use of materials for *rab*, thorns and inferior sort of palm leaves for making fences and enclosures.

(16) That they are entitled to pay no rent for the houses and *vadas* existing on the Sarkari land.

Defendant replied that he was not aware that the village was given to his predecessor-in-title on the aforesaid conditions ; that as no reference

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was made to them in the deed of conveyance of 1819, he was not bound by them; that plaintiffs could not sue on behalf of all the people of Malad; and that as the jungle did not belong to the villagers, but to him, he had a right to levy fees on firewood.

The Joint Subordinate Judge of Thana held (*inter alia*) that, under s. 30 of the Code of Civil Procedure, the suit was maintainable only with respect to the general rights of all the rayats of the village; that defendant by his purchase, became the sole proprietor of the village, subject to the rights and privileges of the rayats, he being clothed with the rights which Ardeshir had obtained in the village; that defendant was not entitled to demand security for the payment of assessment on suti lands before allowing the crops to be reaped; that the rayats were entitled to the free enjoyment of the forest-wood from the jungle, bamboos and implements of husbandry and of flowers from the Sarkari tanks, but not of all ordinary building-wood, and non-productive palms from the Sarkari land for their own private and domestic use, nor to the free use of materials for *rab*, thorns for making hedges, and the inferior sort of palm leaves for making roofs from the Sarkari land; and that no cause of action had arisen for the plaintiffs' claim with respect to remission from the khots in times of necessity, the varkas lands attached to private holdings of suti lands and the houses and *vadas* existing on the Sarkari land. The Subordinate Judge, therefore, made the following order:—

[395] "I order that the defendant is not entitled to demand security for the payment of assessment on suti lands from the rayat before allowing him the crops to be reaped; that plaintiffs are entitled to the free enjoyment of firewood, bamboos and implements of husbandry from the jungle; that they should make an application to the khot to take the above things from the jungle, and that the latter should grant them the necessary written permission according to his discretion; and that the rayats are entitled to the free enjoyment of flowers from the Sarkari tanks for their own domestic use. I enjoin the defendant that he should not prevent the rayats from exercising the above rights, and that he should not demand security for the payment of assessment from the suti tenants. The rest of the plaintiffs' claim is rejected. . . . . "

On appeal by defendant, the Assistant Judge of Thana found (*inter alia*) that there was no objection to the entertainment of the suit by the plaintiffs for themselves and other interested rayats so far as it claimed an interest alleged to be common to rayats of the whole village; that defendant was not entitled to demand security for the payment of assessment on suti lands before allowing the crops to be reaped; that the rayats were entitled to the free enjoyment of all forest common timber and unproductive brab-trees belonging to defendant for house-building, but that they should apply to defendant for permission to take them, and defendant should grant it having regard to the needs of the applicants and the exigencies of forest reservation; that rayats were entitled to free enjoyment of firewood from the forest, bamboos, *purye*, *bundi*, *tatties*, *beleca* *kurgyia*, implements of husbandry, but that they should apply to defendant for permission, and defendant should grant it having regard to the circumstances mentioned above; that the rayats were entitled to the free enjoyment of flowers fom the village tanks; and that Patels, Mhataras and Curumbis or rayats, as discribed in Reg. I of 1808, were entitled to the declarations, and that plaintiffs were of that class. He, therefore, amended the decree of the Subordinate Judge by declaring that the reliefs granted applied to the class of persons known as Patels, Mhataras and Curumbis

or rayats of Malad described in Reg. I of 1808, and that plaintiffs belonged to this class, and by adding the words "*purye*, *bundi*, *tatties*, *beleca kurgyia*" before "and" after "bamboos" in the sentence commencing from "that plaintiffs are entitled to the free enjoyment of firewood, &c." The Assistant Judge further added to the decree as follows:—

[396] "The rayats are entitled to the free enjoyment of all common forest timber and unproductive brab-trees belonging to defendant for house building, but that they should apply to defendant, the proprietor of the village, for permission to take them, and that the said proprietor should grant them that permission, using his own discretion in the matter soundly and reasonably, having regard to the needs of the applicants and the exigencies of the forest reservation; and the discretion should similarly be exercised in the matter of granting permission to cut firewood, bamboos &c., allowed by the decree."

He further directed that an injunction should be issued against defendant forbidding him from interfering with the rights of rayats declared by the decree, and he confirmed the decree of the Subordinate Judge in other respects.

From this decision defendant preferred this second appeal to the High Court.

Scott (with *N. G. Chandavarkar*), for the appellant (defendant).

Shamrao Vithal, for the respondents (plaintiffs).

JUDGMENT.

The judgment of the Court was orally delivered by

BAYLEY, C. J. (ACTING).—This appeal cannot succeed. The suit was brought in 1839 by five persons for themselves and on behalf of others resident in the village of Malad in the Salsette Taluka for a declaration of their rights and privileges and for an injunction. The right of the plaintiffs to sue appears to be quite clear. It is found by the appellate Court that the village was granted in 1806 to Ardeshir Dady in exchange for other property situated in the Fort of Bombay conveyed by him to the East India Company. Before possession of the village was given, the rayats were consulted. They sent in a petition setting out certain articles to which the Government of Bombay agreed. The Collector by a letter dated 5th June, 1806, put Ardeshir Dady in possession. This shows that the consent of the villagers and rayats was considered by the East India Company to be necessary before the village could be transferred to Ardeshir Dady. On 24th February, 1808, certain rules were passed by the Governor in Council. Regulation I of 1799 had provided for the passing of Regulations, and Regulations were from time to time passed by the Governor in Council. See Morley's Digest (Introduction), Vol. I, pp. 76 and 77. The most recent reference to such Regulations is in the Lecture on the Laws and Administration of **[397]** Justice in India delivered before the University of Cambridge by Sir John Strachey, G.C.S.I., in 1884, and reproduced by him in his work "India," p. 143 (1888).

Two cases relating to property in the Salsette Taluka are in point:—*Dadibhai Jahangirji* v. *Ramji bin Bhau* (1); *The Collector of Thana* v. *Dadabhai Bomanji* (2). The Government, the vendors in the first of those cases, it was held, could not affect the rights of their tenants. It would have been a fraud if they had attempted to do so. Here, it would have been little else than a fraud if Government had attempted to

(1) 11 B. H. C. R. 162.

(2) 1 B. 352.

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convey the village irrespective of the rights and behind the backs of the rayats.

Ardeshir Dady got his conveyance subject to these rights, and he accepted subject to them. In the conveyance of 1819 there is, it is admitted, no mention of the rights of the rayats. It is a conveyance of the village and its lands then in the occupation of the villagers and rayats. A purchaser ought to inquire into the rights of the tenants on the property, and if he fails to do so he takes subject to such rights as the tenants may have—*Mancharji Sorabji* v. *Kongseoo* (1). That was a decision of Sir Richard Couch, C. J., on the Original Side of this Court, and he cited many cases in Courts of Equity in England where the rule just stated had been applied. He also referred to a decision of the Privy Council in 1853, *Barnhart* v. *Greenshields* (2), where their Lordships said (p. 32): "With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert* (3), but also to interests under collateral agreements, as in *Daniels* v. *Davison* (4), *Allen* v. *Anthony* (5), the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to **[398]** inquire what that interest is, or to give effect to it, whatever it may be." The present appellant purchased in 1868 apparently without any inquiry at all. It is not suggested that he investigated the title, and he is bound by the rights of the tenants just as if they were specially mentioned in the conveyance to him. Government and Ardeshir Dady's descendants recognized these rights.

It is said, however, that the rights are barred by limitation, by acquiescence, and by a change of custom. There is no force in any of those contentions. The ground of limitation fails, because there does not appear to be a denial of plaintiffs' rights until quite recently. There was no acquiescence by the villagers in any claim made by the appellant, save that he insisted on his written permission being obtained in lieu of a mere verbal one, allowing the rayats to take away firewood and bamboos, &c., from the forests, nor is there any proof of any change of custom.

The next question is, whether the suit can be brought in its present form? It is a suit brought under the provisions of s. 30 of the Civil Procedure Code (Act XIV of 1882). The appellant's counsel relied on *Hallows* v. *Fernie* (6). That was a very different case from the present. It was a suit on an alleged fraudulent representation, whereby the plaintiffs were induced to become shareholders of a company. We will refer to two cases which were not cited by counsel in the argument before us. In *Phillips* v. *Hudson* (7). Lord Cuelmsford, L.C., held that a bill can be maintained by one copy-holder on behalf of himself and other copy-holders, being numerous, against the lord of the manor to have their rights of common ascertained and for an injunction. This was decided in 1867. And in *Smith* v. *Earl Brownlow* (8) decided in 1870, it was held that the bill was not objectionable. At p. 256, Lord Romilly, M. R., says: The defendant "contends that the plaintiff cannot properly sue on behalf of

(1) 6 B H.C.R. O.C.J. 59.
(2) 9 Moo. P.C.C. 18.
(3) 2 Ves. Jun. 437.
(4) 16 Ves. 249.
(5) 1 Mer. 282.
(6) L. R. 3 Ch. 467.
(7) L. R. 2 Ch. 243.
(8) L.R. 9 Eq. 241.

himself and the free-holders and copy-holders of the manor, and that this constitutes a misjoinder; but I am of opinion that this objection fails, and that, though their rights of common might not be exactly co-extensive, yet, as the plaintiff is proved, [399] and, indeed admitted, to be a copy-holder as well as a free-holder of the manor, and, indeed, of both divisions of it, he is entitled to sue on behalf of all. This also appears to me to be established both by authority and by the constant practice of this Court in like cases, and also in cases where a right of fishing comes in question, as in the case of the *Mayor of York* v. *Pilkington* (1)."

Lastly, it is said that the Assistant Judge made an alteration in the form of the decree. It appears to the Court that that alteration is rather in favour of the proprietor, the appellant. What has been given by the appellate Judge is in accordance with the clauses of the agreement made in 1806, as evidenced by Exs. 56, 57, 58, 60 and 61. The appeal must be dismissed, with costs.

Appeal dismissed.

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Before Mr. Justice Jardine and Mr. Justice Ranade.

RANGUBAI (*Original Opponent*), *Appellant* v. ABAJI (*Original Applicant*), *Respondent.** [16th June, 1894.]

Regulation VIII of 1827—Succession Certificate Act (VII of 1889), ss. 19 and 28—Certificate of heirship—Order refusing certificate of heirship appealable—Appeal.

An appeal lies from an order refusing to grant a certificate of heirship under Regulation VIII of 1827, by virtue of s. 19 of the Succession Certificate Act (VII of 1889).

APPEAL from an order of H. L. Harvey, Assistant Judge of Satara, in Miscellaneous Application No. 4 of 1893.

One Abaji Vaman Bendre applied under Regulation VIII of 1827 for a certificate of heirship to the estate of Vaman Abaji Bendre, deceased, alleging that he was the adopted son of the deceased.

This application was opposed by Rangubai, the widow of the deceased, on the grounds (1) that the applicant's adoption was [400] not valid, he being the only son of his natural father; (2) that the deceased had made a will in her favour, bequeathing the whole of his property to her. She, therefore, prayed that a certificate of heirship should be granted to her and not to the applicant.

The Assistant Judge held that the applicant Abaji was not the only son of his natural father; that his adoption was valid, and that the will set up by the opponent Rangubai was not proved. He, therefore, granted a certificate of heirship to the applicant.

Against this order the opponent appealed to the High Court.

B. A. Bhagvat, for appellant.

Ghanasham Nilkanth, for respondent.

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* Appeal No. 10 of 1894.

(1) 1 Atk. 282.

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19 B. 399.

JUDGMENT.

JARDINE, J.—A preliminary objection was raised by Mr. Ghanasham, but not pressed, that no appeal lies from the refusal of the District Judge to grant a certificate, seeing that his adjudication, as is expressly stated in s. 8 of Reg. VIII of 1827, does not finally determine the rights of the person whose application is refused, but leaves him competent to institute a suit for the purpose of establishing his claim. We are of opinion, following *Javermal* v. *The Nazir of the District Court of Poona* (1) and *Pitambar* v. *Ishwar* (2), that the appeal does lie by virtue of s. 19 of the Succession Certificate Act VII of 1889, which is applied to Reg. VIII of 1827 by s. 28 of that Act.

On the question of fact, whether the son given in adoption was an only son, we see no reason to differ from the Assistant Judge, whose order we, therefore, confirm with costs.

Order confirmed.

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19 B. 401.

[401] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

F. YORKE SMITH AND OTHERS (*Original Plaintiffs*), *Appellants* v. TRIBHOVANDAS MANGALDAS (*Original Defendant*), *Respondent.**

[12th October, 1894.]

Will—Construction—Bequest to executors and trustees in trust for son of testator and his widow—Life interest—Estate in fee—Control and management of executors and trustees.

Sir Mangaldas Nathubhoy, a Hindu, by his will bequeathed certain property to his executors and trustees "upon trust for my son Tribhovandas and his heirs from the time of my death to allow him to occupy and use the same, and to enjoy the income thereof and after the death of my son Tribhovandas, in trust to allow his widow to occupy and use the same and enjoy the income during her life; but if the said Tribhovandas Mangaldas shall die without leaving male issue him surviving, then in trust after the death of the survivor of them without leaving such male issue to my son Purshotamdas and his heirs according to the rules of Hindu law." The sons Tribhovandas and Purshotamdas both survived the testator, and Tribhovandas (the defendant) had a wife and three sons living at the date of suit. The defendant contended that under the above clause he was absolutely entitled to the property subject to the interest of his widow for her life. The plaintiffs (the executors and trustees) contended that the defendant had only a life interest in the property.

Held, that the defendant Tribhovandas took only an interest for life in the property. The words "in trust for Trobhovan and his heirs," which, standing alone, would give the property in fee, were to be read with the words immediately following, which showed a clear intention that Tribhovan should only take a life interest to be followed by the same interest in his widow, after whom the heirs of Tribhovan would take as purchasers.

Held, also, that the trustees were intended to take the legal estate and to have the control of the property, allowing Tribhovan to enjoy the income of it.

SUIT for the construction of a will.

The plaintiffs were the executors and trustees of the testator Sir Mangaldas Nathubhoy, who died leaving two sons, *viz.*, Tribhovandas

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* Suit No. 670 of 1892. Appeal No. 805.

(1) 18 B. 748.

(2) 17 B. 230.

(the defendant), and Parshotamdas. The Testator's will was dated the 27th January, 1888, and was duly proved by the executors on the 8th May, 1890.

The will contained the following clause :—

"I devise and bequeath all my property at Girgaum Back Road and Khetvadi Road, as well as the furniture, pictures, glass and crockery ware and cooking utensils, that it may contain at the time of my death, to my said executors and trustees, upon trust for my son Tribhovandas and his heirs from the time of my death to allow him to occupy and use the same, and to enjoy the income thereof, and after the death of my [402] son Tribhovandas, in trust to allow his widow to occupy and use the same and enjoy the income during her life; but if the said Tribhovandas Mangaldas shall die without leaving male issue him surviving, then in trust after the death of the survivor of them without leaving such male issue to my son Purshotamdas and his heirs according to the rules of Hindu law."

The defendant at the date of the suit had a wife living and three sons living. Under the above clause he claimed to be absolutely entitled to the property mentioned therein, subject to the interest of his widow for her life. He accordingly contended that he had a right to manage and deal with the said property, and had erected a building on it to be used as a club without consulting the plaintiffs.

The plaintiffs, on the other hand, contended that as trustees the legal estate of the property was vested in them; that the only right of the defendant was to occupy it and enjoy the income during his life; and that all expenses of repair, &c., ought to be provided out of the income of the said property and not out of the general estate of the testator.

The last three clauses of the plaint were as follows :—

"9. The defendant recently on the 7th day of October, 1892, without communication with the plaintiffs, got a vernacular agreement prepared purporting to be between the plaintiffs and Dada Fatubhai Patan and Bai Rai by which the plaintiffs purport to agree to let a portion of the said premises at Girgaum to Dada Fatubhai and Bai Rai for cultivation purposes. The said lessees have executed the said agreement.

"10. The plaintiffs object to the defendant using their names as aforesaid, and submit that the defendant ought to be restrained by injunction from using the names of the plaintiffs in any agreement with reference to the said premises.

"11. The plaintiffs although they have not consented to the conversion of a portion of the said premises into a residential club are unwilling, if they are not bound by their duties as trustees aforesaid to do so, to compel the defendant to restore the said premises to their original condition; but, if this Honourable Court should be of opinion that they are bound to do so, they will, in addition to the relief hereafter specially prayed for, seek to have the said premises restored by the defendant to the condition they were in prior to the said acts of the defendant."

The following were the prayers of the plaint :—

"1. That the respective rights and duties of the plaintiffs and defendant with reference to the said premises may be ascertained and declared by this Honourable Court, and that all consequential directions and relief that arise on such declaration may be granted.

"2. That the defendant may be restrained by the injunction of this Court from using plaintiffs' names in any agreement with reference to the said premises and from entering into any agreement in the plaintiffs' names without their authority.

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[403] "3. That the said passage in the will of Sir Mangaldas Nathubhoy quoted in paragraph 2 of this plaint may be construed by this Honourable Court and the trusts created by the same may be ascertained and declared, and in particular what trust arises on the death of the survivor of the defendant and his wife in the event of the defendant leaving male issue him surviving."

At the hearing before Parsons, J., the following issues were raised :—

(1) Whether the defendant does not under the will take an absolute interest in the property, subject to the life interest of his widow, if any?

(2) Whether in any event the defendant is not entitled to use the said property during his lifetime as he pleases, and to alter existing buildings and erect new buildings on vacant portions so long as he does not thereby injure the reversion ?

(3) Whether the club in the plaint mentioned was built without the consent of the plaintiffs ?

(4) Whether the defendant has used the names of the plaintiffs as alleged in paragraph 9 of plaint ?

(5) Whether the plaintiffs are entitled to an injunction.

Macpherson and *Inverarity*, for plaintiffs.—We say the defendant is equitable tenant for life of the property. He can occupy it, but cannot alter it. If he leaves no issue, the property will go to Purshotamdas ; but if he leaves issue, there will be an intestacy, as the will does not say who, in that case, is to take the property on the death of the defendant and his wife.

Lang (Advocate-General) and *Scott*, for the defendant.—The defendant is absolutely entitled. There is a gift to him and his heirs. The gift of the income carries the *corpus*—Succession Act (X of 1865), s. 159 ; Mayne's Hindu Law (5th Ed.), para. 388 ; *Bhoobun* v. *Hurrish Chunder* (1) ; *Baker* v. *Sebright* (2) ; *Jones* v. *Chappell* (3) ; *Doherty* v. *Allman* (4).

PARSONS, J.—I find on the first issue in the affirmative. It seems to me that the will while keeping the legal estate with the executors gives defendant an absolute interest in the property. It leaves it to him and his heirs. In the event, however, of his widow surviving him, it gives the widow a life interest. There is no question in this suit as to the legality of the bequest of that life interest or of the bequest to Purshotam after the death of the survivor without male issue. I think the latter gift cannot [404] take effect under s. 111 of Act X of 1865, but both of them relate to points which have not been raised, and which cannot be decided in the absence of the persons interested.

I find the second issue in the affirmative. There is no dispute about it.

I find the third issue in the affirmative. No consent is shown. I also find, at the request of the parties, the additional point that the building of the club is not an injury to the reversion.

4. I give credence to defendant that the agreement (Ex. E) was not prepared with his knowledge or consent, or sent by him to the executors. He knew of the draft only, and, therefore.

5. I do not grant an injunction, but only make a declaration.

6. The repairs must be done and paid for by the defendant out of the income of the property or his own money. They are not payable out of the general estate.

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(1) 5 I.A. 138. (2) 13 Ch.D. 179 (185). (3) L.R. 20 Eq. 539. (4) 3 Ap. Ca. 709.

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There will, therefore, be a decree declaring that the defendant under the will takes an absolute interest in the property, subject to the life interest of the widow if she survives him, with the following directions:—

(1) The trustees are to keep the legal estate to preserve it for the contingent interest of the defendant's widow.

(2) The trustees are not to interfere with the defendant's management so long as he does not injure the reversion.

(3) The repairs are to be provided and paid for by the defendant.

(4) The defendant is not entitled to use the plaintiffs' names as parties to any document without their consent previously obtained.

The costs of this suit are to come out of the general estate of the testator; those of plaintiffs being taxed as between attorney and client.

The plaintiffs appealed.

Macpherson, *Inverarity* and *Macleod*, for appellants (plaintiffs):—We say that on the death of Tribhovandas and of his wife, if Tribhovandas leaves no male issue, Purshotam takes **[405]** absolutely. Section 111 of the Succession Act (X of 1865) does not apply. If it does, the period of distribution is the date of the death of Tribhovandas or his wife, whichever of them survives the other.

[BAYLEY, J., referred to *Ram Lal* v. *Secretary of State for India* (1); *Sreemutty Kristoromoney* v. *Maharajah Norendro Krishna* (2).]

Lang (Advocate-General) and *Scott*, for respondent (defendant):—We contend there is an absolute devise to us subject to the life interest of the widow—*Bhoobun Mohini* v. *Hurrish Chunder* (3). The gift to Purshotam must refer to the date of the testator's death—Section 111 of the Succession Act (X of 1865). They also cited *Jones* v. *Chappell* (4); *Doherty* v. *Allman* (5); *Doe Dem Grub* v. *The Earl of Burlington* (6); White and Tudor's Leading Cases, Vol. I, p. 851.

JUDGMENT.

SARGENT, C. J.—The question in this case, which turns upon the relative legal position of the parties, depends upon the proper construction of the following clause in the will of the late Sir Mangaldas Nathubhoy (His Lordship then read the clause and continued:—)

The Division Court held that Tribhovandas took an estate in fee subject to the life estate of his widow. The words, however, "in trust for Tribhovan and his heirs" which standing alone would create a fee in Tribhovan, must, we think, be read with the words immediately following "to allow him to occupy and use the same and enjoy the income thereof and after his death to allow his widow to enjoy the income during her life," which words, in our opinion, show a clear intention that Tribhovan should only take a life interest to be followed by the same interest in his widow, after whom the heirs of Tribhovan would take as purchasers.

It is necessary, however, to consider another question in order to determine the rights of the parties which are in dispute, *viz.*, whether Tribhovan or the executors take the legal estate. As to this it is to be remarked that the English authorities, for which we may refer to Jarman on Wills, Vol. II, Ch. 34, p. 293, show that **[406]** a distinction has been drawn between the words "on trust to pay the rents

(1) 8 I A. 46 (61). (2) 16 I.A. 29. (3) 5 I. A. 138.
(4) L. R. 20 Eq. 539. (5) 3 Ap. Ca. 709. (6) 5 B. and A. 507 (517).

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to a person" and a direction "to permit him to receive them," a distinction which, however, did not meet with Lord Mansfield's approval, who held that in each case it should be equally a trust, and that the estate should vest in the trustees. However, here it must, we think, in any view of the above distinction, be inferred that the trustees were intended to take the legal estate throughout, as the same words are used when speaking of the widow's interest, with respect to which it can scarcely be doubted that a Hindu testator would intend that the trustees should have the control over the estate both for her protection and that of the reversioner. This is held to be so by the English authorities in the somewhat analogous case of a wife, who is to take the income for her separate use; see *Doe d. Stephens* v. *Scott* (1).

In this view of the relative position of the parties, it follows that Tribhovan was not justified in his resistance to the plaintiffs' contention that "the control of property was with them, and that it was their duty to manage it, allowing you to enjoy the income" as stated in their letter of 15th July, 1891. The first two issues must, therefore, be answered in the negative. And the decree varied by declaring that Tribhovan takes a beneficial interest for life under the will in the property in question.

Passing to the other questions, which were alluded to in argument, *viz.*, as to who would be the heirs to succeed on the death of the survivor of Tribhovan and his wife, and what was the proper construction of the devise over, their determination, as the Divisional Court pointed out, is not necessary for the cardinal purpose for which the suit was instituted. Moreover, they could not be determined in the absence of the parties interested in them so as to bind them, and it is not the practice of the Court, as pointed out by the Privy Council in *Kathuma Natchariar* v. *Dorasinga* (2), to determine questions of title as to future interests. We may here remark that s. 43 of the Specific Relief Act (I of 1877) relied on by the Advocate General only applies to a case under s. 42; and no such case has arisen except between the plaintiffs and Tribhovan.

[407] The Division Court has, at the request of the parties, expressed an opinion as to whether the building the club is not an injury to the reversion. No objection has been taken to this declaration, and we see no reason to differ from it, but it is to be remarked that it will not bind the reversioners, who have not been made parties to the suit.

As to costs, we think that as the suit has been rendered necessary by the wording of the will, the costs were properly thrown on the general estate. Costs of this appeal to come out of the same funds.

Attorneys for appellants:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for defendant:—Messrs. *Nanu and Hormasji.*

(1) 4 Bingh. 505.

(2) 2 I. A. 169 (190).

19 B. 407 = Chitty's S.C.C.R. 430.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

MANEKLAL MOTILAL AND ANOTHER (*Plaintiffs*) *v.* THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY (*Defendant*).*

[25th January, 1895.]

Municipality—City of Bombay Municipal Act (Bombay Act III of 1888), ss. 298, 299, 301, 504, 527—Land taken by the Municipality for street improvement—Compensation—Dispute as to amount of compensation—Limitation.

In 1891 the Municipal authorities of Bombay gave notice to the plaintiffs under s. 299 of Bombay Act III of 1888 that they required 23·30 square yards of the plaintiffs' land for street improvement. On the 14th December, 1891, the plaintiffs gave possession of the land to the Municipality, and on 27th January, 1892, claimed Rs. 60 per square yard as compensation. By letter dated 23rd February, 1892, the Municipal Commissioner (without prejudice) offered Rs. 50 per square yeard as compensation and stated that on the plaintiffs producing the title-deeds and papers to establish their title the necessary documents in connection with the payment would be prepared. Nothing further took place in the matter until the 14th February, 1894, on which date the plaintiff wrote a letter to the Municipal Commissioner in which, without mentioning any sum, he requested the payment of the amount which might be due to him as compensation for his land taken by the Municipality. The Commissioner refused to pay the compensation, contending that the plaintiffs' claim was time-barred. The plaintiffs thereupon brought this suit claiming Rs. 1,165 (being at the rate of Rs. 50 per square yard) as compensation for the land taken up by the defendant or in the alternative for that sum as damages for the breach of contract to [408] pay purchase money for the land. The defendant pleaded (1) that notice under s. 527 of the Municipal Act III of 1888 was necessary before suit filed and (2) that the suit was barred by limitation. The Chief Judge of the Small Cause Court found for the defendant with costs and dismissed the suit contingent on the opinion of the High Court. On a case stated,

Held (1) that notice under s. 527 of Bombay Act III of 1888 was not necessary, that section not being applicable to suits brought to enforce payment of compensation under s. 301 of the Act;

(2) that the suit was not barred by limitation.

Per FARRAN, J.—A suit against the Municipality of Bombay for compensation for land acquired by the Municipality under s. 299 of Act III of 1888 is not an action of tort or *quasi*-tort but a simple action for the price of land, which the terms of s. 301 of the Act impose upon the Commissioner to pay. The obligation to pay that price is of the same nature (1) whether the owner assents to the valuation of the land placed upon it by the Commissioner, (2) whether the value is determined by the Chief Judge of the Small Cause Court, or (3) whether it is left undetermined. Section 527 does not apply to any of these three cases. In all of them the obligation to pay is imposed by s. 301, and does not arise from the manner in which the amount of the price to be paid is arrived at.

2. Section 504 prescribes the only mode in which in case of dispute the value of the land can be determined. If the owner of land disputes the Commissioner's valuation he must apply to the Chief Judge of the Small Cause Court within a year. If he does not do so, the result is that he loses the power of effectually disputing the Commissioner's valuation but does not lose his right to the amount of the valuation.

3. The owner of land has a remedy independent of the provision of s. 504. The section only deals with cases where there is a dispute as to the value of the land, and leaves untouched those cases where there is no such dispute but where the Commissioner for some reason declines to pay. In such cases the owner is left to his ordinary remedy, no special mode of procedure being prescribed. Cases in which there has been a dispute, but in which the owner abandons his claim to dispute the valuation of the Commissioner, fall within the latter category.

[F., 20 B. 697; R., 25 B. 315.]

* Small Cause Court Suit No. $\frac{256}{18761}$ of 1894.

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CASE stated for the opinion of the High Court by C. W. Chitty, Chief Judge of the Bombay Court of Small Causes, under s. 2 of Act XII of 1888 (Bombay Municipal Act Amendment Act).

In 1891 the plaintiffs, who were the owners of a certain house in Dadysett Agiary Street in Bombay, desired to rebuild it. In the usual course they submitted a plan of the proposed new building to the Municipal authorities, who approved of it, but gave notice under s. 299 of the City of Bombay Municipal Act III of 1888 to the plaintiffs that the Municipality required 23·30 **[409]** square yards of the land in front for the improvement of the street. On the 14th December, 1891, the plaintiffs gave possession of the required land to the Municipality.

On the 24th December, 1891, the Executive Engineer of the Municipality addressed the following letter to the plaintiffs :—

"I have the honour to request the favour of your producing the original title-deeds of your property at Agiary Street for investigation, in order to prove your right to receive compensation for the piece of ground admeasuring 23·30 square yards taken up out of the said property by the Municipality."

On the 27th January, 1892, the plaintiffs through their solicitor wrote as follows in reply, claiming Rs. 60 per square yard :—

"As regards the rate of Rs. 25 per square yard, my client objects to receive it, and claims compensation at Rs. 60 per square yard. He says that no property can be purchased in this locality for less than the above rate as the value of the ground.

"You will, therefore, reconsider this matter, and make adequate compensation to my client."

On the 23rd February, 1892, the Executive Engineer sent the following letter to the plaintiffs :—

"*Bombay*, 23*rd February*, 1892.

"SIR,—With reference to your letter dated 27th January, I have the honour to state that the Municipal Commissioner on further consideration has been pleased to direct me to offer (without prejudice) the rate of Rs. 50 per square yard as compensation for the land. The necessary documents in connection with the payment will be prepared on your client producing in this office such deeds and papers as he may have to establish his title to the premises.

"I have, &c.,
"JAMES W. SMITH, M.I.C.E.,
"Acting Executive Engineer."

Nothing further took place until the 14th February, 1894, on which date the plaintiffs wrote a letter to the Municipal Commissioner, in which without accepting the above offer of Rs. 50 he requested payment of compensation for the land taken up by the Municipality. His letter was as follows :—

"*Bombay*, 14*th February*, 1894.

"TO THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY.

"SIR,—As directed by you, I have come from Khambat (Cambay) to receive the amount of compensation due by the Municipality to me with reference to the portion of land taken up by the Municipality for setback purposes in front of my property **[410]** (Ward No. 4150—4151, and street

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No. 17'19) at Dadysett's Agiary Lane without the Fort of Bombay. May I request the favour of your directing the Executive Engineer to pay me in person the said amount without any further delay, as I have to go back to Cambay permanently, and oblige?

"(Signed) R. D. DESAI,
"*for* MANEKLAL MOTILAL."

To this letter the Executive Engineer replied as follows on the 12th March, 1894:—

"In reply to your letter dated 14th February, 1894, to the address of the Municipal Commissioner, I have the honour to inform you that I regret the payment of the amount cannot now be made, as the claim is time-barred."

On the 30th March, 1894, the plaintiff through his solicitor sent the following letter to the Executive Engineer:—

"SIR,—Our client Mr. Maneklal Motilal has placed in our hands your letter to him, No. 17105 of 1893-94 of the 12th instant, with instructions to state in reply that our client is surprised at the Municipality pleading limitation against payment of compensation for land taken from him under set-back line. We have, therefore, to request you to let us know your authority for pleading limitation.

"We may say that the fact as to what amount should be paid to our client still remains undecided, inasmuch as although the Municipality acquired from him 23'30 square yards of land at Agiary Street at Rs. 50 a square yard, our client was not and is not liable to the Municipality for ¾ the value of land under his gallery constructed by him in the lane adjoining his property; and as the area and value of the land in this lane is not fixed, our client could not and does not still know what amount is due to him.

"Under the above circumstances we submit you cannot plead limitation, and we request you to pay to our client what is, on making proper calculation, due to him."

On the 9th April, 1894, the Executive Engineer wrote as follows to the plaintiff's solicitors:—

"*Bombay, 9th April, 1894.*

"GENTLEMEN,—With reference to your letter dated 30th March, 1894, on behalf of Mr. Maneklal, Motilal, I have the honour to state that I am advised that under s. 504 of the Municipal Act the claim is time-barred, possession of the land having been taken on the 14th December, 1891, on which date the compensation became payable.

"2. I may add that until the party pays the municipal fees due for the gallery, and obtains a permit for it, the projection is not lawful, and the Municipal Commissioner has a right to call upon the party to remove it.

"I have, &c., &c.,
"M. C. MURZBAN,
"Executive Engineer."

[411] On the 18th July, 1894, the plaintiffs filed this suit in the Court of Small Causes claiming Rs. 1,165 as compensation for the land, being at the rate of Rs. 50 per square yard. The Chief Judge held that the claim was barred under s. 527 (1) of the City of Bombay

(1) Section 527, Bombay Act III of 1888:—
"527 (1). No suit shall be instituted against the Corporation or against the Commissioner, or a Deputy Commissioner, or against any municipal officer or servant

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Municipal Act (III of 1888), and dismissed the suit contingent on the opinion of the High Court on a case stated by him at the request of the plaintiff.

The judgment of the Chief Judge was as follows :—

"This is a suit brought by the plaintiff to recover from the defendant a sum of Rs. 1,165 as compensation for the land of the plaintiffs taken up by the Municipal Commissioner for street improvement, and, in the alternative, for the same sum as damages for the breach of contract on the part of the defendant to pay the purchase-money for the said land.

In this case there is no dispute as to facts. The land in question (some 23'30 square yards) was taken possession of by the Municipal Commissioner on the 14th December, 1891. The Municipal Commissioner at first offered compensation at [412] the rate of Rs. 25 per square yard. The plaintiffs wanted Rs. 60. On the 23rd February, 1892, the Municipal Commissioner increased his offer to Rs. 50 (without prejudice). This letter remained unanswered for two years, when, on 14th February, 1894, the plaintiffs without directly accepting that offer asked the defendant to pay them the compensation due. They were then told that their claim was time-barred.

The only defences raised in this case were, (i) that notice under s. 527 of the City of Bombay Municipal Act, 1888, was necessary before suit filed, and (ii) that the suit is barred by limitation. In this case the plaintiffs stand in a somewhat better position than the plaintiff in the recent suit No. 18029 of 1894 so far as regards the lapse of time, inasmuch as they bring their suit within three years.

Before proceeding to the questions under s. 527, I may deal with the case as one for damages for breach of contract. As such, in my opinion, it cannot be maintained, as there was never any contract between the plaintiff and defendant for sale and purchase at Rs. 50 or any given price. It is argued that the offer of Rs. 50 of the defendant, dated 12th February, 1892, remained open till the letter of the plaintiffs of 14th February, 1894. I am of opinion that the proposal was revoked by lapse of time (see Indian Contract Act, s. 6, cl. 2). It could hardly be said that two years was a reasonable time for which it should remain open for acceptance. But further than this, the letter of 14th February, 1894, is, in my opinion, no acceptance, and as the letter of 12th March, 1894, must amount to a withdrawal of the offer, it follows that there was no contract.

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in respect of any act done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act :

(*a*) until the expiration of one month next after notice in writing has been in the case of the Corporation, left at the chief municipal office, and, in the case of the Commissioner or of a Deputy Municipal Commissioner or of a municipal officer or servant, delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney or agent, if any, for the purposes of such suit ; nor

(*b*) unless it is commenced within six months next after the accrual of the cause of action.

(2) At the trial of any such suit :

(*c*) the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice delivered or left by him as aforesaid ;

(*d*) the claim, if it be for damages, shall be dismissed if tender of sufficient amends shall have been made before the suit was instituted, or, if, after the institution of the suit, a sufficient sum of money is paid into Court with costs.

(3) Where the defendant in any such suit is a municipal officer or servant, payment of the sum or of any part of any sum payable by him in or in consequence of the suit, whether in respect of costs, charges, expenses, compensation for damages, or otherwise, may be made, with the sanction of the Standing Committee, from the municipal fund.

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I now proceed to consider the case under s. 527. First, as to limitation, I am of opinion that this section must be held to apply to cases like the present. There is certainly nothing in the section itself to exclude it. Indeed the words "suit in respect of any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act" would seem directly to include it. This is a suit for compensation for land taken up under the Act (s. 299) and for default in payment of such compensation (s. 301). This point has been before the learned Second Judge in suit No. 16139 of 1894 and before him and myself in the Full Court, and I am fortified by his judgment in that suit. I think that the six months allowed by s. 527 must be taken to be the period of limitation applicable to this case. It is admitted that if that be so, the suit is barred, and so I must hold it.

As to the notice, there again it appears to me that s. 527 must apply. It has been argued that s. 527 was only intended to apply to cases of torts and *quasi*-torts. If that be so, it is difficult to account for the wording of sub-s. (*d*), which clearly contemplates other actions that those for damages. In the case in 12 Bom. H. C. R. cited by the plaintiffs, the word compensation seems wide enough to include such cases as the present. The intention of the Legislature in requiring notice is to enable persons acting under the Act to tender reasonable compensation, and there seems no reason why it should not apply to cases like the present. I must hold that no notice having been given, the suit is not maintainable. The suit is dismissed and defendant's professional costs Rs. 51 certified. My judgment will be contingent on the opinion of the High Court on a case to be stated at the request of the plaintiffs' counsel.

[413] The following was the statement of the case by the Chief Judge :—

"This was a suit brought by the plaintiffs to recover from the defendant a sum of Rs. 1,165 as compensation for land of the plaintiffs taken up by the defendant, the Municipal Commissioner, for street improvement, and in the alternative for the same sum as damages for the breach of contract on the part of the defendant to pay the purchase-money for the said land.

"2. In this case the only defences raised were (1) that notice under s. 527 of the City of Bombay Municipal Act of 1888 was necessary before suit filed, and (2) that the suit was barred by limitation. On both these points I found for the defendant, and the suit was accordingly dismissed, and the defendant's professional costs Rs. 51 certified.

"3. The facts of the case (which were not in dispute) are fully set out in my judgment, as are also the reasons for my decision.

"4. At the request of the plaintiffs' counsel I made my judgment contingent on the opinion of their Lordships. The only questions to be submitted, are :—

"(i) Whether in this case notice under s. 527 of the City of Bombay Municipal Act, 1888, was necessary before suit filed?

"(ii) Whether this suit is barred by limitation?

"5. The plaintiffs have deposited in Court Rs. 51 professional costs and Rs. 50 to meet the costs of reference."

Russell, for plaintiffs :—The plaintiffs' land was taken under s. 299 of the Bombay Municipal Act, III of 1888, and compensation was payable to them under s. 301 of that Act. This latter section is imperative, and the plaintiffs' right under it is clear. Section 527 does not apply to a claim of this kind. It refers to cases of tort or *quasi* tort—*Sorabji N. Dundas*

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v. *The Justices of the Peace for the City of Bombay* (1); *Price* v. *Khilat Chandra Ghose* (2); *Poorno Chunder Roy* v. *Balfour* (3); *Ranchhod Varajbhai* v. *The Municipality of Dakor* (4); *Chunder Sikhur* v. [414] *Obhoy Churn* (5); *Municipal Committee of Moradabad* v. *Chatri Singh* (6); *Nagusha* v. *Municipality of Sholapur* (7). That section mentions municipal officers and servants, and it is clear that they could not be liable to pay compensation for land taken by the Commissioner, although they might be made liable for illegal acts. Sub-cl. (*d*) also shows the scope of the section. He referred to Bombay Act II of 1865, s. 240, Bombay Act II of 1873, s. 287, and Bombay Act VI of 1873, s. 86.

Macpherson, for defendant:—The suit is barred either under s. 504 (8) of the Act or under s. 527. We contend that s. 504 applies, and the plaintiffs' claim was barred at the end of one year. It is plain there was a dispute as to the amount of compensation, and this section provides for such cases and fixes the period of limitation. There are only two possible classes of cases. First, where there is no dispute, *i.e.*, where the parties are agreed as to the amount of compensation; second, where there is a dispute. In the first case, (*i.e.*, where there has been an agreement) the parties would be on the usual footing and the ordinary law of limitation would apply, and the suit might be brought in any civil Court. But in the latter case (where there is no agreement and where the parties have not come to terms, *i.e.*, where there is a dispute,) this section gives exclusive jurisdiction to the Small Cause Court and prescribes a period of limitation, *viz.*, one year.

If, however, the Court holds that s. 504 does not apply to this case, we submit that the suit is barred by s. 527, in which case the period of limitation is only six months. This suit is clearly one in respect of taking the land, or (2) for default in paying compensation. In either of these cases the section [415] applies. Reference was made to *Foat* v. *The Mayor, &c., of Margate* (9); *Midland Railway Co.* v. *Withington Local Board* (10).

Russell in reply:—Section 504 does not apply here, for there has been no dispute.

JUDGMENT.

SARGENT, C. J.—The facts of the case which have led to this reference are set out in the judgment of the Chief Judge of the Small Cause Court. The two questions submitted to us are:—

1. Whether in this case notice under s. 527 of the Municipal Act of 1888 was necessary before suit filed?

2. Whether the suit is barred?

It will be convenient to deal first with the second question.

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(1) 12 B.H.C.R. (O.C.J.) 250. (2) 5 B. L. R. App. 50. (3) 9 W.R. 535.
(4) 8 B. 421. (5) 6 C. 8. (6) 1 A. 269.
(7) 18 B. 19.
(8) Section 504, Bombay Act III of 1888:—
If, in any case not falling under s. 491, any person is required by the Act or by any regulation or by-law framed under this Act, to pay any expenses or any compensation, the amount to be so paid and, if necessary, the apportionment of the same, shall, in case of dispute, be determined, except as is otherwise provided in ss. 502 and 515, by the Chief Judge of the Small Cause Court, on application being made to him for this purpose at any time within one year from the date when such expenses or compensation first became claimable.
(9) 11 Q.B.D. 299. (10) 11 Q.B.D. 788.

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The suit in question presents the claim of the plaintiff in a double aspect—1st, as a claim for compensation which the Commissioner is directed by s. 301 to pay to the owner of land taken up under ss. 298, 299; and, 2nd, for damages for breach of an alleged contract to purchase the land.

The Judge of the Small Cause Court has found that there was no such contract of purchase. The question, therefore, submitted to us has only to be answered with reference to the first branch of claim, *viz.*, for compensation.

Where the parties are not agreed as to the amount of compensation to be paid as directed by s. 301, or, in other words, where the amount is "in dispute," s. 504 provides the course to be followed, *viz.*, by application to the Chief Judge of the Small Cause Court within one year from the date when such compensation became claimable.

The facts as stated by the Judge show that the last offer of the Commissioner of Rs. 50 per square yard on the 23rd February, 1892, had not been accepted, and that no agreement of any sort was come to between the parties within a year from the date of the Commissioner's taking possession of the plaintiff's land.

It was contended for the Commissioner that under these circumstances all claim to compensation under s. 301 was barred by s. 504. I cannot doubt that the language of that section shows that the course provided by it in the event of the [416] amount of compensation being in dispute is the only one open to the owner of the land taken,—in other words, that when there is such dispute it is in substitution for the ordinary right of action in the Civil Court to recover Compensation as directed to be paid by s. 301, and, therefore, after the expiration of a year if the owner has not been paid, his only course is to agree to the Commissioner's terms.

It was contended for the Commissioner that in that case the plaintiff's cause of action, would be for a breach of contract and not the right to compensation given by s. 301. That is, in my opinion, a mistaken view of the jural relation between the parties. The obligation to pay compensation for the land based on its value, which the Act imposes on the Commissioner by s. 301 would still be in force, although proceedings under s. 504 might be barred, and if the plaintiff accepts the value placed on the property by the Commissioner, he is entitled to enforce payment of it, assuming of course that he can establish his title as owner. I think that the correspondence between the parties, which begins with plaintiff's letter of 14th February, 1894, shows that the plaintiff has accepted the value offered by the Commissioner by his letter of 23rd February, 1892. That valuation was never withdrawn or revoked. In the above view of the relation of the parties, cl. (2) of s. 6 of the Contract Act (IX of 1872) has no application and the correspondence shows that the Commissioner's only objection to pay the compensation claimed was that the claim to any compensation was barred. It was not contended that the suit was barred by the general law of limitation, and the second question must be answered in the negative.

As to s. 527, whatever may be the suits to which it is applicable, I do not think it could have been intended to apply to a suit arising out of s. 301. It is plain it could not apply to proceedings under s. 504, as they can be brought within a year from the time when compensation became claimable, and that being so, it must, I think, be inferred that s. 527 was not intended to apply in the present case, as both the compensation be-

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came claimable and the cause of action accrued [417] (according to the above view of the present suit) under s. 301 of the Act, *i.e.*, from the time the lands were taken possession of by the Commissioner.

FARRAN, J.—I agree in the answers given by the Chief Justice, but I have also prepared a judgment expressing my reasons.

This is a suit for the value of land acquired by the Municipal Commissioner under the provisions of ss. 298 and 299 of the Municipal Act. The more cumbrous phrase, "compensation for the value of the land" adopted in s. 301, is, I think, only used to suit the convenience of the draftsman. The land has been rightfully acquired by the Commissioner. The plaintiff makes no complaint on that head. He merely asks to be paid the price of the land as ascertained upon the basis of its value which the Act directs that the Commissioner shall pay him.

The first question submitted to us is, whether such a claim is barred under s. 527 after the lapse of six months from the time when the land is acquired, (at which time, I apprehend, the plaintiff's cause of action accrued) and whether notice of action must under that section be given to the Commissioner. It has been settled law that the provisions of the English Statute analogous to and, in my mind undistinguishable from the terms of the section with which we are dealing, do not apply to claims arising out of contracts or *quasi* contracts, but do apply to claims arising out of torts or *quasi* torts done under colour of, or in carrying out the provisions of Statute: *Midland Railway Company* v. *Withington Local Board* (1). But the Courts disregarding the form of the action inquire into the nature of the transaction out of which the claim arises. If we ask whether this action arises out of a tort, injury, or *quasi* delict, the answer must, I think, unhesitatingly be in the negative. It is a simple action for the price of land, which the terms of s. 301 impose upon the Commissioner the obligation to pay. The obligation to pay that price is of the same nature whether (1) the owner assents to the valuation of the land placed upon it by the Commissioner, (2) whether the value is [418] determined by the Chief Judge of the Small Cause Court, or (3) whether it is left undetermined. It is admitted that in the former two cases the section does not apply. I am quite unable to distinguish the third case in principle from them. In all three cases the obligation to pay is imposed by the terms of s. 301, and does not arise from the manner in which the amount of the price to be paid is arrived at. When goods are purchased to be paid for at the market rate, the obligation to pay for them arises from the contract of purchase, not from the ascertainment of the market rate. When land is acquired to be paid for at its value, the obligation to pay arises from the acquisition of the land in accordance with the provisions of the Act, and not, it appears to me, from the ascertainment of its value by agreement or otherwise. It is quite clear to my mind that the framers of the Act did not intend the short period of limitation of six months to apply to this case. It would appear unreasonable that they should do so. Section 504 gives the owner twelve months to apply to the Chief Judge to determine the value of the land in case of dispute, but if s. 527 applies to the claim, it is barred after six months. It cannot be that the value is to be ascertained after the claim is barred. In my opinion, s. 527 does not apply at all. Some difficulty in adopting this view arises from the wording of sub-cl. (*d*) to the section, but the

(1) 11 Q.B.D. 789.

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relief is that damages may be sought in respect of a delict or wrong or *quasi* wrong committed, as, *e. g.*, a declaration or mandatory injunction, or possibly such relief as was asked for in *Nagusha* v. *Municipality of Sholapur* (1), and damages are sought in cases of breach of contract to which the section admittedly does not apply. I answer the first question, therefore, in the negative.

Section 504 prescribes the mode, and, in my opinion, the only mode, in which, in case of dispute, the value of the land can be determined. The imperative words used in the section, I think, almost compel that conclusion, and the consideration that the policy of the Legislature has long been to have the value of land taken up for a public purpose determined by a specially [419] constituted tribunal (see Bombay Act III of 1872, s. 289, and Act X of 1870 *passim*) establishes its correctness. If the owner of land disputes the Commissioner's valuation (which usually assumes the form of an offer and often, as in this case, of an amended offer) he must make an application to the Chief Judge within a year. If he does not do so, the result, in my opinion, is that he loses the power of effectually disputing the Commissioner's valuation, but does not lose his right to the amount of that valuation. The section does not enact that his non-application shall have the latter result, and it appears rather an unreasonable, and certainly not a necessary, implication to draw from its provisions that it shall, especially as these provisions are conversant only with the determination of the quantum of value. There is nothing, in my opinion, in the provisions of s. 504 which deprives the owner of land, who does not apply under it to have his compensation determined, of his right to compensation, if independently of its provisions he has a right to receive it; nor is there, in the section, anything to relieve the Commissioner in such case from his obligation to pay the value of the land.

That the owner has a remedy independent of the provisions of s. 504, is, I think, clear. The section only deals with cases where there is a dispute as to the value of the land, and leaves untouched those cases where there is no such dispute, but where the Commissioner from default as to the title of the owner or for some other reason, as in this case, or arbitrarily declines to pay. In such cases the owner is left to his ordinary remedy, no special mode of procedure being prescribed. Cases in which there has been a dispute, but in which the owner abandons his claim to dispute the valuation of the Commissioner, fall, it appears to me, within the latter category. It would be absurd for the owner to apply to the Chief Judge to determine the amount of compensation saying, "I disputed the valuation of the Commissioner, but I do so no longer. Determine the amount." There would be nothing left for the Court to determine. That would not be making an application to the Court in case of dispute as to the amount, but in a case where there was no dispute. Such, I think, is the present case, and the plaintiff has properly resorted to the ordinary [420] jurisdiction of the Court. As to limitation, the case falls, I think, under the general law, and is admittedly not barred by its provisions. I agree, therefore, that the second question also should be answered in the negative.

Attorneys for plaintiff: Messrs. *Mulji and Raghavji.*

Attorneys for defendant: Messrs. *Crawford, Burder & Co.*

(1) 18 B. 19.

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APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

HARI KRISHNA JOSHI (*Original Defendant*), *Appellant v.* SHANKAR VITHAL (*Original Plaintiff*), *Respondent.** [18th June, 1894.]

Easement—Trees—Trees overhanging neighbour's land—Nuisance—Easement Act (V of 1882).

Plaintiff sued for an injunction restraining the defendant from allowing the branches of a tree belonging to him to overhang plaintiff's land, and for an order directing him to cut off such branches.

Defendant pleaded that the branches of his tree had projected over plaintiff's land for forty years, and he contended that he had, therefore, acquired a prescriptive right of the nature of an easement over plaintiff's land.

Held, that the plaintiff was entitled to cut away the branches which overhung his land, though they had done so for more than forty years.

[F., 6 Ind. Cas. 600=7 M.L.T. 247; R., 31 C. 944=8 C.W.N. 710; 15 C.P.L.R. 93; 5 N.L.R. 52=2 Ind. Cas. 230.]

SECOND appeal from the decision of Rao Bahadur Kashinath, B. Marathe, Subordinate Judge, First Class, A.P., at Ratnagiri, in appeal No. 445 of 1891.

The plaintiff sued for an injunction restraining the defendant from allowing the branches of his *cashew* tree to overhang the plaintiff's ground, and for an order directing him to cut off such branches.

Plaintiff alleged that the branches of the trees overhung a part of his land measuring about 22 cubits by 15, and that, in consequence of the shadow cast by the branches, his cocoanut trees died.

Defendant pleaded that the branches had overhung the plaintiff's ground for more than forty years.

The Court of first instance dismissed the plaintiff's suit, holding that the right claimed by the defendant was an easement [421] which he had enjoyed for more than forty years, and that the prescriptive right so acquired could not now be disturbed by an injunction.

The plaintiff appealed and the appellate Court reversed the decree of the lower Court and granted an injunction. The judgment of the appellate Court was as follows:—

"No right of easement can be acquired by the natural growth of a tree. No part of the tree or branch that overhangs the land of another can remain constant or unchangeable for any length of time. The foliage, the sprouts, the twigs, the flower and the fruit change every day in form and size and number; and even the bark and concentric wooden tissue round the axis of the trunk and branches change within short periods, and they cannot last so long as is necessary to create the easement claimed. No tree or its branches can, therefore, be allowed to grow so as to cause injury to, or restrain a neighbour from enjoying, his property in the best possible manner, and the overhanging of a tree or its branches for any length of time cannot be brought within the purview of the definition of an easement as given in Act V of 1882."

The defendant preferred a second appeal to the High Court.

Vasudev G. Bhandarkar, for appellant (defendant).—The branches and foliage of our tree have been overhanging the plaintiff's ground for nearly

* Second Appeal No. 760 of 1892.

forty years. We have thus acquired a prescriptive right to have this state of things continued. The existence of such prescriptive right seems to be admitted in *Naik Parsotam* v. *Gandrap Fatelal* (1). We have acquired a right of the nature of an easement as defined by Act V of 1882. The objection to the acquisition of an easement for roots of trees consists in the secrecy of the mode of enjoyment. That objection is not applicable with respect to branches of trees. Refers to Gale on Easements (5th Ed)., p. 524.

Manekshah Jahangirshah, for respondent (plaintiff).—There is no authority that an easement of the kind claimed by the defendant can be acquired by prescription. It is settled law that no easement can be acquired by user for roots of trees, the reason being that there is a perpetual change in the quality of inconvenience imposed by it. The same objection applies in the case of branches of trees. Refers to Gale on Easements (Ed.), p. 493. A nuisance of this kind is a continuing wrong, for which a cause of action accrues from due to due. Section 23 of the Limitation Act (XV of 1877) would save the bar of limitation—*Vinayak* v. *Bhiwa* (2).

JUDGMENT.

[422] JARDINE, J.—We are of opinion that the judgment of the lower Court is correct on the question of right.

The defendant contends, that because the branches of his tree growing on his own land have for forty years projected more or less over the adjoining land of the plaintiff he is entitled as against the plaintiff to have the continuance of this state of things decreed. The argument used is that the defendant has acquired, by prescription, a "right," which should be treated as an easement under Act V of 1882.

The first question is as to the law before the passing of that Statute. Two rules of Hindu Jurisprudence are quoted in the Vyavahara Mayukha, chap. XV, cl. 12, from Katyayana as follows: "The fruit and flowers of trees produced upon the boundary between two fields, are declared to be joint property, pertaining in common to the masters of the two fields." "But where the branches of trees growing in one man's fields, be spread over that of another, then he shall be considered as the owner [of their produce] over whose field they are so situated." We quote from the translation made by Mr. Borradaile of the Bombay Civil Service. In Mandlik's Hindu Law, p. 136, the second rule is, however, translated as follows:—"But where the branches of trees growing in one man's field are spread over that of another, then he shall be considered as the owner in whose field the trees stand." It is unnecessary to say which translation is correct, as the rule relates only to the overhanging produce or timber, and throws no direct light on the question of prescription or the plaintiff's right to cut away so much as overhangs his land. Apparently Borradaile uses the Sanskrit word *samstit* in the two places in the same one sense, while Mandlik gives it two meanings. No reported case has been shown us.

In similar matters the Indian Courts have often followed the principles applied by the Courts in England. These have lately been set forth, in the Supreme Court in *Lemmon* v. *Webb* (3) by Lord Justice Lindley, Lopes and Kay, L. JJ., concurring. The question raised at the trial was whether the owner of the land was entitled, there being no immediate danger to remove **[423]** the overhanging boughs, without notice to the owner of the tree.

(1) 17 B. 745. (2) P. J. (1886) p. 79. (3) (1894), 3 Ch. 1.

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Kekewich, J., held in the negative, treating the inconvenience as a nuisance of omission and long standing. The Court of appeal took a different view: and as its judgment supports the reasoning of Rao Bahadur Kashinath B. Marathe in the judgment now before us, where he excludes from the category of easements this overhanging of boughs, on the ground that they are constantly undergoing change in foliage, sprouts, twigs, flowers and fruits, in form, size and number as also in girth, we think it right to read it from beginning to end, as we concur altogether in the reasoning and consider it applies to the case before us. Lord Justice Lindley said, pp. 12-15 :—

"The plaintiff and the defendant in this case are adjoining landowners. Some old trees situate on the plaintiff's land had branches which projected over the defendant's land. The defendant cut off so much of these branches as projected over his land, and he did so without going on to the plaintiff's land and without previous notice to him. The question is whether the defendant was justified in so doing. Mr. Justice Kekewich thought not, and gave the plaintiff judgment for £5 and costs, and from this judgment the defendant has appealed.

"There is some controversy as to whether the defendant did not cut rather more than he himself says he did and more than he seeks to justify. But the evidence is clear that he certainly did not intend to cut more than so much of the branches as overhung his land; and the evidence is not sufficient to prove that he did in fact cut more. Having noticed this matter, I pass it over without further comment, for the action was not brought for such a trumpery purpose as to obtain damages for the wrongful cutting of two or three inches too much. The action was brought to obtain a declaration that the defendant had no right to cut the branches at all, or, at all events, no right to cut them without previous notice to the plaintiff and a request to him to cut them and a non-compliance by the plaintiff with that request.

"It was contended on behalf of the plaintiff that, having regard to the age of the trees and of the projecting branches, he had [424] acquired a right to the exclusive possession of so much of the space above the defendant's soil as the branches actually filled, and that either under the Statute of Limitations or by prescription the plaintiff had a right to keep the branches when they had grown. It was contended that if a man erected on his own land something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove it nor maintain any action in respect of it. This is true. But to plant a tree on one's own land infringes no rights, and if the tree grows over the soil of another, I cannot discover that any action lies for the encroachment unless damage can be proved. I can find no authority for the proposition that an action of trespass would lie in such a case, and it is plain that Lord Ellenborough did not think it would (see *Pickering* v. *Rudd*) (1). According to our law, the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow. This is the view taken in the third edition of Gale on Easements, (6th Ed., p. 461) to which reference will be made presently. Considering that no title is acquired to the space occupied by new wood, and that new wood not only lengthens but thickens old wood, and that new wood gradually formed over old wood cannot practically be removed as it grows, and considering

(1) 4 Camp. 219.

the flexibility of branches and their constant motion, it is plain that the analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose. The argument to which I am referring had the charm of novelty, but it is quite inconsistent with the authorities to which I will refer presently, and no Court can introduce by judicial decision a perfectly new mode of acquiring a title to land or to a portion of the space above it.

"The right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, is too clear to be disputed. This has been declared to be the **[425]** law for centuries—see Bro. Ab. "Nusans," (Vol. II, p. 105, pl. 28); *Narris* v. *Baker*(1), *Pickering* v. *Rudd* (2); *Crowhurst* v. *Burial Board of Amersham*(3)—and there is no trace of the age of the tree or its branches being a material circumstance for consideration. Nor did Mr. Justice Kekewich intimate any doubt upon the law up to this point. He, however, held that notice ought to be given to the owner of the tree before it was interfered with, and the real question is whether notice is required by law. The authorities to which I have referred, do not allude to the necessity of notice. In *Pickering* v. *Rudd*, which was an action for cutting the plaintiff's Virginian creeper, the plea contained no averment of notice, and the plaintiff did not demur, but new assigned and alleged an excessive cutting. Lord Ellenborough held that the only question was whether the defendant had exceeded his right by cutting too much. Again, in Chitty on Pleading (7th Ed., Vol. 3, p. 364), a form of a plea justifying the lopping of overhanging branches is given, and there is no averment of notice to the owner of the tree. In the 7th Ed., Vol. 3, p. 364, such an averment is introduced, and reference is made to *Jones* v. *Williams* (4). *Jones* v. *Williams* was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance or in case of emergency, but that in other cases notice to the person in possession and a request to him to abate the nuisance and non-compliance with that request are necessary to justify the entry and the abatement of the nuisance by the person aggrieved by it. This is what the case decided, and so far the decision only applies to what one man may do on another man's land. It does not show what a man may or may not do on his own land. But in *Jones* v. *Williams* (*ubi sup*). Baron Parke, who delivered the judgment of the Court, referred to a case in Jenkins, p. 260, case 57, and to *Penruddock's* case (5) as authorities **[426]** for the proposition that an owner of land cannot without notice remove the overhanging eaves of a neighbour's house erected by a former owner through whom the neighbour had acquired title by feoffment. The reason of this doctrine is not explained.

"But, assuming it to be correct as regards an overhanging house or eaves, it does not follow that it applies to the overhanging branches of a tree. The judgment of Mr. Justice Best in *Earl of Lonsdale* v. *Nelson* (6) is explicit, that overhanging trees may be lopped by the owner of land over which they hang without notice. Mr. Justice Best says the right so

(1) 1 Roll. 393.
(2) 4 Camb. 219 and 1 Stark. 56.
(3) 4 Ex. Div. 5.
(4) 11 M. & W. 176.
(5) 5 Rep. 100b.
(6) 2 B. & C. 311.

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to lop them is an exception to the general rule which requires notice before a nuisance, not created by the owner of what creates it, can be abated by a person injured by it. He is not alluding to a case of emergency, for in such a case no notice need ever be given. He refers to such cases afterwards (His Lordship read passages from the judgment of Mr. Justice Best and continued :—)

"What I have above said respecting the right to cut branches is equally true with respect to the right to cut roots see Gale on Easements, 3rd Ed , pp. 419—420, 6th Ed., p. 461). (His Lordships read an extract from that work and continued :— This passage has the authority of the late Mr. Justice Willes, who edited the edition from which I have read the foregoing extract.

"The law on the subject is, in my opinion, as follows :—The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land, including the space vertically above and below its surface.

[427] "The defendant contended that he was justified in cutting the plaintiff's trees because they were in imminent danger of falling, but this is not proved, and my judgment is not based on grounds of urgency.

"The appeal, therefore, must be allowed, and the appellant must have the costs of the appeal, and judgment must be entered for the defendant; but, having regard to the obscurity of the law as to notice and to the very unneighbourly conduct of the defendant, there will be no order as to the costs of the action."

Following the Lords Justices we are of opinion that the plaintiff may on his own land cut away the boughs that overhang. We are also of opinion that this judgment confirms the view of the lower Court that a growing tree being always in a state of change differs from such things as eaves and projecting beams. Thus the private nuisance caused by the overhanging boughs does not create a "right" under the definition of Easements in the Indian Statute, nor does the convenience to the owner of the tree, always changing in extent and position of space, become at any time so determinate that it can by length of time be held to be enjoyed as "of right," a matter essential under s. 15 of that Statute. In this way we deal with the argument about prescription.

It is unnecessary to determine here the other issue raised in the lower Court whether the plaintiff is entitled to the relief by injunction, as no contention has been raised before us on that point. Nor are we in a position to say whether for the purpose of relief the plaintiff if he tried to abate the nuisance himself would have to enter on the defendant's land. The point not having been raised it is unnecessary for us to consider whether the relief by injunction can be granted under s. 54, cls. (*b*), (*c*) and (*d*), of the Specific Relief Act.

For these reasons we are of opinion that the decree should be confirmed with costs.

Decree confirmed.

19 B. 428.

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[428] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

BASAVA AND OTHERS (*Original Defendants*), *Appellants v.* LINGANGAUDA (*Original Plaintiff*), *Respondent.**

[20th June, 1894]

Hindu law—Adoption—Adoption of an only son—Validity of such adoption among Lingayets—Custom of Lingayets—Gift by adoptive father at the time of adoption—Gift binding on adopted son—Conditional adoption—Custom—Evidence of custom.

According to the custom of Lingayets in the districts of Dharwar and Bijapur the adoption of an only son is valid.

Where a Hindu at the time of taking a son in adoption made a gift of a portion of his ancestral property to his daughters, and the deed of gift as well as the adoption deed were executed on the same day, and they mutually referred to each other.

Held that the plaintiff's natural father having been a party to the deed of adoption which referred to the deed of gift executed along with it, the case fell under the category of conditional adoptions which are allowed by law.

Held, also, that the deed of gift in favour of defendants Nos. 2 and 3 was valid and binding on plaintiff.

Quære—Whether the *dwyamushyayana* form of adoption has become obsolete in the southern districts of the Presidency of Bombay.

[N.F., 8 Ind. Cas. 897=4 S.L.R. 88; F., 3 Ind. Cas. 378; R., 21 B. 105; 21 B. 110; 22 B. 277; 25 B. 537; 21 M. 10; 27 M. 577=14 M.L.J. 310.]

APPEAL from the decision of Rao Bahadur Babaji Lakshman, First Class Subordinate Judge of Dharwar, in suit No. 69 of 1888.

The main question raised in this appeal was whether the adoption of an only son was valid according to the custom of Lingayets in the Dharwar and Bijapur districts.

The plaintiff sued for a declaration that he was the adopted son of one Shivangauda, deceased, and to recover possession of the moveable and immoveable property belonging to his adoptive father. He alleged that he was adopted by Shivangauda on 31st March, 1887; that an adoption deed was executed in his favour by Shivangauda at the time of the adoption; that Shivangauda died on 13th April, 1887; that after his death he (the plaintiff) lived with his adoptive mother till October, 1887, when disputes [429] and differences arose, in consequence of which she denied his adoption and turned him out of his house.

Defendant No. 1 (the widow of Shivangauda) pleaded (*inter alia*) that the plaintiff's adoption was invalid under the Hindu law, as he was the only son of his natural father.

Defendants Nos. 2 and 3 (the daughters of Shivangauda), besides disputing the validity of the plaintiff's adoption, contended that part of the property in dispute had been given to them by their father under a deed of gift dated 31st March, 1887.

Defendant No. 4 did not contest the plaintff's claim.

Defendant No. 5 (the husband of defendant No. 2) raised the same defences as defendants Nos. 2 and 3.

The parties to this suit belonged to the Lingayet community of Dharwar and Bijapur. The plaintiff alleged that according to the custom of this caste the adoption of an only son was valid.

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The Subordinate Judge held that the custom set up by the plaintiff was proved; that this custom was a valid custom; that the defendants were estopped from questioning the validity of the plaintiff's adoption; and that the plaintiff was entitled to all the moveable and immoveable property in dispute, except the portion given by the deed of gift to the defendants Nos. 2 and 3 by the deceased Shivangauda. Subject to this exception, the plaintiff's claim was decreed with costs.

Against this decree the defendants appealed to the High Court.

The Advocate-General and *Scott* (*B. A. Bhagvat* with them), for the appellants.—In this Presidency it is settled law that the adoption of an only son is invalid—*Waman Raghupati* v. *Krishnaji* (1). The plaintiff relies on a special custom of the Lingayets in the Southern Maratha Country, according to which he alleges that the adoption of an only son is valid. Such a custom he has failed to prove. Out of fifty-one instances adduced by him, eleven are cases of adoption in the *duyamushyayana* form. In this group we include cases of adoption not only of a brother's son, but also of a brother's grandson, for the same reason and on the same principle that the Hindu law forbids an adoption so long [430] as a son or a grandson exists—West and Bubler (3rd Ed.), 917 and 944. These cases must be excluded, because they are valid without any special custom. We must also exclude eight other cases which are sought to be proved by hearsay evidence. So, too, we have to exclude four cases which are only supported by affidavits. Then there are about fourteen cases of adoption which took place in castes other than *Lingayets*. Excluding all these cases there remain not more than ten or fifteen cases of adoption of an only son among the Lingayets of Dharwar. These cases are of a comparatively recent date, and cannot establish an ancient and uniform custom such as can be recognized by a Court of Justice. The present case resembles the case of *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (2), where it is held that occasional breaches of general rules of caste or law do occur, but a few modern breaches of such a rule do not constitute an ancient and invariable custom. That such a custom does not exist among Lingayets, appears clearly from the Full Bench case of 1879 referred to in *Waman Raghupati* v. *Krishnaji* (1). Disputes occur when such adoptions take place among Lingayets, as is shown in plaintiff's case, and in about thirty other cases cited by the defendants; so plaintiff goes to other castes and to Native States like Miraj and Sangli. The wider the circle, the more breaches of religious law will be found. The cases adduced by the plaintiff do not, therefore, establish a valid custom.

Ganasham Nilkanth (with *Jardine*), for respondent.—The present case comes from a district which lies on the borders of the Madras Presidency, where adoptions of an only son are held valid—*Chinna Gaundan* v. *Kumara Gaundan* (3); *Narayansami* v. *Kuppasami* (4). In *Gawri* v. *Shivaram* (5) this Court has held that the adoption of a daughter's son, though invalid according to the strict Hindu law, is permissible according to the custom of Saraswat Brahmins in the neighbouring district of Kanara. The custom set up by the plaintiff has been satisfactorily proved. The instances cited are mostly from the Southern Maratha Country—from Dharwar and Bijapur districts. Most of the cases [431] are from watandar families. If such adoptions had not been sanctioned by custom, they would have been contested. Yet there has been no dispute or litigation in civil

(1) 14 B. 249. (257). (2) 6 B. 107. (3) 1 M.H.C. R. 54.
(4) 11 M. 43. (5) P.J. (1894), p. 30.

Courts. Such of the adoptions as came under the cognizance of the district authorities, of Government, or of the Native States were confirmed by them. The instances given range from the commencement of the British rule up to the present time; and they are sufficiently numerous to establish a valid custom, and not occasional breaches of the law—*Chain Sukh Ram* v. *Parbati* (1); *Vayidinada* v. *Appu* (2); *Viraragava* v. *Ramalinga* (3). The existence of such a custom among the Lingayets of the Southern Maratha Country is probable, because the law on this subject, though now authoritatively settled by the recent Full Bench decision of this Court in *Waman Raghupati* v. *Krishnaji* (4), was differently interpreted by the other High Courts and even by this Court—*Hanuman Tiwari* v. *Chirai* (5); *Beni Prasad* v. *Hardai Bibi* (6); *Narayanasami* v. *Kuppusami* (7); Mandlik's Hindu Law, pp. 496—514; Strange's Hindu Law, Vol. I, p. 87. The prohibition against the adoption of an only son has reference to the performance of funeral rites, and *shradhas*, &c., which are not observed among Lingayets. Like the Jains, the Lingayets adopt for temporal purposes only. The religious grounds which prohibit the adoption of an only son do not, therefore, apply to the Lingayets.

As to the cases of *dwyamushyayana* adoption, which the appellant's counsel seeks to exclude, some of them are cases of adoptions of a brother's grandson, to which the *dwyamushyayana* theory does not apply. It is restricted to the case of a brother's son and cannot be extended further. The remaining cases are cases of brother's sons, in which the brothers were separated in interest at the date of the adoptions. But the *dwyamushyayana* adoption takes place only in the case of united brothers—*Wooma Daee* v. *Gokoolanand Dass* (8). It requires a special agreement to the effect that the son adopted shall be son to both the adoptive and natural father—Vyavahar Mayuk, ch. IV, **[432]** s. 5, pl. 31, 32; Stokes Hindu Law, pp, 65, 69; Sarkar's Tagore Law Lectures, pp. 23, 301, Mandlik's Mayuk, 58; West and Buhler (3rd Ed.), 1134, 1208, 898 and 1045. In the case of united brothers, the existence of such an agreement may be presumed. But where the brothers are separated, such a presumption would work injustice to the heirs of the natural father, such as the widow, the daughter, &c.

JUDGMENT.

RANADE, J.—In this case, the appellant No. 1 is the widow, appellants Nos. 2, 3 are the daughters, and appellant No. 4 is the son-in-law, of the deceased Shivangauda, and the respondent, (original plaintiff), claims to be the adopted son of Shivangauda. Shivangauda, it was alleged, had adopted the respondent according to the custom of the caste and the Hindu Shastras on 31st March, 1887, and after executing a deed of adoption in respondent's favour, Shivangauda died on the 13th April, 1887. Respondent alleged that he first lived with his adoptive father, and since his death with the appellants till October, 1887, when differences arose, and appellants refused to recognize his adoption, and turned him out of the house. Thereupon he brought his suit to establish his alleged adoption by Shivangauda, and to recover possession of the moveable and immoveable property of the deceased Shivangauda.

The chief contentions of defendants Nos. 1, 2, 3, 5, were (1) that the deceased Shivangauda did not adopt the respondent, plaintiff, as his son

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(1) 14 A. 53. (2) 9 M. 44. (3) 9 M. 148.
(4) 14 B. 249. (5) 2 A. 164. (6) 14 A. 67.
(7) 11 M. 43. (8) 3 C. 587 (598).

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according to the Hindu law, as plaintiff's natural mother was Shivangauda's daughter-in-law, and the plaintiff could not be validly adopted (2). It was also urged that as plaintiff was the only son of his natural father he could not be given or received in adoption according to Hindu law.

The defendont No. 1 also urged that all the moveable and immoveable property and cash in dispute belonged to defendant No. 1, excepting such property as was given by a deed of gift to defendants Nos. 2, 3, 5 by Shivangauda, and that no part of the property belonged to plaintiff. Defendant No. 4, the third daughter of Shivangauda, did not appear to defend the suit. Defendants Nos. 2, 3, 5 claimed to be owners of most of the moveable and some immoveable property in their own right, and [433] they also claimed a house and certain lands under a deed of gift Defendant No. 5 (appellant No. 4) was the husband of defendant No. 2.

The lower Court held (1) that plaintiff was the only son of his natural father; (2) that he was adopted by Shivangauda; (3) that the adoption was not valid according to Hindu law; (4) but that it was valid by the custom of the Lingayets in the southern districts of this Presidency, which permitted such adoptions; (5) that this custom was a valid custom; (6) that defendants were estopped from questioning the validity of plaintiff's adoption by reason of their conduct prior and subsequent to the date of adoption; (7) that the plaintiff was the owner of all the moveable and immoveable property, save that which was given by the deed of gift (Ex. 113) to the defendants Nos. 2, 3 by the deceased Shivangauda. Plaintiff's claim was accordingly awarded, subject to the exception noticed above.

Defendants Nos. 1, 2, 3, 5, appealed from this decree, chiefly on the grounds (1), that the alleged custom of Lingayets in the southern districts of this Presidency was not proved; (2) that the custom was not valid, and could not be enforced (3). It was also urged that the decision of the lower Court was based on insufficient and inadmissible evidence, and was against the weight of that evidence. As regards the details of the property, it was contended (4), that some of the moveable property had been set apart by Shivangauda for defendant No. 1's maintenance, and some property was her *stridhan*, and plaintiff had no right to the same. (5) The same objection was urged in respect of the rest of the movable property as belonging to defendants Nos. 2, 3, 5, in their own right. Respondent prefered cross-objections in respect of the portion of the claim disallowed by the lower Court, and he urged that the deed of gift was invalid and inoperative, as Shivangauda had no power to execute such a deed of gift of ancestral property in favour of defendants Nos. 2 and 3 to the prejudice of his adopted son.

This case came on before this Division Bench (Jardine and Telang, JJ.) on the 30th March, 1892, when the case was sent back under s. 568 for receiving the evidence of the parties [434] in respect of certain genealogies filed on plaintiff's behalf, which had been accepted by the lower Court, without being formally proved, on the strength of a presumed admission of the same by the parties. This additional evidence has been since recorded, and the whole of the arguments have been heard afresh, and the case has been pending for judgment since March last.

As the evidence filed in the case was of a very voluminous character, both the parties have, with the permission of the Court, filed printed statements (A and B) carefully prepared on the basis of the documentary and oral evidence bearing on the main point in controversy, namely, the evidence regarding the alleged custom of the Lingayets in the southern or Canarese

districts of the Presidency of adopting an only son. The statements summarize the evidence affirming or negativing such custom. This was indeed the principal point argued before us by the learned counsel on either side. The Advocate General in his first argument admitted that this was the main point in controversy in regard to the adoption. The dispute was not in regard to the *factum* of adoption, but in regard to the legality of the alleged adoption of the plaintiff by Shivangauda. About the alleged custom, the Advocate General ; and after him Mr. Scott, contended that no such custom, even if proved, would be valid, as it was opposed to Hindu law, that the custom set up in this case was sought to be proved by instances which had no bearing on the alleged practice of Lingayets in the southern districts of the Presidency, and that the so-called instances were made up largely of exceptional cases of *dwyamushyayana* sons. It was admitted that the Hindu law allowed the adoption of an only son as a *dwyamushyayana*, but it was contended that the present case did not fall under this category. It may be of use to reproduce here a brief summary of the arguments urged on either side before examining the evidence in detail. On behalf of the appellants it was urged (1) that very few witnesses came from the immediate neighbourhood, and many instances occurred in Native States where the law was not settled ; (2) that many of the instances were based on erroneous views of the Shastras, which were upheld in the earlier decisions ; (3) that many instances were cases of *dwyamushyayana*, [435] being sons of uncles first removed, and not of second cousins' sons, as in this case ; (4) that many of the witnesses were women, who adopted after their husbands' death ; (5) that many of the instances were of very recent date, some having taken place after the suit, and others only a few years before the suit ; (6) that the evidence in the case of many of them did not make it quite clear whether the adoption was of an only son ; (7) that some instances were evidently based on vague hearsay evidence, and the facts were not personally known to the witnesses ; (8) that many instances did not belong to the members of the Lingayet caste, but belonged to Reddis, Hatgars, Dhangars, Brahmins, and other castes. In other words, no ancient, invariable, and general custom was proved. (9) Moreover, evidence was given on defendants' behalf to prove that the adoption of an only son was looked upon as illegal by Pandits and others, and the High Courts' decisions were against such a custom (10). It was also urged that there was no estoppel in this case, as the dispute was raised within six months after the alleged adoption.

On behalf of the plaintiff, it was urged (1) that the defendants were estopped by their conduct from raising the question of the validity of plaintiff's adoption; (2) that the deeds of gift and adoption were parts of the same transaction, and the defendants could not claim under the deed of gift, and repudiate the adoption. (3) As regards the evidence of custom, it was alleged, that there were very few cases of contemporaneous or subsequent adoptions ; (4) that out of 51 cases in all, in nine or ten cases only was the adoption made of a nephew, and such adoptions of nephews cannot be held to be *dwyamushyayana* in all cases; in the absence of special agreement to inherit from both families ; (5) that in none of the previous decisions where Lingayet adoption disputes came up before the High Court, was there any plea of custom set up ; (6) that most of the witnesses were from the neighbourhood; (7) that even if women adopted in some cases they did so in the presence of many persons, and the estates affected were watan properties where litigation might have been expected if the validity of the custom was not generally recognized ; (8) that those who gave hearsay

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evidence had also given evidence of similar adoptions within their own knowledge, and many cases [436] were presumably very old cases; (9) that even in cases where the adoptions were previously disputed, the dispute was raised on other grounds, and not on the ground alleged by defendants in this case; (10) that the Brahmin instances were given to show that, if custom prevailed over the Shastras in the Brahmin caste, with its devotion to ceremonials and *shraddha* offerings, it should *ipso facto* be less open to question among the Lingayets, who, like the Jains, are heretics, and observed no ceremonies, and performed no *shraddhas*; (11) that defendants' witnesses were either unreliable, or gave vague and hearsay opinion evidence; and (12) that no instances were cited by defendants' witnesses where the adoption of an only son had been disallowed.

This epitome of the arguments on either side brings out clearly the several bye-issues which have to be considered in properly appreciating the evidence of custom adduced in this case. These bye-issues resolve themselves into:—(1) Whether the evidence adduced comes from the part of the country under consideration, or from outside those limits. (2) Whether the instances noted are of recent or ancient date? (3) Whether the evidence relates to the Lingayet caste, or to other castes, whose practice in such matters can have no bearing on the point in dispute? (4) Whether the evidence is of a vague and hearsay character given by incompetent witnesses, or whether it is the result chiefly of personal knowledge? (5) Whether many of the cases cited were really instances of the alleged custom of the adoptions of an only son, or were adoptions in the *dwyamushyayana* form? Defendants' contention is that if proper exceptions be made under all these heads, out of the fifty-one instances adduced on plaintiff's behalf to prove the alleged custom, fifteen instances would go out as belonging to other than Lingayet castes (Brahmins, Marathas, Kostis, Reddis, Dhangars, Hatgars, &c.). The castes in five more are unknown. Ten cases fell under the category of the adoption of brothers' sons, permitted by Hindu law. Three more related to adoptions subsequent in date to the one in dispute. Eighteen were objected to on the ground of being supported by hearsay evidence only. Several instances came from Native States, where the law of adoption might be different, and from Poona and Satara districts, where the general law [437] obtains, and has been so applied by the High Court. In three or four instances it was not proved that the adopted child was the only son of his natural father. These deductions leave very few, if any, instances, which at all support the alleged custom. Plaintiff, on the other hand, contended that these objections did not apply, at least in a vast majority of the instances deposed to on his behalf.

In regard to the first bye-issue noted above, a glance at the printed statements filed by the parties shows clearly that most of the instances came from Dharwar and Bijapur districts. Ten instances came from Bijapur (one from Bagevadi, three from Bagalkot, and six from Badami talukas in that district), and thirty-two instances came from the Dharwar District, being spread-over all the talukas; one from Nargund; eleven from Navalgund; six from Bankapur; three from Kalghatgi; four from Hubli; three from Dharwar; and one each from Gadag, Hangal, Karajgi, and Ron. There are three instances from Lakshmeshwar, and one from Shirhatti, which are talukas of the Patwardhan Chiefs of Miraj and Sangli, surrounded on all sides by the Dharwar Districts. To prove the alleged custom, these last instances appear to us, for reasons given below, to be perfectly legitimate. There are only five instances from Poona and Satara

districts and the Kolhapur State, which must be excluded from the category of the southern districts of the Presidency.

As regards the second by-issue as to the period of time covered by these instances, it may be noted that the period covered is nearly seventy-five years, from 1814 to 1889. One instance is of 1814-16, another of 1825, a third of 1829, one each of 1837, 1847, 1849, 1857, 1859 and 1861. The rest, about thirty-eight, occurred between 1867 and 1889, and only four are contemporaneous, or of subsequent years. It could not be reasonably expected that, either in respect of time or place, plaintiff should have produced all very old instances, or instances from his own particular taluka Ron of Dharwar District. The range of instances is both in respect of time and place wide, and evenly distributed.

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As regards the castes, there are 29 cases of Lingayets, 4 Reddis, 7 Brahmins, 4 Shepherds or Dhangars, 1 Hatgar, 1 Kunbiwani, [438] 1 Maratha and 4 of unknown castes. The instances of Brahmins, and of the Maratha, Kunbiwani and unknown castes, may at once be excluded from consideration, as proof of any custom among them cannot be of much use in the present case. The exclusion affects, thirteen instances, Nos. 28, 30 to 34, 36, 43, and 47 to 51. The last five cases are excluded also on account of the locality they come from, being outside the local sphere of the custom now pleaded. Four of these cases are further open to objection on the ground that they are based on affidavits filed in another case in 1879, which affidavits were not then accepted, and are certainly inadmissible in this case. This exclusion leaves about thirty-eight instances, which we must now consider in detail. We do not think that the few instances of recent adoptions should be excluded from consideration solely on that account, as it cannot be assumed that parties to them resorted to such a practice with a view to favour or disfavour the litigants in this case. These instances, being uncontested are useful as expressions of the general legal conscience of the country on this point. The exclusion or inclusion of adoptions by Reddis, Dhangars and Hatgars, (instances 1, 2, 8, 11, 18, 25, 41, 42, 44,) cannot be summarily made. It is a question of fact which will have to be considered later on on the evidence given, since the Reddis described themselves, and are described in the Gazetteers, as Lingayets by religion, and the Shepherds are in a similar condition, being alleged to be either half Lingayets, or affiliated Lingayets in that part of the country. We shall, however, for the present confine our attention to purely Lingayet cases, and proceed to a detailed consideration of the evidence to see how far they are satisfactiorily proved or disproved. These are 29 in number (3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20—24, 26, 27, 29, 35, 37—40, 45, 46).

Instance No. 3.—The adoption in this case is alleged to have taken place in Bagalkot in Bijapur District in 1884. Plaintiff's witnesses, (Exs. 75, 159,) were present at the adoption. The only objection urged on defendants' behalf to this evidence was that one of the witnesses was a woman living in Bagavadi, while the adoption took place in Bagalkot, and that the parties to the adoption were not themselves examined. We do not think that [439] these are valid objections. The defendants might have examined the parties themselves, if they suspected the truthfulness of plaintiff's witnesses. As regards the objection that witness, Ex. 75, is a woman, she is over fifty-five years old and personally witnessed the adoption. This instance may, therefore, be held to be sufficiently proved. It is not alleged by defendants that this is a case of the adoption of a brother's son.

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Instance No. 4 is not entitled to similar credit. It is only supported by the evidence of witness, (Ex. 159) who mentioned four instances in all, but whose knowledge in this case appears to be based on very vague hearsay. He cannot identify the parties to the adoption, and cannot say if the person adopted was an only son. We, therefore, hold that the evidence in this case is not of a very satisfactory character.

Instance No. 5 comes from Navalgund, Dharwar District. It is proved by the evidence of witnesses, Exs. 160, 232, who were present at the time, and by the far more valuable evidence of the natural mother, a woman seventy years old, and by the documentary evidence, Exs. 324, 325, the first being a letter of assent passed by the bhaubands, and the last an order of the Nargund State. The adoption occurred in 1857 before Nargund was annexed. Defendants' only objection to the oral evidence is that witness, Ex. 160, was too young at the time to remember the event. No such objection applies to the other witness, Ex. 232, and to the natural mother of the person adopted. As regards the documents, it is urged that they do not mention the fact that the adoptee was an only son. There was no occasion to make any such mention in 1857, and any mention of the fact would have been suspicious. The positive evidence of the natural mother removes all doubts. It is urged that the instance came from Nargund when it was a Native State, and the law there might have been different. This objection is not sustainable, because till the High Court first raised the point in 1868, the general understanding every where was that, though blameable, the adoption of an only son, once effected, was valid. Tht Advocate General himself admitted in his argument that the older decisions were to this effect. In such matters, true customary law is likely to be better preserved in Native States than in British territory. This **[440]** instance, supported as it is by oral and documentary evidence, is certainly entitled to great credit as evidence of custom. This is also not a case of the adoption of a brother's son.

Instance No. 6 comes from Navalgund in the Dharwar District, and the adoption is alleged to have taken place in 1829. It is proved by the evidence of witness, Ex. 160, who is the son of the alleged adoptee, and by the evidence of witness, Ex. 74, who saw the adoption. This instance, however, does not appear to be an illustration of the adoption of an only son, as the document, Ex. 328, produced on plaintiff's behalf, shows that Maregauda had other sons at the time. Witness, Ex. 74, is not sufficiently old herself to speak from personal knowledge about events that took place sixty years ago. We must, therefore, exclude this instance as being of a doubtful character.

Instance No. 7 comes from Navalgund, Dharwar District, and the adoption took place in 1877-79. It his proved by the evidence of witnesses, Exs. 160 and 74, who were present, and witness, Ex. 170, who is himself the adopted son. The defendants did not raise any doubts about the truthfulness of this evidence, except by saying that it is a case of the adoption of a brother's son. It is not quite clear from the evidence whether the brothers, Yellappa and Goundappa, were separate or united. It was for the defendants to prove that the adopted son succeeded to the property of both his natural and adoptive fathers. Such evidence ought to have been given to warrant the exclusion of this case from consideration of the evidence about custom. As it is, we must admit this instance provisionally, as an instance of the adoption of a brother's son by his uncle.

Instance No. 9 comes from Navalgund, Dharwar District, and the adoption took place in 1885. It is proved by the evidence of witness, Ex. 166, who is the adoptive father, and Ex. 245, who is the natural father of the adopted son. Witness, Ex. 161, was also present at the adoption. The adoption in this case was that of a brotner's son, but after, and not before separation, as is erroneously stated in the printed statement filed on defendants' behalf. No other objection is urged by defendants, save the one stated above to the inclusion of this instance.

[441] Instance No. 10 comes from Badami Taluka, Bijapur District, and the adoption took place in 1867. It is proved by the evidence of witnesses 161, 73, who were present at the time of the adoption, and witness 232, who is the natural father, and witness, Ex. 168. Defendants take exception to the evidence of witness, Ex. 73, because she lives in Bagalkot Taluka, while the adoption took place in Badami, and to the evidence of witness 161, because it is hearsay. Leaving aside these witnesses, there is nothing to shake the credit of witnesses 168 and 232, confirmed as it is by the official extract, Ex. 352, relating to the mutation of names. This is not a case of the adoption of a brother's son, as the adoptive mother was paternal aunt of the natural father.

Instance No. 12 comes from Bankapur, Dharwar District, and the adoption took place in 1886. It is proved by the evidence of the natural father, Ex. 165, and witness 169, who saw the adoption. The adoptive mother was the aunt of the father of the boy given in adoption. This was, therefore, not a case of the adoption of a brother's son. Defendants urged no objection to this evidence, except that witness, Ex. 169, said that his knowledge was of a hearsay kind, and witness, Ex. 165, stated that the watan in the adoptive family was in dispute. These circumstances do not detract much from the value of the evidence of witness, Ex. 165. It may, therefore, be accepted as a good instance of the alleged custom.

Instance No. 13 comes from Lakshmeshwar, Miraj territory, and the adoption took place in 1874. It is proved by the evidence of witnesses 165, 239, who stated that some 400 persons were present at the time. The only objection taken by defendants to this instance was that it took place in the territory of a Native State, which objection has not much force for reasons stated above. This is also not a case of the adoption of a brother's son, as the adoptive father is a distant bhauband of the natural father. The defendants were quite free to examine the parties to the adoption if they thought the evidence of witnesses, Exs. 165, 239, defective or unreliable. This case must, therefore, be accepted as a very clear instance of the alleged custom.

Instance No 14 also comes from Lakshmeshwar, and the adoption took place in 1884. It is proved by the oral evidence of the [442] adopting widow, Ex. 70, and of two witnesses, Exs. 165 and 239. The adopting widow produced the deed of adoption, which shows that the adoption was not that of a brother's son. The defendants' objections to this instance are, that it comes from a Native State, that the natural father was not examined, and, lastly, that the deed makes no mention of the fact that the adopted child was an only son. None of these objections appear to us to be at all valid. The omission in the deed to notice the fact, that the boy adopted was an only son, is itself suggestive that no doubts were felt on that point, and the defect is supplied by the oral evidence of witness, Ex. 70.

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Instance No. 15 comes from Badami in the Bijapur District, and the adoption took place in 1877—79. It is proved by the evidence of witness 167. Defendants' only objection to this instance is that the names of the parties given by the witness are not indicative of their being Lingayets. The witness, however, swore positively that the adoptive mother was an adherent of the Virkalmath of Badami, and he was not cross-examined. It was certainly open to the defendants to show by positive evidence that the parties were not Lingayets, and they could have adduced rebutting evidence if they desired to discredit the witness, Ex. 167.

Instance No. 16 also comes from Badami, and the adoption took place in 1885. It was proved by the evidence of witness No. 168, who, however, stated that his knowledge about the adopted child being the only son of his natural father, was derived from what the adopted son told him. This instance cannot, therefore, be accepted as satisfactorily proved for the purposes of this suit, and the defendants' objection is well sustained so far as this case is concerned.

Instance No. 17 comes from Bankapur, Dharwar District, and the adoption took place in 1867. It is proved by the evidence of witness No. 168, who was himself the adopted son. He stated that he had learnt the fact of his being an only son from his adoptive mother. Defendants object that the natural mother ought to have been examined in this case. As a matter of pedigree, the hearsay evidence in this case is not, in my opinion, open to the same objection as in instance No. 16.

[443] Instance No. 19 comes from Bankapur, Dharwar District, and the adoption took place in 1873. It is proved by the evidence of the natural father of the adopted son, Ex. 230, as also by the deed of adoption. This is not a case of the adoption of a brother's son, as the adoptive father was father-in-law of the natural father of the boy given in adoption. Defendants' only objection to this instance is that it was a family arrangement. That circumstance, however, does not detract from its value as evidence in support of the alleged custom. As an instance of the adoption of a daughter's son, it rather strengthens plaintiff's contention that the Lingayet caste in these parts does not observe the strict Brahminical doctrine which prohibits the adoption of daughters' sons. This liberty in regard to daughters' sons has been recognized in respect of this caste by judicial decisions, which have treated Lingayets as being Shudras, who might adopt daughters' and sisters' sons.

Instance No. 20 comes from Kalghatgi, Dharwar District, and the adoption took place in 1880. It is proved by the evidence of the person adopted, who also produced the deed of adoption, Ex. 238. Like the last case, this is also not an instance of the adoption of a brother's son, but of a daughter's son. Defendants' only objection to this instance is that this was also a family arrangement, which circumstance, however, does not detract from the value of the precedent. Defendants further contend that Ex. 238 shows that the son given in adoption was not an only son. A careful perusal of the deed, however, satisfies us that this contention is not correct. The deed only recites that the husband of the adoptive mother had directed her that she should adopt one of her daughter's sons. It does not necessarily follow from this that the daughter had more than one son at the time when the adoption took place. Witness, Ex. 233, states positively that this was a case of an only son. This is an instance of adoption in a watandar family; and is, therefore, of more than ordinary importance.

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Instance No. 21 comes from Hubli, Dharwar District, and the adoption took place in 1881. It was sought to be proved by the evidence of witness, Ex. 233, who was present at the time. His information about the adopted child being an only son was, [444] however, admittedly derived from the adoptive father, and it may, therefore, be regarded as hearsay evidence of no great probative value.

Instance No. 22 comes from Kalghatgi, Dharwar District, and the adoption took place in 1875. It is very satisfactorily proved by the evidence of the adopted son, Ex. 244, and the adoption deed produced by him, Ex. 331, as also by the evidence of witnesses, Exs. 233 and 70, who were present at the time. This is again not a case of the adoption of a brother's son, and the property is watan property of considerable value. Defendants' only objection is that this was an instance of the succession of a foster child, which theory is rebutted by the deed itself, and the oral evidence of the witnesses.

Instance No. 23 comes from Dharwar itself, and belongs to the respectable family of Chanbasapa, late Deputy Educational Inspector, Dharwar. The evidence of the only witness examined is, however, admittedly hearsay, and the defendant very properly objected to this instance being accepted as evidence of the alleged custom. This instance must, therefore, be excluded from consideration.

Instance No. 24 comes also from Dharwar, and the adoption took place so far back as 1837. It is very satisfactorily proved, both by documentary and oral evidence. There is, first, the will of the natural father, Ex. 242, and a petition of the adoptive mother, Ex. 329. Then there is a statement of the son of the adopted person made in Ex. 243, and finally an order of the Assistant Collector, Ex. 330, confirming the adoption. The son of the adopted person was examined as witness, Ex. 241. The property is watan and inam property of considerable value, and nazrana or succession duty had to be paid to Government. It is further stated in the printed statement filed on plaintiff's behalf, and apparently not controverted by the defendants, that the matter came before the High Court so far back as 1876, and the adoption was confirmed, no contention having been then raised on the point of the adopted person being an only son, though the fact was patent on the face of the will itself. Defendants' objection that the evidence of witness, Ex. 241, [445] is hearsay, is not entitled to consideration. Defendants stated further that the will and other documents did not recite the fact that the adopted child was an only son. This is certainly incorrect in so far as the will is concerned. This instance is perhaps the strongest case in support of plaintiff's allegation about the custom in dispute. The adoption in this case was not that of a brother's son, but of a sister's son, which, though disallowed among Brahmins, is permissible in the case of the Shudras and Lingayets.

Instance No. 26 comes from Navalgund, Dharwar District, and the adoption took place in 1859. It is proved by the evidence of the adopted person himself, Ex. 246. This is an instance of the daughter's son being made an heir by adoption. Defendants' only objection to it is that there is no documentary evidence, which objection by itself is not of much moment.

Instance No. 27 comes from Navalgund, Dharwar District, and the adoption took place in 1887. It is proved by the evidence of witness, Ex. 246, who was present at the time. Defendants' only objection to it is that the parties to the adoption were not examined. This objection is not entitled to any weight, as it was open to the defendants to examine the

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parties, if there was reason to suspect the truth of the statement made by the witness. This adoption appears to be that of a separated brother's son.

Instance No. 28 comes from Gadag, Dharwar District, and the adoption took place in 1880. It was sought to be proved by the evidence of witness, Ex. 70, and by the Assistant Collector's order, Ex. 351. Defendants' objection that witness, Ex. 70, is only thirty-four years old, does not disqualify her from being present at the ceremony of adoption, which took place in 1880. It is mentioned in defendants' statement that this witness is a cook. She is not a cook by profession. In answer to the question as to what her profession was, she stated that she performed household duties, cooking, &c., which means that she had no profession. We do not think that either of these objections are valid so as to discredit the evidence of this witness, confirmed as it is by Ex. 351. This is also not a case of the adoption of a brother's son.

[446] Instance No. 29 comes from Shirhatti, Sangli territory, and the adoption took place in 1887. It is proved by the evidence of the adopting widow, Ex. 71. The adoptive and natural fathers were separated in interest, and their relationship was described in Canarese by the word "*bhava*." Plaintiff contends that this word means both full brother or cousin, or sister's husband, while defendants contend that it means only full brother. Accepting defendants' contention, this is a case of the adoption of a separated brother's son. But defendants failed to prove that the adopted son inherited the property of both families.

Instance No. 35 comes from Bankapur, Dharwar District, and the adoption took place in 1880. There is a conflict of evidence on the point of this adoption. Plaintiff gave evidence to show that the natural father had no other son at the time he gave his only son in adoption, while defendants' witnesses seek to make out that the natural father had other sons at the time. Plaintiff's witnesses are Exs. 451, 452, 453, 454, and the genealogy, Ex. 340, was filed on plaintiff's behalf. Plaintiff's witnesses prove the genealogy, but the witnesses on defendants' behalf appear to be more entitled to weight, seeing that one of them is the natural father of the boy given in adoption, Ex. 484, and the other is the adopted son himself, while plaintiff's witnesses are comparative strangers, though distantly related to the person adopted. Defendants' witnesses are, moreover, borne out by the extracts, Exs. 492 and 512. We must, therefore, exclude this instance from consideration.

Instance No. 37 comes from Hangal, Dharwar District, and the adoption took place in 1868. This is also, like instance No. 35, the subject of conflicting testimony. Plaintiff's oral and written evidence is intended to show that the person adopted was the only son of Irappa, who was cousin of the adoptive father; while defendants' evidence goes to show that he was one of the sons of Gangappa, brother of the adoptive father. The genealogy, Ex. 342, filed on plaintiff's behalf is contradicted by the genealogy, (Ex. 472), filed on defendants' behalf. Plaintiff's genealogy is supported by the evidence of the patil, Exs. 472, 477, while defendants' genealogy is supported by the kulkarni, (Ex. 482), who, however, admits that he prepared Ex. 342, **[447]** but pleads that the statement about Irappa's son was made by mistake. The other Kulkarni, witness, Ex. 483, appeared to have prepared the genealogy, Ex. 472, but the occasion for preparing it, as mentioned by him, seems not to be supported by the genealogy itself. The official extracts 475, 484, 533, 534, however, appear to support defendants' contention. On the whole, as the burden of proof

lies on plaintiff, and his evidence does not remove all doubts on the point at issue, we must exclude this instance also from consideration.

Instance No. 38 comes from Karajgi, Dharwar District, and the adoption took place before British rule commenced in those parts. This is also, like Nos. 35, 37, a case of conflicting genealogies. Plaintiff's genealogy is Ex. 343, and was first filed in 1878. Defendants' genealogy is a copy of a copy filed in 1866. Neither genealogy is properly proved, and both appear to be made up from some instructions given by an old lady. This instance must, therefore, also be excluded.

Instance No. 39 cannot also be included. It is a case of disputed genealogies and conflicting evidence, and as the adoption is said to have taken place sixty years ago, the oral evidence of the witnesses is not of much value either way.

Instance No. 40 comes from Hubli, in Dharwar District, and the adoption is alleged to have taken place about 1866, according to plaintiff, and about 1844—1852, according to the defendants. It is also a case of disputed genealogies, like the three preceding instances. Plaintiff's genealogy is Ex. 345, and was sought to be proved by witnesses, Exs. 446, 447, and the official extract, 539. Defendants' genealogy, (Ex. 504), was produced by witness, Ex. 496, and proved by the evidence of witnesses, Exs. 497, 498. These last witnesses push back the date of the alleged adoption, and they urge also that the adopted son had a brother living at the time. Extracts 504 and 525 support defendants' story. On the whole, the evidence is not free from doubt, and as the burden of proof is on plaintiff, and defendants' witnesses appear to be relatives of the adopting family, we must exclude this case also from consideration.

Instance No. 45 comes from Navalgund, Dharwar District, [448] and the adoption is alleged to have taken place before 1875, about 1864. It is also a case in regard to which both parties have given evidence, but plaintiff's genealogy, Ex. 350, is proved by the evidence of witness, Ex. 435, who professes to have seen the adoption, and witness, Ex. 436, who has attested the pedigree, and who shares the estate. Plaintiff's evidence is confirmed by the order of the District Deputy Collector, Ex. 537, and the deposition, Ex. 437, of witness, Ex. 436. given so far back as 1876. Against this evidence, defendant examined only one witness, Ex. 576, who is not a member of the family, and whose evidence to the effect that the adopted son had a brother at the time is too vague and uncorroborated to be entitled to credit. Plaintiff's evidence is more reliable, and this case must be regarded as affording good evidence in support of the alleged custom.

Instance No. 46 comes from Ron, Dharwar District, and the adoption is alleged to have taken place about 1834. It is also a case of conflicting evidence. Plaintiff's witnesses 428, 478 are both sons of the person given in adoption, and prove the genealogy, Ex. 377. Witness, Ex. 434, is patil, and supports their testimony. On defendants' behalf, a third son was examined, Ex. 501, who denied the adoption, but was unable to explain the statement made in the genealogy. Defendants' witness, Ex. 502, is a stranger, and gave hearsay evidence, and the extracts 493, 523, 524, are not decisive either way. The balance of evidence in this case is decidedly in plaintiff's favour. This is a case of the adoption of a nephew by a separated uncle.

This completes the analysis of the twenty-nine Lingayet instances. As the result of such analysis, nineteen instances aprear to us to be satisfactorily proved, while ten instances have to be rejected, chiefly on the

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ground of doubtful or conflicting evidence or the hearsay character of the testimony. Of these nineteen instances in three cases the adoption was of daughters' and sisters' sons, and in five of separated brothers' sons. Out of the ten rejected cases, in only two instances the evidence suggests any doubt as to whether the adoption was that of an only son. These nineteen cases are those numbered in plaintiff's statement [449] as Nos. 3, 5, 7, 9, 10, 12, 13, 14, 15, 17, 19, 20, 22, 24, 26, 27, 29, 45, 46, and the excluded cases are 4, 6, 16, 21, 23, 35, 37, 38, 39, 40. In most of these latter cases, as stated above, the failure of the plaintiff was due to the rejection of secondary or hearsay evidence. It is not easy for a private party to hunt up cases of adoption all over the country, and to secure the attendance of the most competent witnesses when the events took place many years ago, and the parties thereto were in many cases dead. It may be also noted that in the cases of disputed genealogies, some witnesses, summoned at first on plaintiff's behalf, apparently went over to defendants' side. Witnesses Nos. 501, 514, 408, 457, 459, 485, 482 fall under this category. Bearing in mind that adoptions are not very common, and the adoptions of only sons are still rarer, it is by no means a small task to establish by satisfactory evidence nineteen Lingayet adoptions of only sons, some of them in watandar and inamdar families, with Government sanction. The cases, moreover, are spread over a large extent of country including Bagalkot, Navalgund, Badami, Bankapur, Lakshmeshwar, Kalghatgi, Dharwar, Gadag, Shirhatti, and Ron talukas, and cover a long period of seventy years and more. Plaintiff appears to us to have thus fully discharged the *onus* of proof thrown on him. His failure to establish his allegation by equally satisfactory evidence in the remaining ten Lingayet cases is not a fact which detracts from the general credibility of plaintiff's evidence about the prevalence of the alleged custom among Lingayets in these districts as shown in the nineteen proved instances.

Turning next to the Reddis, they described themselves (Exs. 479, 159, 161, 73, 78,) to be Lingayets by religion. The Dharwar Gazetteer also states that most Reddis wear *ling*, and are reckoned as Lingayets. They call Jangams as priests, though a few call Brahmins to officiate on marriage occasions (p. 141). In Bijapur out of six divisions of Reddis, five profess the Lingayet faith, and are married by Jangam priests (p. 145). There are only four Reddi instances in plaintiff's statement which require consideration.

Instance No. 1 comes from Bagevadi in Bijapur District, and [450] the adoption took place in 1887. It is satisfactorily proved by the evidence of the natural father and adoptive mother, Exs. 159, 75, witness, Ex. 73, and the Collector's sanction, Ex. 326. Defendants object to the evidence of witness, Ex. 73, on the ground that it is hearsay, but this circumstance cannot detract from the value of the evidence of witness 150. The omission in Ex. 326 of all mention of the fact of the adopted boy being an only son, is of no great consequence, and it rather strengthens plaintiff's case. Defendants' reference to Ex. 388 is not in point, for that order was passed in the case of a Maratha family, and it is not at all likely that, if the Collector had thought the same objection would apply to Lingayets, he would have given his sanction in this case. This does not appear to have been a case of the adoption of a brother's son.

Instance No. 2 comes from Nargund, when it was a Native State, and the adoption took place in 1814—1816. It is proved by the evidence of witness, Ex. 159, and the order of the Nargund Darbar, Ex. 375, as also

by the genealogies, Exs. 369, 376. The defendants' objection that this instance comes from a Native State has been more than once noticed before. Witness, Ex. 159, is not an entire stranger, but bases his information on the papers produced by him. This is also not a case of the adoption of a nephew by an uncle. The order, Ex. 375, speaks of *purvaja*, which word would not have been used if the relationship was very close.

Instance No. 8 comes from Bagalkot, Bijapur District, and the adoption took place in 1888. It is proved by the evidence of the adoptive mother and natural father, Exs. 161, 73, as also by the evidence of witness, Ex. 160, and the document, Ex. 327. The only objection urged by defendants to this instance rests on the ground that it is a brother's son's adoption, which it no doubt is, though the brothers appear to be separated.

The last Reddi instance is No. 25, which comes from Navalgund, Dharwar District, and the adoption took place about 1873. This case is not satisfactorily proved, as witness, Ex. 245, only speaks from hearsay.

[451] There are only four cases of Shepherds or Dhangars. The District Gazetteers (Dharwar, 180-181), (Bijapur 122-123), do not throw any clear light on the religious condition of Dhangars. Some sub-divisions among the shepherds are plainly Lingayets by religion, and all are more under Lingayet than Brahminical influence. Kurubar or Dhangar witnesses, Exs. 510, 438, stated that Kurubars, Shepherds or Dhangars followed the tenets of the Lingayet faith. The Kurubar gurus are admittedly Lingayets in religion. The Kurubars bury their dead like Lingayets. The test of flesh-eating does not apply strictly to half Lingayets or affiliated Lingayets. The tests of burying the dead by Lingayet rites, and inviting Jangam Gurus on marriage occasions, are more decisive in such matters. On the whole, I am inclined to admit these Kurubar or Dhangar instances.

Instance No. 18 comes from Lakshmeshwar, Miraj State, and the adoption took place so far back as 1849. The adoption is proved by the evidence of the adopted son, Ex. 171. Defendants object that as he was only eight years old at the time, his evidence is of no great value. As, however, defendants did not give any counter evidence to discredit him, I see no reason to disbelieve his positive statement, based as it is on a knowledge of his own family. This is a case of a brother's son adopted by the uncle.

Instance No. 41 comes from Hangel, Dharwar District, and the adoption took place in 1863-64. There is in this case conflicting evidence. On plaintiff's side there is a genealogy, No. 446, proved by witness 510, and on the other hand the adoptee and his uncle, Exs. 513, 514, stated that there were two other sons. We must believe these last witnesses, and exclude this case from consideration.

Instance No. 42 comes from Navalgund, Dharwar District, and the adoption took place in 1876. This is also a case of disputed genealogies. The genealogy filed on plaintiff's behalf, Ex. 347, is supported by the evidence of the adopted person himself, Ex. 442, and his previous deposition, Ex. 443, given in 1878, and by the evidence of the patil witness, Ex. 444, and the Collector's order, 536. The evidence, on the other hand, of **[452]** defendants' witness, Ex. 537, is hearsay, and the silence maintained on this point in the reports 531, 532, 533 is not very significant, when defendants' own witness, Ex. 517, admits that the person alleged to be adopted was entrusted to the care of the alleged adoptive father. We feel satisfied that this instance is properly proved, and that

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it is an instance of the adoption of a brother's son, who had inherited both his natural and adoptive father's property.

Instance No. 44 comes from Navalgund, Dharwar District, and the adoption took place in 1853-54. It is also a case of conflicting evidence. The adopted son, Ex. 438, and witness, Ex. 440, proved the genealogy, Ex. 349, and the deposition, Ex. 439, given so far back as 1878, and the kulkarni's deposition, Ex. 441, and the Collector's order, Ex. 538, passed in 1878, prove the fact of adoption. Against this evidence, defendants examined witness, Ex. 515, and filed kulkarni's statements 527, 528 given in 1871, which either ignore the adoption, or speak of it as that of a foster child. The later orders of 1878 are, however, decisive on the point, and prove the adoption, which is of a nephew by his uncle.

The Hatgar witnesses, Exs. 162, 167, do not claim to be Lingayets, and state that only some among them were *ling*. The Gazetteers of Bijapur and Dharwar also confirm this statement. Hatgars have no affinity towards Lingavets, and their instance No. 11 must, therefore, be excluded from consideration like that of the Brahmins and Marathas.

We have thus passed in review the whole of the evidence in regard to the twenty-nine Lingayet cases, four Reddi Lingaye and four Shepherd (Dhangar) cases, in all thirty-seven instances, and excluded from consideration fourteen cases in all (1) the seven Brahmin cases, one Hatgar, one unknown caste, and the five instances coming from parts of the country other than the southern districts of the Presidency, to which alone these inquiries have been confined. As the result of these inquiries we find that the custom of giving an only son in adoption has been satisfactorily proved in nineteen Lingayet instances (2), three **[453]** Reddi (3), and three Dhangar cases (4), making in all twenty-five instances in favour of the alleged custom, while it has not been satisfactorily established in ten Lingayet, one Reddi, and one Shepherd case, making in all twelve cases (5). Plaintiff's failure to prove his allegation in these twelve cases is not a matter of much surprise, for that failure is chiefly due to the length of time that has elapsed since many of these adoptions occurred, and to the general difficulty of proving any positive allegation under the conditions imposed by law about the admission of relevant evidence, and the exclusion of secondary evidence. In only two or three out of these twelve cases, the failure was due to the fact that the evidence negatived the allegation of an only son. This sort of suspicion does not rest on the other cases, in which the failure was due to the length of time that had elapsed, and the absence of direct evidence This disposes of the bye-issue about the hearsay and the doubtful character of the evidence in support of the alleged custom of the adoption of an only son. This objection applies only to twelve out of thirty-seven cases in all.

The next point to be considered relates to the inquiry how far these twenty-five cases of the proved adoption of an only son can be explained on the ground that the adoption was by an uncle of his nephew in the *dwyamushyayana* form, which is permitted by the Shastras, and which cases, therefore, cannot be held to prove the alleged custom. Defendants' counsel himself suggested in all only eleven cases of this kind out of the entire list, *viz.*, Nos. 6, 9, 25, 35, 46 being admitted by plaintiff's vakil to be adoptions of nephews by uncles, and 2, 7, 10, 27, 37,

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(1) 11, 28, 30–34, 36, 43, 47–51.
(2) 3, 5, 7, 9, 10, 12–15, 17, 19, 20, 22, 24, 26, 27, 29, 45, 46.
(3) 1, 2, 8. (4) 18, 44, 42. (5) 4, 6, 16, 21, 23, 25, 35, 37, 38, 39, 40, 41,

38 being named by defendants' counsel, but not admitted by plaintiff's pleader. Out of the eleven cases named by defendants' counsel, we have found it necessary to exclude instances Nos. 6, 25, 35, 37 as being cases where the adoption was not satisfactorily proved. This deduction leaves only seven cases, 2, 7, 9, 10, 27, 38, 46, as the cases that we have still to consider in this connection. Out of these seven cases, in only one case, No. 46, has plaintiff's pleader admitted that the adopted son has inherited, or has a right to inherit, both his natural father's and adoptive father's property. Of the **[454]** other six cases, Nos. 2, 10, 38 are clearly not cases of nephews adopted by uncles. Nos. 7, 9, 29, as also Nos. 27, 8, 18, 42, 43, as shown above, are cases of adoption by uncles, but these adoptions were obviously made by separated uncles. It was open to the defendants to prove that the son had inherited in both families in these cases. In the absence of such evidence, it is not strictly necessary to discuss the question raised by defendants' counsel, at it does not affect seventeen out of the twenty-five cases we have held as being satisfactorily proved.

We may, however, observe, in passing, that the defendants' counsel sought to give an unwarranted enlargement to the doctrine of *dwyamushyayana* when he urged that it covered not only the cases of brothers' sons, but brothers' grandsons also. This enlargement was sought to be justified by the analogy of the rule of Hindu law by which the existence of a son, grandson or great grandson bars the way to adoption. This analogy, however, is too far-fetched to be readily accepted. The original *dwyamushyayana* son was a relic of the Niyoga form and as such this order of son is prohibited in Kuliyuga (West and Buhler (3rd Ed.), p. 879). *Dwyamushyayana* of the second and more modern form is still permitted, but Rao Saheb Mandlik has stated in his work that he had not come across such adoptions in this Presidency (p. 506). Steele also (p. 183) has stated that such adoptions seldom take place. The Madras Sadar Divani Adalat came to a similar conclusion in 1859. On the other hand, the learned authors of the Digest state that this form obtains in the southern districts of this Presidency (West and Buhler (3rd Ed.), p. 898), and Steele also refers to certain castes where it is still in vogue (p. 385.) The Judicial Committee of the Privy Council has recognized the existence of this form in the North-West Provinces: and there are also some Bengal cases to the same effect—*Wooma Daee* v. *Gokoolanund Dass* (1). The presumption in the case of an adoption by a united brother would certainly be in favour of the son adopted being the son of two fathers. No such presumption can be made in the case of separated brothers, for the *dwyamushyayana* is not equally effective as the Dattaka son to secure the spiritual salvation of the person adopting—*Srimati Uma Dey* v. **[455]** *Gokoolanund Dass* (1)—as also of his natural father (West and Buhler (3rd Ed.), p. 899). It is, thus, not difficult to understand why this form of adoption should have become generally, if not altogether, obsolete in this Presidency. Even if it still exists, the best test of it is either the proof of a special agreement, or evidence to the effect that the son inherited, or has a right to inherit, in both families. There is no such proof of agreement in the cases relied upon, and only one or two instances were cited where the son appears to have succeeded to the estates of both his father and uncle, who apparently were united. On this bye-issue accordingly, we find that the large bulk of the instances adduced on plaintiff's

(1) 3 C. 587=5 I.A. 40.

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behalf are not touched by this ground of exclusion, and that for the purposes of this suit we may safely leave it out of consideration, except in regard to, at the most, two out of the twenty-five cases in which the custom of the adoption of an only son has been satisfactorily proved.

We have next to consider how far the twenty-five instances of the adoption of an only son satisfactorily proved to have occurred as facts among Lingayets over a large part of two districts of Bijapur and Dharwar, during a period of seventy-five years or more, can be held sufficient to prove the validity of the alleged custom as one which the Courts are bound to give effect to. In this respect several considerations have to be borne in mind. (*a*) The prohibition of the adoption of an only son, is not a generally recognized part of Hindu law. Neither the Sanskrit text writers, nor their English translators, are unanimous on the point, Shrinath Jagannath, Vijnyaneshwar and Mayukha range as authorities on one side, and Nundapandit and Kuber on the other. Similarly, Strange, Ellis and W. Macnaghten are on one side, and Colebrooke and F. Macnaghten on the other. (*b*) The Madras and Allahabad High Courts have interpreted the texts of Caunaka and Vasishta, on which the prohibition is mainly based, as commendatory only, and not directory, and held that the act of giving an only son is injurious to the giver, but does not affect the validity of the gift—*Chinna Gaundan* v. *Kumara Gaundan* (1), *Hanuman Tiwar iv. Chirai* (2). The Bombay and [456] Calcutta High Courts have interpreted the texts more strictly. (*c*) But even in Bombay and Bengal, the current of authorities down to very recent times was in the opposite direction—*Huebut* v. *Govindrao* (3); *Vishram* v. *Narainrav* (4); *Lakshmibai* v. *Ganpat Moroba* (5); *Mhalsabai* v. *Vithoba* by Sausse, C. J., and Hebbert and Forbes. JJ. (6); and *Sreemutty Joymony* v. *Sreemutty Sibosundry* (7). The first Calcutta decision to the contrary is reported in *Raja Upendra Lal* v. *Srimati Rani* (8), and was followed up later on in *Wooma Daee* v. *Gokoolanund Dass* (9).

On the Bombay side, the first case "questioning the correctness of the previous decisions" was decided on the Original Side of the High Court, and was reported in *Bhaskar* v. *Mahadev*(10). The doubt therein expressed was confirmed in *Lakshmappa* v. *Ramava* (11), but the Court did not pronounce its final judgment on the point even in that case. Next came the Full Bench, but unreported Lingayet, case of 1879 in certificate proceedings, and finally the Full Bench decision in *Waman Raghupati* v. *Krishnaji* (12). See also *Dada* v. *Appa* (13); *Hanamagowda* v. *Hanamagowda*(14). The Chief Justice Sir C. Sargent admitted in *Waman Raghupati* v. *Krishnaji* that until 1875, with the exception of *Bhaskar* v. *Mahadev*(10), the current of decisions, both of the Sadar Divani Adalat and of the High Court, was in favour of not setting aside such an adoption. These Full Bench decisions of 1879 and 1890 must of course be held to have settled the general law in this Presidency, but the fact, that the law was regarded to be otherwise for nearly sixty years (1820—79), cannot be lost sight of in judging of the weight and character of the evidence required to prove an alleged custom, contrary to the law as now declared, but in conformity with the law as previously enforced. (*d*) The Lingayet

(1) 1 M.H.C.R. 54. (2) 2 A. 164. (3) 2 Borr., 83.
(4) 1 Morley 24=4 S.D.A. R. (1857), 26. (5) 4 B.H.C.R.O.C.J. 151 (161).
(6) 7 B.H.C.R. Appx. 26. (7) 1 Fulton's Reports, 75.
(8) 1 B.L.R. 221. (9) 3 C. 587. (10) 6 B.H.C.R. O.C. J. 1.
(11) 12 B.H.C.R. 364. (12) 14 B. 250. (13) P.J. (1885), p. 111.
(14) Cross S. A. No. 1007 of 1889 and No. 37.

community may well be supposed to have first received notice in 1879 of the [457] change of views in the interpretation of the texts and it appears from plaintiff's printed statement in this case that, so late as 1876, the High Court affirmed on other grounds a Lingayet adoption of an only son, and no objection was raised in the course of that dispute on this ground. The presumptions, therefore, are all in favour of, and not against, such a custom or usage having been recognized by all parties as obligatory, more especially when it is borne in mind that in the neighbouring Madras districts, the law, even after 1868 and 1879, was declared to be in favour of such an adoption, not only among Shudras—*Vasudevan* v. *The Secretary of State for India* (1), but even in the case of Brahmins. (*e*) The Bombay High Court itself has recognized a custom about the adoption of daughters' sons in the neighbouring Brahmin communities such as the Saraswats—*Gowri* v. *Shivaram*(2)—and Haviks of Kanara—*Devarshanbhag* v. *Devappa* (Appeal No. 36 of 1881 decided on 3rd May, 1882)—at the same time that it laid down the law to be otherwise for Brahmins generally elsewhere. This High Court has thus recognized an essential difference between the customary law of Maharashtra and Carnatic.

(*f*) The binding force of custom as law was discussed in *Tara Chand* v. *Reeb Ram* (3): and it was there held that it is not the act or omission of the parties, but the recognition by the Courts which makes customs valid and obligatory. In conferring or withholding this recognition, the reason of the Shastra prohibition must never be lost sight of by the Courts, when applying and interpreting Shastra texts. The Lingayets are admittedly a heretical sect, and are not subject to Brahmin religious laws, and repudiate the Shastras in the matter of the obligatory character of funeral rites and *shraddhas* on which Brahmins lay so much stress. The exceptional character of the Lingayets in this respect has been recognized both by the Madras and Bombay High Courts—*Koduthi* v. *Madu* (4) *Virasangapa* v. *Rudrapa* (5); *Gopal Narhar* v. *Hanmant Ganesh* (6). The liberty of widow re-marriage, and even of wife re-marriage, has [458] been allowed to this Lingayet community, and so has the adoption of daughter's and sister's son been sanctioned among Lingayets on account of their status as Shudras—*Mhalsabai* v. *Vithobaw*(7); *Gopal* v. *Hanmant*. Bearing all these considerations in mind, we feel satisfied that the evidence of the alleged custom among Lingayets furnished on plaintiff's behalf, unrebutted as that evidence is by any attempt of the defendants to adduce a single case to the contrary, their evidence being mostly of the nature of opinion evidence, is sufficient both in quality and quantity to justify us in finding the custom to be a valid custom.

(*g*) Some of the decisions in regard to the proof of custom may be briefly referred to here. In *Vayidinada* v. *Appu* (8) the custom among Brahmins of adopting daughter's and sister's sons was affirmed precisely on the same sort of evidence as we have reviewed here. More evidence is rigorously exacted when it is sought to prove an alleged family custom—*Suriya Ran* v. *The Raja of Pittapur* (9). In *Virasangappa* v. *Rudrappa* (5), a custom of wife re-marriage among Lingayets was affirmed. In *Mirabivi* v. *Vellayanna* (10) the difference between custom and practice is thus set forth: "Practice may be more or less common, but it does not become a custom unless it is consciously accepted as having the force of law."

(1) 11 M. 157 (165). (2) P. J. (1894), p. 30. (3) 3 M.H.C.R. 50.
(4) 7 M. 321. (5) 8 M. 440. (6) 3 B. 273.
(7) 7 B.H.C.R. Appx. 26. (8) 9 M. 44. (9) 9 M. 499.
(10) 8 M. 464.

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In the present case, the numerous acts of official recognition, and the absence of disputes, and the conduct of defendants themselves (Ex. 82), show clearly that the custom set up in this case is not a mere practice, but was recognized to be an obligatory custom by the people concerned, and by the authorities. A Bohra Brahmin custom of adopting a sister's son was similarly affirmed by the Allahabad High Court in *Chain Sukh Ram* v. *Parbati*(1). The Lingayet custom to the same effect was affirmed in *Gopal Narhar* v. *Hanmant Ganesh*(2). In order to prove a custom of Khoja inheritance according to rules of Hindu law, it was laid down by the High Court that "the mere opinion evidence of elderly persons in its favour was not sufficient. Specific instances must be proved where it has been observed and followed—*Rahimatbai* v. [459]*Hirbai* (3). The peculiar succession of dancing girls by force of custom was affirmed in *Tara Naikin* v. *Nana Lakshman* (4). The custom of Jains to adopt a daughter's son in opposition to the rules of Hindu law, which generally applied to them, was upheld by the Privy Council in *Sheo Singh* v. *Mussamat Dakho* (5). The reasons given in that judgment for departing from the general law apply with equal, if not with still greater, force to the Lingayets. It was stated in this judgment, quoting from the judgment in another case of Sir E. Perry, "that if a custom is proved to exist for a time whereof the memory of man runneth not to the contrary, if it is not injurious to the public interests, and if it does not conflict with the express law of the ruling power, such custom is entitled to have the sanction of the Courts" (Perry's Oriental Cases, p. 110, judgment in *Khojas and Memons* case; as also *Abraham's* case.(6) The judgment of the Privy Council went on to state "that the general rules of Brahminical law cannot be justly made to override well-established local and caste custom, especially when (as in the case of Jains and Lingayets) the *ratio decidendi* is inoperative." Lingayets like the Jains do not revere the Shastras, and their views of religious efficacy differ widely from those of the Brahmins.

On the whole, therefore, we feel satisfied that the evidence of the twenty-five proved instances in this case is sufficient to show that the custom of the adoption of an only son is an immemorial, invariable and recognized custom among the Lingayets in the southern districts of this Presidency, and that that it has been so affirmed both by Native and English rulers, and that in the present case it cannot be justly urged that the instances adduced are only breaches of a generally received law, and that they are not sufficient to justify this Court in affirming its validity. Not a single case was shown on defendants' behalf where an adoption of an only son by the Lingayets of these parts was disowned or repudiated by the people, or by their rulers, Native and British. In the Poona, Satara and Sholapur cases referred to above, the custom was neither alleged nor disproved. Those instances, therefore, cannot be allowed much weight in this case as disproving [460] the alleged custom. Of course it has never been contended that every person adopting a child was bound to adopt an only son. Cases of adoptions of one out of many sons will naturally be more numerous, but this preponderance by itself will not invalidate the adoptions of only sons, when the custom was properly proved.

The question of estoppel was not much pressed in argument on either side, and in the view we have taken of the merits, it is not

(1) 14 A. 53. (2) 3 B. 273. (3) 3 B. 34.
(4) 14 B. 90. (5) 5 I. A. 87. (6) 9 M.I.A. 195 (239).

necessary to go into that inquiry. On the whole, we are satisfied that the instances adduced cover a long range of time and place, and are proved by satisfactory evidence, and that they justify this Court in deciding in plaintiff's favour on the principal point in issue between the parties.

The finding recorded above on the point of adoption disposes of the first six contentions raised in the memorandum of appeal by the defendants. The next four contentions in defendants' appeal, and all the cross-objections urged by the plaintiff, relate to the question of property. Plaintiff claims the whole of the moveable and immoveable property as belonging to the estate of his adoptive father, the deceased Shivangauda; and this claim was allowed by the lower Court, except in respect of the immoveable property included in the deed of gift, Ex. 113, executed by Shivangauda in favour of his daughters, defendants Nos. 2 and 3. Defendant No. 1 contended that she was the owner of a portion of the moveable property (four ornaments worth Rs. 281-8, Ex. 35) as being her *stridhan*, and that another portion (a cash sum of Rs. 1,128) was hers because it was given to her by the deceased Shivangauda for her maintenance, and that generally she was the heir of Shivangauda in respect of the moveable and immoveable property not owned by defendants Nos. 2, 3, 5, or not bestowed on them in gift by Shivangauda. Defendants Nos. 2, 3, 5 confined their contention chiefly to the moveable property not claimed by defendant No. 1, and this property amounted to Rs. 7,863-2-6 in cash, and 115½ tolas in weight of gold ornaments, and 121 tolas of silver ornaments, besides pots, furniture, grain and cattle, Ex. 36. Plaintiff on the other hand contended that the deed of gift, Ex. 113, was invalid, and not binding on him. Such being the respective contentions **[461]** of the parties, the sub-issues involved in this part of the inquiry involve the following questions :—

(1) Whether the deed of gift, Ex. 113, was valid and binding on the plaintiff ?

(2) Whether a portion of the moveable property, the four ornaments claimed, belonged to defendant No. 1 as her *stridhan* ?

(3) Whether the cash sum of Rs. 1,128 belonged to defendant No. 1 as having been given to her for her maintenance ?

(4) Whether the rest of the moveable property, cash, ornaments &c., belonged to defendants Nos. 2, 3, 5 ?

As regards the first bye-issue, we see no reason to differ from the lower Court in the view it has taken of the same. Reading together the two deeds, the adoption deed (Ex. 112) and the deed of gift (Ex. 113), it is obvious that as they mutually refer to each other, and both were executed on the same day, they were really parts of one and the same transaction. The adoption deed states that plaintiff was to have the whole of Shivangauda's estate, except the property which he assigned in gift to his daughters in the deed, Ex. 113. The deed of gift similarly refers to the adoption of plaintiff, and Shivangauda gave thereby the house occupied by himself and 7 jirait lands with trees to his daughters. Both deeds were written and attested by the same writer and witnesses (Exs. 102, 103, 104, 109, 110, 255, 277, 278), and were executed on the day and registered together, Exs. 82, 83, 84. It was admitted on respondent plaintiff's behalf that, if the gift had been made prior to the adoption, no valid objection could have been urged, but that even half an hour's difference would have made it invalid as against the plaintiff if executed after the adoption. The Registrar's evidence, Ex. 84, however, shows that both the deeds were registered together, and the other

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evidence, both of plaintiff's and defendants' witnesses Nos. 102, 103, 104, 110, 255, 277, 278, shows that they were simultaneously executed, and formed in fact parts of one and the same transaction. Respondent's objection must, therefore, fail. There is nothing to show that, like some other property expressly stated to be ancestral, the house and lands mentioned in the deed of gift **[462]** had been inherited as ancestral property, and were not acquired by Shivangauda. As between the parties to the suit, he must, therefore, be held to have a full right to dispose of these his acquisitions. The consideration was a good one, seeing that the donees were his daughters, and would have been his ultimate heirs, if he had not adopted plaintiff. The property given in gift was, moreover, only a small portion of the entire estate. Plaintiff's natural father did not indeed expressly assent to the deed of gift, but as he was a party to the deed of adoption which referred to the deed of gift executed along with it, the case falls under the category of conditional adoptions which are allowed by law. We must, therefore, overrule respondent's contentions on this point, and hold that the deed of gift in favour of defendants Nos. 2 and 3 was valid, and binding on plaintiff.

As regards the next two sub-issues, it is to be noted that defendant No. 1 claimed a gold *sargi*, gold bracelets, silver *tolbandis*, and silver *gundgudigi*, as her *stridhan*, and she claimed Rs. 1,128 out of the cash as having been given to her by Shivangauda for her maintenance, Ex. 35. She also claimed to be the owner by right of heirship of the remaining property, so far as it did not belong, or was not given, to defendants Nos. 2 and 3. This latter claim of heirship must be disallowed, as plaintiff, and not the defendant No. 1, is the heir of Shivangauda.

About the ornaments claimed as *stridhan*, and about the cash sum, it is to be noted that in her deposition, Ex. 227, defendant No. 1 claimed to have received the ornaments and Rs. 1,000 in cash (in place of Rs. 1,128 mentioned in the written statement), and she claimed to have received this double gift one month before her husband's death. She did not rest her claim upon any reservation made by Shivangauda for her maintenance at the time of plaintiff's adoption. It is true that the deed of gift contains a statement that the moveable property was retained by Shivangauda for his own and his wife's maintenance. There is, however, no specification of the value of the property so retained, and there is no similar reservation in the contemporaneous deed of adoption, which makes plaintiff his heir in respect of all the property not included in the deed of gift. The oral gift **[463]** alleged to have been made one month before his death by Shivangauda is not referred to in either deed, though these last were executed within fifteen days before Shivangauda's death. Defendant No. 5, moreover, contradicted defendant No. 1 openly, for he stated that the gift of Rs. 1,000 was made by Shivangauda twenty or thirty years ago, Ex. 202. It is admitted by defendant No. 1 herself that there were no witnesses present at the time of the gift. The oral evidence on this point on defendant's behalf is thus entitled to no weight.

It is plain that the alleged oral gift is not proved, and defendant No. 1 has no right as against plaintiff either to the cash sum of Rs. 1,000, or to the four ornaments, claimed as *stridhan* by her. The *yadis*, Exs. 10, 16, show that, in this case, attachment before judgment was made at the instance of the plaintiff, and Rs. 8,991-6-9 in cash, about Rs. 3,550 worth of gold ornaments, about Rs. 154-8-0 worth of silver ornaments, and about Rs. 320 worth of other property, including utensils, grain and cattle, &c. in all property worth about Rs. 13,000, was attached on two occasions

The bailiff's report shows that defendants made away with some other property. The attached property was, moreover, subsequently returned back to the defendants after taking security from them for an equivalent amount, and defendants will have to account to the plaintiff for the value of the same. Defendant No. 1 has no doubt a right to be suitably maintained by the plaintiff out of her husband's estate; but till defendants have rendered a proper account to the plaintiff of the property in their possession, it will not be fair to decide upon defendant No. 1's claim for maintenance, and require plaintiff to settle any definite amount on her. She set up a specific defence about an alleged oral gift, and failed to prove the same. Both her objections, therefore, about the *stridhan* property and the cash gift must be overruled.

As regards the fourth sub-issue, which relates to defendants Nos. 2, 3 and 5, it may be noted that they claim in their written statement to be the owners of nearly the whole of the moveable property in dispute, excepting the portions to which defendant No. 1 laid claim. Voluminous evidence was given on defendants' **[464]** behalf to prove this portion of the claim. It is to be noted, however, that nearly all the witnesses who gave evidence in defendants' favour on this point gave evidence also against the alleged custom of adoption. These witnesses come mostly from Naregal, where the parties reside. Defendants' witnesses on this point were Nos. 255, 256, 258, 263, 264, 267, 270, 272, 276, 278, 279, 280, 281, 282, 283, 285, 286, 289, 290, 292, 296, 298, 301, 303, 304, 308; and bonds, Exs. 265, 271, 273, 275, 279, were produced as having been passed in defendants' name. Plaintiff also gave both oral and written evidence to prove that all the property in dispute belonged to Shivangauda, and not to his daughters. Plaintiff's witnesses are Exs. 100, 102, 103, 104, 109, 110, 111, 178, 181, 183, 184, 185, 186, 190, 193, 195, 198, 199, 200, 202, 203, 206, 207 and 302, and the written documents in his favour are 332, 338, 353, 366, 179, 180, 194, 196, 197, 201, 204, 205.

After a careful consideration of the whole of the oral and written evidence on both sides, we see no reason to disturb the finding of the lower Court on this point: (1) If defendants Nos. 2, 3 and 5 were so well off as they claim to be, it was not likely that Shivangauda would have made any gift of lands and house to them. (2) At least some mention would have been made of this fact in the deed of gift. (3) Defendant No. 3 has been a widowed daughter of Shivangauda for many years, and she and defendant No. 2 and her husband have been to all appearance dependent members of Shivangauda's family. (4) Defendant No. 5's deposition, Ex. 202, leaves little room for doubt that neither he nor his wife nor her sister were ever in possession of cash and ornaments of their own, as stated on their behalf by their witnesses. (5) A few of these witnesses themselves, Exs. 255, 262, 292, 293, admitted that the actual management was with Shivangauda, who, according to them, took bonds, and received payments, on behalf of his daughters. (6) The bonds, in defendant No. 3's name, Exs. 265, 271, 273, 275, 279, are few in number, and for small amounts. One of the bonds produced was in the name of defendant No. 3's deceased husband Appanna, but he was described in it as having been a party on behalf of Shivangauda. (7) Defendant No. 1 is sister of this **[465]** Appanna, and she is mother of defendants Nos. 2, 3, 4, and this relationship accounts for her partiality in favour of defendants Nos. 2 to 5, and her assumed ignorance about her husband's means. (8) Defendant No. 5 admitted that he only tilled the lands, and that he had no money of his own with him. (9) The census

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papers, Exs. 338 and 353—364, show that the houses were all entered in Shivangauda's name. (10) The bonds, 177, 180, 192, 196, 197, 201, 204, 205, are also in Shivangauda's name. Bearing all these circumstances in mind, we feel satisfied that plaintiff's witnesses on this point are obviously more entitled to credit than those of the defendants. The defendants Nos. 2 and 3 are of course entitled to the property given to them by the deed of gift. The rest of the property belongs to the estate of Shivangauda, and the plaintiff as his heir succeeds to the same, subject to the charge of maintaining defendant No. 1, his mother.

Defendants contended that certain properties did not belong either to them or to the estate of Shivangauda. The evidence of plaintiff's witnesses relates to the property generally. If strangers have a claim to any of these properties, they will in due course assert the same. It is not necessary to inquire into this point further here.

JARDINE, J.—I concur in all the findings on the issues and in most of the reasons just given.

The parties are Kudava Kaligars by caste and Lingayets by religion, and dwell at Naregal in the Ron Taluka of the Dharwar District, not far from the Nizam's territory.

It is now the settled doctrine of this Court, that the adoption of an only son is, by the general Hindu law, invalid—*Waman Raghupati* v. *Krishnaji* (1). The report of that case shows that in appeal No. 1 of 1879 under Act XXVII of 1860 this rule of law was applied to Lingayets by a Full Bench; and that an attempt to prove validity by custom in that appeal from the District Judge of Belgaum failed. In the report of *Gopal* v. *Ganesh* (2), which determines that the Lingayets are Shudras,—*cf. Virasangapa* v. *Rudrapa* (3),—some account is given of the case of *Kashibai* v. **[466]** *Nagapa* decided in 1828 between Lingayets of the Sholapur District, in which the Zilla Court at Poona held the adoption of an only son invalid.

In arguing on the instances relied on as proof of custom in the present case the counsel for the appellants asks the Court to exclude several on the ground of irrelevancy, they being valid at Hindu law as adoptions of *dwyamushyayanas* or sons of two fathers: Maynes's Hindu Law, 5th Ed., para. 132. The respondent meets this contention with the following arguments: 1st, that it is not shown by any cited case or otherwise that this form of adoption is still in vogue in the Presidency of Bombay; 2nd, that if not obsolete, it extends only to the son of a brother, and not to any other relations: and 3rd, that where the brothers are separate in interest, and there is no proof of an express agreement that the adopted son's relationship to his natural family shall continue, he is not a *dwyamushyayana*, and so the adoption stands on custom, not on law. The appellants reply to this third point that in all cases where the only son of a brother, divided or undivided, has been adopted, the law raises a presumption that the son is a *dwyamushyayana*.

The respondent, who denies that this status exists, relies on the Rao Saheb Mandlik's opinion *arguendo* at p. 506 of his work on Hindu law that this form of adoption is not recognized in this age and a Madras decision of 1859, *Annamala* v. *Mungalam* (4), against which, however, there is in Mr. Mayne's opinion overwhelming authority—Mayne's Hindu Law, para. 160. But in para. 132 of Mayne's Hindu Law it is said: "It seems to be admitted everywhere that there is no objection to the adoption

(1) 14 B. 249.
(2) 3 B. 273.
(3) 8 M. 440 (450).
(4) M.S.D.A. Rep. (1850), 81.

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of an only son, when he is taken as *dwyamushyayana*, or the son of two fathers." For this text, books and decisions are cited. The form is said to be common in the North-West Provinces—Jolly's Tagore Law Lectures, 166. It is argued that there is no case in the Bombay Reports. But several are mentioned by West and Buhler, 898, 1044, 1045, 1208. The learned writers say that from personal inquiries it appears that the *dwyamushyayana* son is not at all unusual in the southern districts of Bombay—898, 1045. **[467]** See also Steel's Law and Custom. 47, 384, 45, 183. The form is common in Malabar, though obsolete on the Coromandel Coast—*Vasudevan* v. *Secretary of State* (1). In *Nilmadhub* v. *Bishumber* (2), a Bengal case, the Judicial Committee of the Privy Council treat the *dwyamushyayana* son as recognized. Also in another Bengal case, *Srimati Uma Deyi* v. *Gokoolanund* (3). On consideration of these authorities, I am not inclined to hold that the *dwyamushyayana* son is obsolete in this age in the southern parts of the Bombay Presidency.

The second question is, whether the adoption of an only son, being the son of the son of the brother of the adopter, can, where there has been no special condition, be upheld as the adoption of a *dwyamushyayana* son, so that the instance must be imputed to Hindu law and withdrawn from the evidence of custom. No text has been shown by Mr. Scott to support this argument, nor any decision: it is merely based on the supposed analogy between a son and a grandson, drawn from the fact that the existence of either makes adoption impossible—West and Buhler, 917, 944. This basis appears far too slender for us to extend the meaning of *dwyamushyayana* in the absence of any reason for supposing that the brother's grandson would stand in the same spiritual relation to the adopter as a natural grandson does according to the Dattaka Mimansa, s. 1, pl. 13. But it appears from the decisions that a stranger may become a *dwyamushyayana*. As is said in 1 Strange Hindu Law, 96, "the same double relation may be the result of agreement, at the time of adoption, between the adopter and him who is willing to give his son for the purpose." For the formula of giving we may refer to West and Buhler, 1134, quoting the Vyavahara Mayukha.

The third point is, whether, when the two brothers are separated in interest, and one of them adopts the only son of the other, and there is no evidence of a special condition, the son is a *dwyamushyayana* son at Hindu law, or whether, as the respondent contends, the adoption and the inheriting in both families must be imputed to the custom.

[468] The distinction between united and separated brothers is not taken by Mayne, who in para. 132 says in general terms that when one brother takes in adoption the only son of the other, the double relationship of *dwyamushyayana* appears to be established without any special contract. Nor can I find the distinction in West and Buhler *ubi supra*. A general presumption may possibly be drawn from some of the decisions, *viz.*, that where a *dwyamushyayana* can be given at all, as, *e.g.*, between two brothers the presumption is that he has been given as such—West and Buhler, 1045, note *h*. The respondent relies on the remarks of the Judicial Committee in *Srimati Uma Deyi's* case (3) as authority for making the distinction between divided and united brethren. The remarks appear to me applicable on the question of evidence, and shew that the consent of the divided brother is more improbable. No text of Hindu law has been cited

(1) 11 M. 157 (165). (2) 13 M.I.A. 85 (101). (3) 5 I.A. 40 (50) = 3 C. 587.

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as authority for the distinction: I find none in the history of the *dwyamushyayana* son given by Dr. Joliy in his Tagore Law Lectures, 1883, 165, where it is traced to the obsolete custom of Niyoga (see Mitakshara, ch. I, s. x.), nor in the rules about *dwyamushyayana* at p. 318, nor in Colebrooke's Digest. But I think that the remarks in *Srimati Uma's* case do require the Court to consider in dealing with the present evidence of adoption between separated brothers such facts as the absence of any special agreement, and whether the adopted only son succeeded to property in his natural father's family. (For the Bombay rules on this point, see West and Buhler, 898, 1209). But the significance of the presumptions, especially those drawn from the ordinary motives of religious Hindus, is weakened much when we are dealing with Lingayets, who, as remarked by the Court below, attach no religious value to adoption and its ceremonies. Mr. Jardine compares this purely civil act of theirs to the adoptions of the Jains; it also resembles the Kritrima form of Mithila—Mayne's Hindu Law, para 95.

It is admitted by both sides that the instances numbered 6, 9, 25, 35 and 46, are adoptions of brothers'sons. The *factum* and in most cases the only sonship are not disputed. The respondent **[469]** has admitted that in cases 25 and 46 the adopted sons inherited in both their natural and adoptive families, but denies this as regards the cases 6, 9 and 35. But in case 6 we concur that the only sonship is not proved. Case 25 must be excluded as not being one among Lingayets. I find on examining Exs. 74, 160 and 328 that in case 6 there is no evidence on this point, nor can it be inferred whether at the time of the adoption the brothers were separated in interest. I also do not find this adoption proved. In case 9, to which Exs. 161, 166 and 245 belong, the brothers had separated; and as the natural father, Ex. 245, speaks of his elder brother (probably the adoptive father) as his heir, it would seem that the adopted son loses his rights as such in his natural family. The agreement, Ex. 332, shows that when the adoptive father married again, there was a dispute between the brothers, which was settled by the adoptive father agreeing that the adopted son and each natural son should have equal shares. In case 35 the brothers were separate, and the natural father still lives. But we concur in excluding this case, as both the natural father and the son, Exs. 494 and 495, say there was a second natural son at the time of the adoption, although Exs. 451 to 453 swear the contrary. We do not think it proved that the adoptee was an only son.

In case 46, though evidence to contradict was given, we are satisfied on the testimony of two of Irangauda's sons, Exs. 428 and 478, confirmed by the patil, Ex. 434, and the genealogy, Ex. 377, that plaintiff has proved this case and that the two brothers were separate in interest when Irangauda was adopted.

Thus, after excluding cases 6, 25 and 35 as irrelevant to the custom, we concur in finding that in cases 9 and 46 the brothers were separate in interest.

The appellants-defendants have declined to admit that the cases 2, 7, 10, 29, 37 and 38 are not cases of brothers' sons as the plaintiff avers. We concur in holding the only sonship in cases 37 and 38 to be not proved: and that in cases 2 and 10 the adoption was not between brothers.

[470] The contest then is as to whether the other proved adoptions, cases 7 and 29, can be presumed to be of the *dwyamushyayana* form without proof of special condition. I will now examine the facts of all these cases.

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Case 2 occurred about eighty years ago in what was then the Nargund State. The *factum* is proved, and the family is Lingayet. The son of the adoptee, Parvatgauda, though living has not been called. In Exs. 376 and 369 the fathers of the two fathers bear different names, which fact indicates that they were not brothers. The word of relationship used in Ex. 375 is "*purvaj*," which includes elder brother, but has also a wider meaning. The witness, Ex. 159, is not more specific. We are agreed that this is not an adoption between brothers.

The *factum* of case 7 is not disputed, and is deposed to by the adoptee, Ex. 170, who says the fathers were uterine brothers. But the adopting father is not called. Exhibit 74 gives different names to the fathers' fathers, and Ex. 160 knows nothing. I think we must hold them to be brothers, as the plaintiff has not disproved the assertion of the witness without whom the case is not proved. There is no evidence as to whether the fathers were joint or separated.

We agree that case 10 is certainly not a case of two brothers, although Ex. 161 says it is. It is clear from Exs. 73 and 232 that the woman who adopted was a relation of the natural father; but neither he, nor the son, Ex. 168, suggests the brotherhood of the fathers.

In case 29 the only evidence is the adoptive mother, Ex. 71, who says the giver was her "*bhava*", which in Canarese means, according to the dictionary, "husband's elder brother, wife's brother, maternal uncle's son if older than one's self." On studying her deposition I incline to hold that Mudibasapa, the father of the adopted son, was her husband's separated brother, as the appellants' counsel argues. The act occurred in the Sangli territory of Shirhati about the year 1887. The adoption deed and other documents have not been produced: and there is no official recognition of the act alleged. The facts that a dispute occurred with the natural father, and that some other son was also adopted, [471] and that at a private settlement both have been treated as adopted sons, somewhat discredit this instance. At the same time it is to be remarked that the dispute is not said to have been raised on the question of only sonship: and I would, therefore, admit this case as one relevant to the custom.

As we concur in finding that in cases 37 and 38 the fact of the only sonship is not proved, it is unnecessary to deal with them here.

The result is that we concur in holding cases 2 and 10 to be proved and relevant evidence of the custom and not cases of *dwyamushyayana*: and in holding case 29 to be like, cases 9 and 46, an adoption of a separated brother's only son. Case 7 is an adoption of a brother's only son. My learned colleague thinks the evidence shows separation: while I am unable to form an opinion. The discussion of the *dwyamushyayana* form thus only touches four cases, *viz.*, 7, 9, 29 and 46 out of the twenty-two cases we find proved and relevant: in three out of the above four the brothers were separate, and perhaps in the fourth also; all but case 46 are recent.

It appears then that the only point regarding the *dwyamushyayana* form of adoption which we can be asked to decide is whether without proof of a special agreement such an adoption between separated brothers can be held proved. But I am of opinion that it is not necessary for us to decide the point; firstly, because, even if we exclude cases 7, 9, 29 and 46 there is material in the other eighteen proved cases on which we can adjudge the question of custom; secondly, because the religious motives of ordinary Hindus have little influence on the minds of Lingayets, who look on the destiny of their dead ancestors from a different religious standpoint.

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The learned Judge below finds that among Lingayets no funeral ceremonies are performed; and he logically infers that, therefore, the salvation of the father who gives his only son is not imperilled: and he holds on the statements of the witnesses that he incurs no sin. These findings have not been seriously disputed. In discarding the *shraddha* ceremonies, they resemble the Jains from whom many of them are believed to be descended. We can, therefore, apply to the Lingayets Sir M. R. Westropp's remarks **[472]** on the Jains in *Bhagvandas* v. *Rajmal*(1). "This circumstance is fatal to the existence, amongst that sect, of the principal reason which renders adoption almost indispensible to the more orthodox Hindus when they are sonless, "the future beatitude of" such "a Hindu depending, according to the prevalent belief, upon the performance of his obsequies, and payment of his debts by a son as a means of redeeming him from an instant state of suffering." The motive for which a Lingayet adopts is the perpetuation of the the name and family, recognized by Westropp, C. J., in *Bhala* v. *Parbhu*(2). Now, it appears that the views of the Court below are confirmed by the interesting accounts of the tenets and practices of the Lingayets found in the volumes about Bijapur and Dharwar in Mr. James Campbell's Gazetteer. These were respectively supplied by Mr. Cumine of the Civil Service and Rao Bahadur Tirmalrao Venkatesh whom we remember as an experienced Judge, well informed about the locality. The latter reports: "As regards the future state, Lingayets believe that the wearers of the *ling* are not liable to transmigration. According to his conduct, a Lingayet after death is sent either to heaven or to hell, and where he is sent there he stays. The Lingayet belief that none of the house spirits can come back, frees them from one great section of the Brahmin ritual. They have no offering to the dead of sesamum, sacred grass, burnt sacrifices, new moon and full moon rites, and pourings of water. In their disregard of after-death rites the Lingayets agree with the Jains" (3). Mr. Cumine contrasts the tenets with the practices in his philosophic discussion and comes to the same opinion: "that the dead Lingayet goes to Shiv's heaven seems to be a practical belief which has greatly reduced the rites to the dead and probably the fear of spirits" (4).

I am of opinion, therefore, that these four cases may more reasonably be imputed to the influence of the alleged custom than to motives of religious law: and on considering the evidence I would impute them to the custom.

I see no reason to exclude the cases where adoptions occurred since the present suit began. Nor for excluding the cases arising **[473]** in Native States, in the absence of any reason to suppose that the Hindu law in force in those States differs from that of the neighbouring British Indian districts. *Cf. Shivji* v. *Datu* (5).

Before examining the evidence it may be remarked that the burden of proving the custom, by clear and unambiguous evidence, to be ancient and invariable lies on the plaintiff under the rulings of the Privy Council—*Bhagvandas* v. *Rajmal* (1). There must be "satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has by common consent been submitted to as the established governing rule of the particular family, class or district of country, and the course of practice upon which the custom rests must not be left in doubt, but be proved with

(1) 10 B.H.C.R. 241 (262). (2) 2 B. 67. (3) Vol. 22 Bom. Gaztr. 106.
(4) Vol. 23 Bom. Gaztr. 227, 229 (236). (5) 12 B.H.C.R. 281.

certainty"—*Sivanananja* v. *Muttu Ramalinga* (1); *Shidhojirao* v. *Naikojirao*(2). It is to specified instances that the Court pays most attention—*Bhagvandas* v. *Rajmal*(3), and it is unsafe to act on mere opinions of witnesses—*Rahimatbai* v. *Hirbai* (4); *Casumbhoy* v. *Ahmedbhoy* (5). The Court below has applied these rules and found the custom proved by specified instances. It says: "On the whole, it appears that the defendants' witnesses are not very serious in asserting that there exists no custom of adopting an only son. They cannot cite instances of such adoptions having become null and void amongst the community."

It now becomes the duty of this Court to determine whether the specified instances outweigh the opinions of witnesses adverse to the custom, as the Subordinate Judge has held. We must examine each instance before giving our decision. We are of opinion that the defendants' witnesses have not proved any instance of an adoption of an only son being disallowed or even seriously disputed. Most of them come from Naregal, to disprove the *factum* or some other point alleged by the plaintiff. The Judge below is right in disbelieving their denial of the custom. As I have already noticed, they cannot seriously suppose that the desire of salvation from hell moves Lingayets at all, or that the dogma about the hell named *Put* is any part of their creed. One **[474]** witness, Ex. 296, tries to make out that one such adoption was disallowed in the Madras Presidency. But he must be ignorant of the decision of the Madras High Court in *Narayanasami* v. *Kuppusami* (6) which recognizes the adoptions of only sons as valid. It is admitted that the instances numbered 30 to 34, 36 and 43 relate to Brahmins. We exclude them as not relevant to the custom of so different a people as the Lingayets; and until the right of the Brahmins in the Dharwar and Bijapur districts to adopt only sons is established as a custom, it is as likely as not that these seven instances are infractions of the Hindu law as interpreted by this Court.

The two instances of Hatgars or weavers numbered 11 and 15 must next be considered. The Court has been referred to Vol. 22 and 23 of Campbell's Gazetteer, the volumes about Dharwar and Bijapur, pp. 165 and 267, respectively. People of this caste have in their habits and worship resemblances to both the Brahmin and Lingayet forms of Hinduism: and it is said that "though they have an hereditary feud with the true Lingayetism, half of them have gone over to Lingayetism and the other half have begun to feel its influence"— Vol. 22, 268. In case 11, witness 162, the adopted son, says plainly that he is not a Lingayet; and the adopting father, witness 167, does not contradict him. It is, therefore, clear to us that case 11 is not relevant. Case 15, about which witness 167 gives vague evidence, appears to us relevant.

Case 28 is objected to by the appellants as irrelevant, because there is no proof nor indication that the parties were Lingayets. But the questions put to the one witness examined, Ex. 70, confine her assertions to Lingayet cases. The order, Ex. 351, gives no indication of the caste. If, as appears, the adopters were Deshpandes, it would have been easy for the appellants to produce evidence about their religion, or to have asked witness 70 if they had any doubt. We, therefore, admit case 28.

The four instances, Nos. 18, 41, 42 and 44, occurring among the shepherds (called Dhangers in Marathi and Kurubas in Canarese) are disputed on similar grounds.

(1) 8 M.H.C.R. 75 on appeal to 14 M.I.A. 570.
(2) 10 B.H.C.R. 228 (234).
(3) 10 B.H.C.R. 241 (264).
(4) 3 B. 34.
(5) 12 B. 280 (302).
(6) 11 M. 43.

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[475] In case 18 no question was put about religion to the only witness, Ex. 171. We have been referred to the Gazetteer volumes, Dharwar, 180, Bijapur 121. The Dharwar writer does not treat the Kurubas, who number 87,800 in that district, as Lingayets at all, as appears from the table at p. 103, though he styles the Kuruba Gurus as half Lingayets. These Gurus seem to be what are known as Vaders in the Bijapur District. The Bijapur writer says at p. 123 that the Kurubas are Brahminical Hindus. Neither does he include this great caste numbering 94,786 in Bijapur District in his tables of True, Affiliated and Half Lingayets. In the full notice of the Kurubas in the Telugu country written by Dr. Buchanan in the early part of this century (Journey into Mysore and Canara, Vol. I, p. 395) there is nothing distinctive to show that they are Lingayets ; and another reference made by Mr. Ghanasham for the respondent (8 Bombay Royal Asiatic Society's Journal, 74) only shows a story in the Basava Purana, one of the Lingayet sacred books, in which a shepherd appears as an adorer of the *linga*.

In case 41 the only evidence that the parties were Lingayets is a statement of a collateral, Ex. 510, that although he is a Kuruba he follows Lingayet tenants. In case 42 there is nothing whatever in the evidence, Exs. 442 to 445, 347, 517 and 536 to show that the parties were Lingayets. In case 44 from the Navalgund Taluka of the Dharwar District the evidence is Exs. 349, 438 to 441, 515, 526 to 529 and 538. In Ex. 438 the son of the adopted son says that the Kurubas of his neighbourhood follow the religious tenents of the Lingayets. But the kulkarni of his village Ex. 440, a Brahmin called by the plaintiff throws doubt on the statement by pointing out that the Kurubas eat flesh, which he says is contrary to Lingayetism ; and witness 438 says himself that Lingayets do not dine or intermarry with them. The Kurubas in Dharwar District eat the flesh of sheep, fowls, hare and deer, but not of kine or swine (Gazetteer, Dharwar, 181). There is a class of shepherds called Hande-Vazirs or Hande-Kurubas separately described in Gazetteer, Bijapur, 244, and mentioned in the accounts of the Kurubas. These are real Lingayets, and it is stated that they have left off meat and liquor. The Vaders or Kuruba Gurus, who are the ecclesiastics [476] of the non-Lingayet Kurubas, appear to recognize a Lingayet superior. But the writers of the Gazetteer class these ecclesiastics as half Lingayets ; and it appears that unlike the laity of either division, these Vaders eat no flesh and wear the *linga*.—Gazetteer, Bijapur, 123. But these differences, though striking to the casual observer, are not a test enabling us to say whether or not a Canarese tribe has gone over to Lingayetism—Gazetteer, Dharwar, 102, 106 ; Bijapur 219. "In the northen districts, in Poona, Satara, Kolhapur and Belgaum, the Lingayet faith is declining, and many Lingayets are adopting Brahmincal ways of worship, ceremonies and gods. On the other hand, in Bijapur, in Dharwar and in parts of southern India, Lingayetism appears to be gaining ground" and getting converts from Brahminical Hinduism as it originally did from among the Jains, whose religion it in many respects resembles. On the whole I think case 44 must be excluded as not shown to be relevant, the *onus* being on the plaintiff.

I am of opinion, on the evidence, that cases 18, 41, 42 and 44 are not relevant to the issue of custom, it not appearing that the parties were Lingayets ; and the presumption being in the present state of the Kuruba community that the Kurubas have not gone over to Lingayetism.

The cases 1, 2, 8 and 25 occurred among the people called Raddis or Radders (Gazetteer, Bijapur, 145; Dharwar, 141). The Gazetteer shows that, excepting the division called Namad, these people are Lingayets. In the cases 1, 2 and 8 the witnesses make it clear that the parties were Lingayets. The only witness in case 25, Ex. 245, says that it occurred in his own village when one elder and divided brother adopted the only son of his brother, and that the adopted son has inherited in both families. This witness is explicit on every point and must be believed when he says that the son is not a Lingayet. Case 25 must, therefore, be excluded.

Cases 47 to 50 must be excluded for more reasons than one. The only evidence of them consists of affidavits, Exs. 384 to 387, made in appeal No. 1 of 1879, in which the High Court decided that the rule of Hindu law prohibiting the adoption of an only son applies to Lingayets. The present defendants filed **[477]** these affidavits in order to show that they had not convinced the High Court. They cannot be used to prove the plaintiff's case, as there has been no opportunity in this suit of cross-questioning the deponents. Moreover, cases 48, 49 and 50 are irrelevant, as there is nothing whatever to show that the parties were Lingayet, and the names suggest Brahmin and Maratha lineage. Case 47 is irrelevant, as the issue in the present case only relates to the Carnatic and not to the country where Poona stands amid a population not Canarese and Dravidian, but Maratha and Aryan.

Case 51 is based on Exs. 368, 371 and 374. Ex. 368 is P. J., 1882, p. 294, following which the District Judge of Satara held further inquiry, and in his judgment found on the evidence that the adoption of an only son was valid by custom in the country round Tasgaon in the Satara District. The parties were Lingayets. We exclude the case as coming from a different part of the country, hardly within the Carnatic. The final judgment of the High Court, P. J., 1885, 111, was based on other grounds.

It may here be mentioned that the Advocate-General drew attention to the fact that in a case where the Assistant Judge of Bijapur held the adoption of an only son of a Lingayet invalid, no plea that it was valid by custom was raised. See Cross Appeals 1007 of 1889 and 37 of 1890. It appears from the original judgment, in Canarese, of the Bagalkot Court that the Judge found that when the son was given he was not an only son, and the postponement of the ceremony which occurred after all his brothers had died did not invalidate it. That Judge held the case to be an exception, outside of the prohibitory rule. The Assistant Judge thought otherwise and acted on the *obiter dicta* in the cases *Lakshmappa* v. *Ramava* (1) and *Kashibai* v. *Tatia* (2). It is not safe under the circumstances to speculate why the plea of custom was not raised.

After careful examination of the evidence in the light of the arguments, we concur in holding the following twenty-two instances to be both proved and relevant:—

Cases 1, 2, 3, 5, 7, 8, 9, 10, 12, 13, 14, 15, 19, 20, 22, 24, 26, 27, 28, 29, 45, 46.

[478] And the following ten not proved:—

Cases 4, 6, 16, 21, 23, 35, 37, 38, 39, 40.

And the following fourteen irrelevant to the custom of Lingayets:—

Cases 11, 25, 30 to 34, 36, 43, 47 to 51.

And though our reasons differ, we agree to exclude case 41.

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(1) 12 B.H.C.R. 364.

(2) 7 B. 221.

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We differ on the following instances :—

Case 17 which I think not proved.

Cases 18, 42, and 44, among Kurubas, not in my opinion proved to be Lingayets.

Case 1 occurring in 1887 in the Bijapur District in a family of Lingayet Reddis is clearly proved by the natural father and adopting mother, witnesses 159 and 75. The boy is the only son of a divided brother. Exhibit 326 F shows that an inquiry was made into the propriety of the act by the Revenue authorities, as the right to share in patelki watan was involved, and that the Collector solemnly confirmed the adoption.

Case 2 occurred about 1815, in a district then belonging to the Chief of Nargund. Exhibit 375 is the chief's sanction to the adoption of Parvatgauda in order that he might succeed to the patil's watan at Sirol. Parvat's son, father of witness 159, is the present patil. I do not doubt that Parvat was an only son—see the genealogies, Exs. 369 and 376—which the witness got from the kacheri when he was considering whether to give his own son in case 1 in adoption. It cannot be inferred that Parvat was son to his adopting father's brother.

Case 3 occurring about 1884 in the Bijapur District is spoken to by witnesses 159 and 75, who were personally present. Witness 159's wife belongs to the village of Bilgi. These persons are not rightly objected to as hearsay witnesses. I hold the case proved.

Case 4 depends solely on witness 159, who admits that he does not know whether the boy was an only son. The proof, therefore, fails.

Case 5 arose in 1857 in Navalgund, in what was then the State of Nargund. A faint objection was made that witness 160 **[479]** speaks from hearsay : and it was urged that the case is one of *dwyamushyayana*, being of a brother's grandson. The *factum* is clearly proved by the natural mother, witness 70, an eyewitness, Ex. 232, the Chief's sanction, Ex. 325, and the settlement, Ex. 324.

Case 6 I hold not to be proved to be one of an only son, for the reasons given by my learned colleague.

Case 7 already discussed (1) as one of a brother's son occurred about 1878. The *factum* is not disputed.

Case 8 is from the Bijapur District and dated 1888. The *factum* is not seriously disputed and the whole transaction is proved by the natural father and adopting mother, witnesses 161 and 73, by two persons present, witnesses 160 and 166, and by a registered deed, Ex. 327. All this evidence shows clearly that the parties believed the act was sanctioned by their law. The natural father says the adopting family was that of his cousin. It illustrates the pertinacity with which this case has been fought, to notice that the appellants object that they may have been brothers. This unfounded contention is based upon the ambiguous expression "*annatammandaru*", literally "elder and younger brethren" used by witness 73. The Canarese word is as ambiguous as our word "brethren", and does not exclude cousins. They were separate in interest.

Case 9 is clearly proved by the two fathers, witnesses 245 and 166 and the document, Ex. 332 B. It occurred in 1885, in the Navalgund Taluka between two separated brothers. The parties have had a dispute, but they have up till now treated the adoption as legal and binding.

Case 10 occurring about 1867 near Badami we have found not to be a case of two brothers. The son and natural father, witnesses 168 and 232,

(1) 19 B. 470.

prove that the former is an only son. The adoption has been distinctly recognized by Government in Ex. 352.

Case 11 we exclude, as the parties are not Lingayets. In case 12 the *factum* is admitted. It is a proved instance of 1886 from the Bankapur Taluka. In case 13 the instance is, in our opinion, proved by the eye-witnesses, 165 and 239, as [480] occurring in 1874 in presence of hundreds of people near Lakshmeshwar in the principality of the Chief of Miraj. The fact in both cases 13 and 14 was admitted by Mr. Scott. Case 14 also comes from the Lakshmeshwar region. We agree that the evidence, witnesses 70, 165 and 239, prove it. The date is 1884. The registered document, Ex. 323 of 1885, which recites the transaction and its reasons, corroborates the adopting woman's statement that the adoption was believed to be legal and proper.

Cases 15 and 16 come from Badami, and are dated about 1878 and 1885. The evidence is slight. But I concur with Mr. Justice Ranade in his reasons for holding case 15 proved and rejecting case 16 As to case 17, dated 1867, from Bankapur I do not think it proved, as the only evidence, witness 169, says it occurred in his third or fifth year: and he does not allege his own direct knowledge of his only sonship. Case 18 of 1849 from Lakshmeshwar I have already excluded, there being no testimony that the Kurubas, parties thereto, were Lingayets. The only witness, No. 171, styles himself Hindu. Moreover, I think his statements do not prove the *factum*.

In case 19, dated 1873, from Bankapur the *factum* is fully proved by witnesses 230 and 231, the natural father and son. The latter was a daughter's only son. It is quite clear from the depositions and the solemn document of adoption, Ex. 327, that the parties acted, unconscious of any want of validity.

Case 20 occurred in the Kalghatgi Taluka under Dharwar in 1880 and is clearly proved to be the solemn adoption of a daughter's only son. The *factum* is not disputed. The adopted son, witness 233, says there was no dispute: and as a patil's watan was involved, there would have been objection taken, if any remote relation had thought the act improper. This witness and the adoption deed, Ex. 238, show clearly that the parties were conscious of nothing improper, but acted as if the adoption were in every respect properly performed. The document is fully attested by four witnesses and was registered. It shows that the widow acted under her husband's direction, and it bases the act on religion and custom, the two great forces [481] which dominate the rural society with its love of tradition. Other similar documents filed in this case show the same things.

We agree in holding that case 21 is not proved by witness 233's somewhat vague statements.

Case 22, dated 1875, comes from the same taluka as case 20, and the same remarks apply. Here the property, especially the inam fields, is considerable. See witness 244, the adopted son, and the deed, Ex. 331, drawn up ten years after. No serious objection to this case is raised by appellant. The adopted son inherited in both families.

Case 23 we reject, witness 240 speaking from hearsay. Case 24 from the Dharwar Taluka in 1837 is clearly proved by witness 241 and the documents, Exs. 242, 243, 329K and 330 to be the adoption of an only son of the sister of the adopting mother. There seems to have been no dispute; and the revenue authorities have recognized it.

Case 25 we have excluded, the Raddi family not being Lingayet.

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Cases 26 and 27 come from Navalgund and belong to the years 1859 and 1887. The one is an adoption of a daughter's son: the other of a separated brother's grandson. Both are proved by the testimony of witness 246, the adopted son in case 26, and related to the family in case 27.

I concur with Mr. Justice Ranade in holding case 28 from the Gadag Taluka to be proved by witness 70 and the revenue order, Ex. 351. It is of the year 1880 and is important as occurring in a family holding a Deshpande right.

We have both given reasons for admitting case 29 which occurred in the Sangli territory in 1887. We have excluded cases 30 to 34, which relate to Brahmin families as irrelevant.

In case 35 and some others we have no finding by the Court below. I concur in Mr. Justice Ranade's reasons for holding that this instance of only sonship is not proved.

Case 36 we exclude as relating to Brahmins. In cases 37 and 38 the testimony and documents being full of conflictions we hold only sonship not proved. Also in case 39, where the son [482] of the adopted person says the latter had brothers at the time. For similar reasons I concur in rejecting case 40.

Case 41 I would exclude on the ground that the Kuruba family in which the case is alleged is not shown to be Lingayet. My colleague excludes it for failure of proof of only sonship.

On case 42 I have already given opinion that the Kuruba family is not Lingayet. I entirely agree with Ranade, J., in holding the *factum* and the only sonship proved. The opposite contention of the appellants is vain and unfounded. The adoption, which was about 1878, in the Navalgund Taluka involved a right to police service and to a share in the police inam lands. Exhibit 443 shows that Bhima, the adopted son, said distinctly to the revenue officers that he was the only son of his natural father Basappa. A careful inquiry was made before Bhima was accepted to fill his adopting father's place. The other heirs must have known of these public proceedings, but there was no dispute. This is a clear instance of a brother's only son being adopted. The evidence does not show whether the brothers were joint or not.

We have excluded case 43 as one of Brahmins. I have given my reasons for excluding the Kuruba case 44 from Navalgund as not one of Lingayets. My learned colleague admits it as proved.

I agree with him in holding case 45 of 1864 from Navalgund to be clearly proved. The adopted son has not inherited in his natural family. The two fathers were cousins. As temple inam lands were involved, and the relations appeared at the inquiry, the recognition by the Collector of this adoption, of which the legality was not disputed in the family, makes this case important evidence of the custom.

Case 46 is alleged to have occurred in a patelki family in the Ron Taluka about 1834. Concurring in my colleague's remarks I hold this case proved. It is that of a nephew adopted by a separated uncle. The nephew was often described as son of the natural father. This fact is partly explained by his inheriting in both families.

[483] We have already given our reasons for excluding cases 47 to 51 as irrelevant.

The result of our consideration of the above cases is that we concur in finding that the existence of the alleged custom is clearly proved by the evidence. The instances range from 1814 till the present time, and belong

to the Bijapur and Dharwar Districts, between the Bagevadi and the Hangal talukas. If the adoptions were considered invalid, it is incredible that no disputes should have been raised, either in the British districts or the Native States, especially where the right to service or watan or inam was in question. Many of the cases were publicly conducted, in the kacheri as well as the home: there is documentary evidence of them in registered deeds and public records. There is no sign of secrecy or indication that the transactions were improper or unusual. Like the adoption in the present suit, they must have been matter of great notoriety. If we turn to the remarks of the Judge below on the present adoption, the abundant evidence shows that it was treated as right and proper; the defendants concurred in it, and some of the witnesses who depose against the custom are found to have witnessed the deeds, and nobody protested against the adoption. I think it may, therefore, be inferred that the objection to validity is an after thought; and I find that the parties acted at the time with a consciousness that the act was valid by custom. Following the decisions already noted, we must give it our judicial recognition. "Thus by frequent iteration and multiplication of the act, a custom constituted, and being used for a time obtains the force of law"—*Case of Tanistry* (1).

Turning now to other questions on which we must give judgment, I concur with the Judge below and with my learned colleague, for the reasons he gives, in upholding the gift of house and lands by the deceased Shivangauda to his two daughters, the defendants Nos. 2 and 3, by Ex. 113. I do not think we can affirm, on the evidence, that either the deed of adoption, Ex. 112, was executed, or that the ceremony of adoption took place prior to the gift: and, therefore, I think we must treat the gift and adoption as substantially one transaction.

[484] We concur, for the reasons given by Ranade, J., with the Subordinate Judge in refusing to the widow, the defendant No. 1, the four ornaments and the sum of Rs. 1,128.

With regard to the claim of defendants Nos. 2, 3 and 5 to the residue of the moveable property and the endeavour to make out that the defendant Gangava did a large money-lending business of her own quite independently of her deceased father Shivangauda, I am of opinion, after careful examination of the evidence, that the Subordinate Judge, who examined the witnesses, is right in believing them to be false, and in his conclusions rejecting the defendants' claim. My reasons are substantially those of the lower Court, and I concur entirely in the reasons given by Ranade, J., on this part of the case. Both Courts are enabled to apply several tests to the conflicting evidence. It is to be noticed prominently that many of the defendants' witnesses on this claim are persons who professed complete ignorance of the practice of adopting only sons, although some of them were present at this particular adoption, which was performed with great publicity and without dispute. Moreover, these same people try to convince the Court that such adoptions never have occurred among Lingayets, by swearing to a religious reason, the Brahmin dogma about the delivery of the soul from hell by the begetting of a son.

Witness 282 even goes so far as to represent some unknown deceased Lingayet religious doctors preaching at Naregal some twenty years ago this dogma as a reason for objecting to these adoptions. This is as unlikely as a story would be that ministers of the Protestant Churches

(1) Sir J. Davy's Report, 32.

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were insisting on marriage being treated as a sacrament. This story about these abbots or pandits, if there is any truth in it, points to the fact that the Naregal people were aware years ago of the custom of adopting only sons, and possibly people of the other religious community may have expounded the Brahmanical view. There is no statement that the three pandits, who, according to witness 293, met above thirty years ago in the Nizam's territory and declared that the custom was invalid, were Lingayets; and the authorities they are said to have quoted, Smriti and Sruti, indicate that they may have been Brahmins interpreting mere texts of Hindu law, possibly those [485] very texts on which the great dispute has turned, *i.e.*, whether at Hindu law the adoption of an only son is valid. No living priest of importance nor learned man has been called to prove these adoptions to be wrong or contrary to religion or practice: there is no evidence of any such adoption being followed by caste meeting or penance or ecclesiastical censure. The family guru, witness 255, says he does not know the Shastras: and although his tongue declares these adoptions to be wrong, his acts speak differently, as he took a part without remonstrance in the adoption under our consideration in this case.

The Court now confirms the decree of the Subordinate Judge of the First Class in all particulars; but adds to it a declaration that the plaintiff-respondent takes the property awarded to him subject to the obligation to provide a sufficient maintenance for the first defendant Basava; the costs of the cross-objections to be paid by the respondent; and all the other costs of the appeal by the appellants.

Decree confirmed.

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19 B. 485.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

H. A. ACWORTH, MUNICIPAL COMMISSIONER OF BOMBAY (*Original Defendant*), *Appellant v.* SHAVAKSHA DHUNJIBHAI (*Original Plaintiff*), *Respondent.** [10th and 11th December, 1894.]

Malicious prosecution—Procuring wrongful execution of a warrant of arrest—Reasonable and probable cause.

The plaintiff sued the Municipal Commissioner of Bombay for damages, alleging that the Commissioner had maliciously and without reasonable and probable cause procured a warrant to be issued against him on 24th March, 1892, and subsequently procured that warrant to be executed at a time when its force was spent, and under circumstances when it ought not to have been executed. From the evidence it appeared that on the 21st December, 1891, a notice was served on the plaintiff under s. 232 of the City of Bombay Municipal Act (III of 1888) requiring him to do certain drainage work upon premises belonging to him. The work not having been done, a summons was issued against him on the 11th February, 1892, requiring him to appear before the [486] Presidency Magistrate to answer a charge of not having complied with the above notice. The summons was returnable on the 25th February, 1892, and on that day the plaintiff appeared, but the hearing was postponed until the 24th March, 1892. On the 27th February, 1892, the plaintiff wrote to the defendant objecting to the nature of the work he was required to do, and adding "after this explanation I will leave the matter in the hands of the Drainage Department to do the work, and will pay the expenses." In reply to this letter the Executive Engineer on the 21st March

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informed the plaintiff that he must appear in Court on the 24th March, and also requested him to "take the work in hand at once and complete it within the time now allowed." On the 22nd March, 1892, the plaintiff replied by letter stating that he did not understand the work, and asking the Municipality to get it done, he offering to pay the expense. The letter ended as follows :—"I do not see any reason now to attend in Police Court on 24th instant, as I am ready and willing to do the work." The plaintiff did not attend the Court on the 24th March. On that same day (the 24th) a letter signed by the Municipal Commissioner was delivered to the plaintiff, dated the 23rd March, informing him that a "fresh summons" had been issued against him for not complying with the requirements of the notice served on him. The Courts held that the non-appearance of the plaintiff on the 24th March was not caused by the receipt of this letter. On the 24th *idem*, in consequence of the non-appearance of the plaintiff in obedience to the summons, a warrant of arrest, was issued against him. The date originally inserted in the warrant for the plaintiff's appearance before the Magistrate was the 7th April, but this date was subsequently altered to the 2nd June. There was no evidence as to how or by whom this alteration was made. The plaintiff having heard on the 25th March of the issue of the warrant appeared next day (the 26th) before the Magistrate and surrendered, showing to the Magistrate the defendant's letter of the 23rd March and explaining why he had not attended on the 24th. A note was made of his surrender and he was told by the Magistrate to appear on the 7th April. The plaintiff, however, did not get the warrant cancelled. He stated that at the office of the Presidency Magistrate's Court he was informed that the warrant was with the Municipality, and that he then went away and did nothing more. On the 7th April the Municipal Engineer went to the plaintiff's premises and pointed out the work that was to be done. He (the plaintiff alleged) told the plaintiff that he need not attend the Police Court that day, as he would get the hearing of the summons postponed for a fortnight. The plaintiff then instructed a plumber to do the requisite work, which was completed (as plaintiff alleged) on the 26th April and was passed and approved by the municipal authorities. The plaintiff swore that he attended the Police Court on the 21st April, but apparently did not bring his appearance to the notice of the Magistrate, as the municipal officers had left the Court before he arrived. He further stated that he attended again on the 28th April, but was told by a municipal inspector that he might go away, as the work was done. Another hearing was apparently fixed on the 19th May, but the case was again adjourned to the 2nd June. On the 31st May the plaintiff was arrested in execution of the warrant of the 24th March. The evidence was that on that morning, at 8 o'clock, a municipal inspector (Hormasji Cursetji) who was not called as a witness at the hearing, accompanied by a police sepoy, went to the plaintiff's house and pointed out the plaintiff to the sepoy, who arrested him and took him in custody to the police station and subsequently before [487] the Magistrate. He was released on depositing Rs. 25 as security for appearing when required. On the 16th June the plaintiff again appeared in the Police Court when the summons was withdrawn. The plaintiff claimed Rs. 10,000 as damages for malicious prosecution, wrongful arrest and detention in custody, and false imprisonment.

The defendant denied that he had applied for or obtained the warrant for the plaintiff's arrest or that he or his servants had anything to do with the arrest or was responsible for it, save that a sub-inspector who knew nothing of the warrant had pointed out the plaintiff to a police officer at the latter's request. He further denied that the proceedings were malicious and without reasonable and probable cause. The lower Court (Starling, J.) held that the defendant was liable for the wrongful execution of the warrant against the plaintiff, and awarded the latter Rs. 500. On appeal,

Held, affirming the decree of the lower Court, that the defendant was liable. On the 28th April at any rate the warrant in question was a spent warrant and could not be properly executed, as it was, on the 31st May. As the warrant was issued by the Magistrate of his own accord, the defendant would not be liable for its execution (as shown by the case of *West* v. *Smallwood* (1)) unless he or his subordinates took an active part in executing it. The mere circumstance that the plaintiff was pointed out to the police officer who executed the warrant by a municipal inspector might not of itself amount to taking an active part. But there were special circumstances which should be taken into consideration in conjunction with it. The length of time which elapsed before the warrant was executed, and the alteration of the date in the direction contained in the warrant

(1) 3 M. and W. 418.

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as to taking bail, not explained in any way and which could not have been made by the police, pointed to the warrant having been, if not in the actual keeping of the municipal authorities at any rate under their control, and to the police having been set in motion by them. Under these circumstances it was incumbent on the defendant to give rebutting evidence, and more especially to call the municipal inspector to explain the circumstances under which he pointed out the plaintiff to the police officer who executed the warrant.

APPEAL from Starling, J.

Suit to recover Rs. 10,000 as damages for the improper issue of a warrant against the plaintiff and for malicious arrest.

In December, 1891, the plaintiff in Bombay was served with a notice by the defendant under s. 232 of the City of Bombay Municipal Act, III of 1888, to do certain drainage work upon premises belonging to him in Bombay. The work not being done, a summons under s. 471 of the Act was issued against him in February, 1892, requiring him to appear before the Presidency Magistrate to answer a charge of not having drained his premises in compliance with the said notice. The summons was made returnable on the 25th February, 1892, and on that day the [488] plaintiff appeared before the Magistrate when the hearing was postponed until the 24th March, 1892.

On the 27th February, 1892, the defendant wrote the following letter to the plaintiff :—

"DEAR SIR,—I beg to bring to your information and at the same time protest that instead of decrease the nuisance, the Drainage Department will increase every day complaint under the following circumstances.

"To my house there is a pucka pavement gully and a cesspool well built according to the notice served on me under s. 257, No. 1016 which is working up to this time without any hindrance and it (sic.) also open to the garden. This will be certified by the inspector of the Health Department. Now I am summoned, No. 345, before Magistrate not complying to put gully trap, &c., I, therefore, inform you that I am ready to do the work, but mind there will be an often hindrance of the free pass of the water of the *nani* to the cesspool, and there will be an often complaint.

"Please, therefore, be good enough to order not to disturb the present system. At present *nani* water runs into the cesspool by a good slope, and not a drop stops into the chunam and cement gutter which they wanted to shut up and choked often ; at present water runs right into the cesspool, which watter every day removes by cart.

"All this place often visited by an inspector whose name I think Mr. Dosonere, who will inform you about it.

"After this explanation if you insist upon me I will leave the matter into the hands of the Drainage Department to do the work and will pay the expenses and at the same time they will be responsible for the future cleanlinees and nuisance."

In reply to that letter the plaintiff received the following letter from the defendant, dated the 21st March, 1892 :—

"SIR,—Referring to your letter dated the 27th February, to the address of the Municipal Commissioner, I have the honour to inform you that the case in the Magistrate's Court, Girgaum, in respect of the drainage of your premises in Gowalia Tank Road, has been postponed to the 24th March, 1892, on which day it will be necessary for you to appear.

"I have to request you that you will take the work in hand at once and satisfactorily complete it within the time now allowed."

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On the 22nd March the plaintiff wrote as follows to the Municipal Executive Engineer :—

"22*nd March*, 1892.

"DEAR SIR,—In reply to your No. 8119 of 1892, I beg to inform you that I don't understand what to have it done, and at the same time to avoid the mistake I wish you will, kindly appoint one man to do the work to your satisfaction, and I will pay the expenses.

"I use to attend my business from 7 A. M. till 6 P. M., so I cannot show him the work what you wanted to have it; so please on receipt of this letter send one licensed [489] plumber with instruction, as well as, please, inform him what money will be required to purchase the pipes, &c., which I will pay him.

"I myself don't understand, so please get it done by the man of your satisfaction.

"I don't see any reason now to attend in Police Court on 24th instant as I am ready and willing to do the work."

On the 24th March the plaintiff received the following letter dated the 23rd March and purporting to be also a reply to his letter of the 27th February :—

"No. 29922 of 1892.

"In answer to his letter dated 27th ultimo, Mr. Shavaksha Dhunjibhai is referred to this office No. 17710 of 31st October last, and is informed that a fresh summons has been issued against him for not complying with requirements of the notice served on him."

The plaint stated that in consequence of this letter he did not attend the Police Court on the 24th March as he expected to be served with another summons; but on the 25th he read in a newspaper that a warrant had been applied for and obtained against him for not having attended on the 24th.

He accordingly went to the Police Court and surrendered himself, showing to the Magistrate the letter of the 23rd March, and explaining why he had not attended on the 24th. A note was made of his surrender and he was told by the Magistrate to appear on the 7th April.

On the 7th April, one of the municipal engineers visited the plaintiff's premises and pointed out the work that was to be done.

He (the plaintiff alleged) told the plaintiff that the hearing of the summons would be postponed for a fortnight and that he need not attend the Police Court on that day (*i.e.*, the 7th April.)

The plaintiff attended the Police Court on the 21st April and again on the 28th April. On the latter day one of the officers of the Drainage Department met him at the Police Court and told him he might go away, giving him to understand that the matter had been settled. The work on the plaintiff's premises was completed on the 26th April and was passed and approved by the municipal authorities.

The plaint further stated that the plaintiff heard nothing more about the matter until the morning of the 31st May when he was arrested by a police constable who was attended by one of [490] the municipal inspectors, in execution of the warrant of the 24th March to which, as above stated, the plaintiff had surrendered.

The warrant when signed by the Presidency Magistrate was in the following form :—

"To all Constables and other Her Majesty's Officers of the Peace for the town of Bombay and the places subordinate thereto.

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"Whereas Shavaksha Dhunjibhai at Gowalia Tank Road of Bombay stands charged with the offence of breach of Municipal Act, s. 232, you are hereby directed to arrest the said Shavaksha Dhunjibhai and to produce him at the Second Presidency Magistrate's Court at Bombay before such Presidency Magistrate as may then be present.

"If the said Shavaksha Dhunjibhai shall give bail himself in the sum of Rs. 25, with one surety in the sum of Rs. 25, to attend before me on 7th April, 1892, he may be released."

When executed the date 7th April had been erased with a pencil and 2nd June written above it.

The plaintiff was taken in custody to the police station and was subsequently brought before the Magistrate. He was then released on depositing Rs. 25 as security for appearing when required.

On the 8th June, 1892, the plaintiff received the following letter from the Executive Engineer of the Municipality :—

"SIR,—In continuation of this office No. D. $\frac{299}{16\text{-}4\text{-}92}$ I have the honour to inform you that the case in the Magistrate's Court, Girgaum, in respect of the drainage of your premises in Gowalia Tank Road, has been postponed to the 16th June, 1892, on which day it will be necessary for you to appear.

"I have to request that you will take the work in hand at once and satisfactorily complete it within the time now allowed."

To that letter the plaintiff replied as follows :—

"*Bombay, 9th June*, 1892.

"JAMES W. SMITH, ESQUIRE,
Municipality.

"SIR,—In reply to your letter dated 8th instant, I beg to inform you that according to your department's instruction the disputed work has been done by the plumber since seven or eight days ago, and one of your inspectors, I am told by my man with plumber, been in my absence to see the work on the 7th instant.

"You will please note that as I am ignorant of the work. So please see again whether the plumber have worked to your satisfaction or not; if not, then insist upon him to do more work as the plumber is bound to do the work to your satisfaction.

"**[491]** I am quite at a loss to understand as per your letter No. D.—299 of 16th instant (April) which was shown to the plumber who informed me that such work has been done since 26th April, except the present disputed gully trap which was before disallowed, and now you wanted to have it, so the plumber has put it since many days.

"You write to take the work in hand while the work done many days ago.

"Please pay a visit to the work before the 16th June."

On the 16th June, 1892, the plaintiff again appeared in the Police Court when the summons was withdrawn.

The plaintiff claimed Rs. 10,000 as damages "for malicious prosecution, wrongful arrest and detention in custody, and false imprisonment."

The defendant in his written statement (*inter alia*) denied that he had applied for or obtained the warrant for the plaintiff's arrest. He stated that on the 24th March the case was called on in the Police Court and that on plaintiff's non-appearance the Magistrate had issued the warrant. The written statement further stated as follows :—

"8. The defendant says that neither he nor any of the municipal authorities caused or had anything to do with the arrest of the plaintiff on

the 31st May, 1892, save and except that a sub-inspector who knew nothing about the issue of the warrant pointed out to the police officer at his request the plaintiff as the person who appeared to be named in a warrant which the police officer had with him for service. The defendant denies that he was in any way responsible for the said arrest or what followed thereupon.

"9. The defendant denies that the institution of the said proceedings against the plaintiff and the continuance thereof were malicious and without reasonable and probable cause, or that the said arrest and detention in custody of the plaintiff was improper, wrongful and illegal as alleged."

The case was heard by Starling, J.

Russell (with *Lang*, Advocate General), for the plaintiff.—He cited Addison on Torts (6th Ed.), p. 150; *Churchill* v. *Siggers* (1); *Johnson* v. *Emerson* (2); *Morrell* v. *Martin* (3); *West* v. *Smallwood* (4); Starling's Criminal Law (5th Ed.), p. 257.

Macpherson and *Inverarity* for the defendant.—They cited Pollock on Torts (3rd Ed.), p. 204; *Huffer* v. *Allen* (5); *Bank of* [492] *New South Wales* v. *Owston* (6); *Metropolitan Bank* v. *Pooley* (7); *Spencer* v. *Jacob* (8), *Gibson* v. *Veasey* (9); Addison on Torts (6th Ed.), p. 160.

STARLING, J.— This suit is filed by the plaintiff against the defendant, the Municipal Commissioner, to recover damages from him for the improper issue of a warrant against the plaintiff and for his improper arrest under that warrant. The facts upon which the plaintiff bases his case are fully set out in the plaint, but the plaintiff nowhere distinctly sets out the legal aspect of his claim. I, however, gather from para. 14 of the plaint that he charges that the defendant, maliciously and without reasonable and probable cause, procured a warrant to be issued against him on the 24th March, 1892, and that, subsequently, he maliciously and without reasonable and probable cause procured that warrant to be executed at a time when its force was spent and under circumstances under which it ought not to have been executed, and on this view of the case I shall found my judgment.

The defendant in his written statement sets out his view of the facts, and denies that the plaintiff has sustained any damage, and that he is in law liable for what has happened. The plaintiff is a man who, in the opinion of the municipal officers, has given "endless trouble" to them by neglecting to put the drainage into his cesspools into a proper sanitary condition; and I think that their opinion is a correct one, and that the conduct of the plaintiff before the 24th March, 1892, is certainly not such as to enlist the sympathy of the Court with him. During the whole of the latter half of 1891 correspondence was going on between the plaintiff and the Health Department about the insanitary condition of the plaintiff's drainage, but nothing whatever resulted therefrom, and on the 21st December, 1891, a notice was served upon him under s. 232 of Bombay Act III of 1888 requiring him to do certain works. That notice was not complied with, and on the 11th February, 1892, a summons, (which, however, bears no date) was issued against the plaintiff for not having drained his premises in compliance with the beforementioned notice and requiring him to attend at the Girgaum Police Court on the 25th February,

(1) 8 El. & Bl. 929 (937). (2) L. R. 6 Ex. 373. (3) 3 M. & G. 595.
(4) 8 M. & W. 418. (5) L. R. 2 Ex 15. (6) 4 Ap. Ca. 270.
(7) 10 Ap. Ca. 210. (8) 1 M. & M. 160. (9) 15 L.T. (N.S.) 586.

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1892. [493] The plaintiff appeared on that day, and the hearing of the case was postponed from time to time until the 24th March, 1892. On the 24th March the plaintiff was not present, and the Magistrate, Mr. Hamilton, after taking evidence of the service of the summons, and, I presume, also taking judicial notice of the case having been called on before him, and the plaintiff having been ordered to appear on the days to which it was adjourned, and especially on the 24th March, all of which was necessary for his subsequent action, issued a warrant for the arrest of the plaintiff for non-appearance on that day. That warrant, in my opinion, is on the face of it bad. It simply recites that the plaintiff was charged with the offence of breach of s. 232 of the Municipal Act and orders his arrest. Now the Magistrate had no authority to issue a warrant against any one for non-compliance with a notice issued under that section, for by s. 471 of the same Act a neglect to comply with the provisions of s. 232 is only punishable by fine. He could only issue a warrant when he has reason to believe that the defendant has absconded, or will not obey the summons, or when the defendant fails to appear to the summons, and service of the summons in due time for him to appear is proved to the Magistrate (s 90 of the Criminal Procedure Code of 1882). Therefore, on the face of a warrant in a summons case there should appear a statement of the offence charged, that a summons was issued, that its service was duly proved, and that the defendant did not appear—or, as in the present case, that the defendant appeared on a certain day; that he was then ordered to appear on a certain other day, and that on the latter day he did not appear, otherwise the warrant on the face of it would appear to have been issued without jurisdiction. The form in use in England is given in Burn's Justice of the Peace, "Warrant of Apprehension," Vol. V, p. 1117. No. VII of the Forms of Process annexed to the Criminal Procedure Code is for a warrant for the arrest of a witness, and that shows how such a document should be drawn up in a case where a summons is ordinarily the proper means of compelling attendance.

There is no form given for a warrant for the arrest of an accused after non-obedience to a summons, but a little consideration of form No. II (Warrant of Arrest) in connection with No. VII [494] will show that what I have stated above ought to have appeared in the warrant in this case. The form is as follows: "Whereas ———of———stands charged with the offence of (here state the offence) you are hereby directed to arrest," &c. Now it is an elementary rule of law that the offence stated must be one for which the Magistrate can issue a warrant; the offence of contravening a notice under s. 232 of the Municipal Act is not such an offence; but the offence of having been summoned to answer a contravention of such a notice and not appearing in answer to such summons is such an offence. Consequently, the statement of the issue of a summons and non-obedience thereto must appear on the warrant. This objection may appear to be a technical one; but in my opinion the omission to state the real cause for arrest arises from a want of appreciation of what that cause is, and is probably a cause of the subsequent irregularities which I shall have to notice. The municipal officers have apparently not looked upon these warrants as merely instruments to compel the accused to attend at the next hearing, but as means of pressure by which the accused could be brought up at any time if he did not obey the notice served upon him; for they are not executed forthwith, or necessarily in time for the next hearing, but apparently are left in the hands of a police sepoy to be executed when he has time, or when he sees fit to execute them, or

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when some municipal servant points out the accused; whereas they ought to be executed at once, and the accused kept in custody or held to bail.

Then the question arises, how was it that the plaintiff was absent on the 24th March? He says that he did not attend in consequence of a letter from the defendant dated the 23rd March (Ex. G) in these terms (His Lordship read the letter above set forth and continued :—) Now that letter does not say that the plaintiff need not attend on the 24th March, though I am inclined to think that he might infer that as a fresh summons had been issued against him, the former one was cancelled, and that he need not attend till the new summons was served upon him. But in order that this letter should have any effect upon his mind, it was necessary that he should have received it before 1 P. M. on the 24th. He says he received it at his office in the Fort in the forenoon of the 24th, and in that he is corroborated [495] by his son. I cannot say that the evidence on behalf of the defendant satisfies me that I ought not to accept the story of the plaintiff and his son. The date 24-3-1892, 1-45 P. M. or else 7-45 P. M. (I really cannot say which it is) attached to the initials acknowledging the receipt of Ex. G. would be a very important piece of evidence if it was in the handwriting of the plaintiff's son. The plaintiff and his son, however, swear it is not. To me it appears to be in different handwriting to the initials and written with a different pencil. Byramji Dadabhai says these figures were there on the 17th June, 1892, when he made a pencil memorandum in answer to the defendant's first enquiry endorsed on Ex. Q; but if they were there then, I cannot conceive why, in answer to the defendant's enquiry when Ex. G was delivered, Byramji did not reply "on the 24th March, 1892, at 1-45 P. M."; whereas he only gives the date, and the defendant has to make another enquiry about the hour. If the case for the defendant had been that on the 16th June enquiries were made, and that the date and hour were then ascertained and noted against the initials as the result of the enquiry, I should have given considerable weight to those figures; but as that is not the case, they did not impress me at all. I cannot give any weight to the evidence of the peon Ganpet Gopal, who professes to remember all the details of the round he took when he delivered this particular letter, whereas he cannot remember any other round; and a comparison of the evidence of this witness with that of Byramji Dadabhai leaves me with the feeling that on this point I cannot give much weight to their evidence. Consequently, if I had definitely to determine this point, I think I should have to accept the evidence of the plaintiff and his son. I should also have to go into the circumstances under which this letter was written and sent. It is alleged that it was written under some misapprehension, but no evidence has been given as to how the misapprehension arose or who was liable for this mistake, except that Mr. James says he had nothing to do with drafting or sending it, though the draft is one which would issue from his office. I do not, however, think that it was this letter which determined the plaintiff's action in not going to the Police Court on the 24th March, though if he did receive it on the forenoon [496] of that day it might possibly have confirmed him in his previously formed intention. The Acting Executive Engineer by his letter of 21st March had told the plaintiff to appear on the 24th. In answer to that the plaintiff replied on the 22nd saying he did not know how to set about the business, and asking the Executive Engineer to send some plumber to put

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his drainage to right and that he would pay him. He then goes on, "I dont' see any reason now to attend in the Police Court on the 24th instant as I am ready and willing to do the work." Consequently, I am of opinion that on the 22nd the plaintiff had made up his mind that he need not attend on the 24th, and so did not attend. Under these circumstances I do not consider the defendant is responsible for the non-appearance of the plaintiff on that day. Then it appears from the evidence that on non-appearance of an accused the Magistrate issues a warrant as a matter of course on proof of service; and Mr. James swears he made no application for a warrant though he knew of its issue, as appears from a memorandum in his handwriting in Ex. I. Consequently, I am of opinion that the defendant is in no way responsible for the issue of the warrant; and he is not responsible for its defective form, as it was made out in the office of the Magistrate's Court without any intervention of the defendant's officers.

On the 26th March, the plaintiff, having heard of the issue of the warrant, went to the Magistrate at the Girgaum Police Court to surrender to the warrant, in order to avoid arrest. According to the plaintiff's account the Magistrate referred him to the office, and there he was informed that the warrant was] with the Municipality, and thereupon he went away and did nothing more. According to the evidence of Sitaram Dhakji the judicial clerk, the Magistrate would have sent him in to the office to see if a warrant had really been issued against him, and if so, he would have been referred to the officer in whose charge the warrant was. I think the latter account is more probable. Now, this does not seem to me to be a right mode of procedure. When the defendant surrenders to a warrant, it is the duty of the Magistrate to keep him in custody to answer the charge, or to hold him to bail, not to let him go again by sending him to search, perhaps all over Bombay, for the officer in charge of the warrant, and then be [497] arrested and brought in custody to the Court—the thing he wished to avoid. I do not suppose that the Magistrate would thus act if the charge were a serious one under the Penal Code, and this practice is probably only in regard to municipal warrants which do not seem to be of much account. But proceedings under any warrant should be conducted on the same principles whatever the offence charged against the accused, and if he surrenders before he is arrested, due provision ought to be made at once for his appearance at the proper time. The defendant is not responsible for the action of the Magistrate, and I think that the plaintiff has in part himself to thank for what happened afterwards, for any sensible man would have notified what he had done to the municipal officer and to the Police Superintendent in charge of the warrant, though, of course, he was not bound to do so.

The next day of hearing was on the 7th April, and for appearance on that day the plaintiff would have, under the order on the warrant to have given bail if he had been theretofore arrested; but on that day the matter was postponed till the 21st, when the plaintiff appeared, the warrant not having been executed. By the appearance of the plaintiff on that day without having been arrested, in my opinion the force of this warrant was spent, and he ought not to have been subsequently arrested for his default in appearance on the 24th March. If it was desired to arrest him afterwards it could only be as the result of subsequent non-appearance and on a fresh warrant. Mr. James, who was in charge of the case, knew from a memorandum on Ex. No. 1 that the warrant had not been executed, and in my opinion, he ought to have brought to the notice of the Magistrate that a warrant was out against the plaintiff and asked him to recall it and

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to have seen that the proper steps were taken for that purpose; for s. 75 of the Criminal Procedure Code (X of 1882) provides that every warrant shall remain in force until it is cancelled by the Court which issued it or is executed. Mr. James in his report to the defendant says that if the plaintiff had communicated with the Drainage Department after the 26th March, when he surrendered to the warrant, it would have been withdrawn as a matter of course. If so, I cannot understand why it was not withdrawn on the 21st April when the plaintiff appeared in Court. **[498]** I consider Mr. James' omission to withdraw the warrant on the 21st April a grave neglect of duty, probably arising from a want of knowledge of what the real meaning and end of the issue of such a warrant was; but as he was the officer in charge of these prosecutions it was his duty to have had the requisite knowledge. If the warrant had then been withdrawn, the necessity for this suit would never have arisen. Of course, the plaintiff knew the warrant was out against him, and might himself have asked to have it withdrawn, but an accused person may not know of the issue of a warrant, and consequently if the prosecuting officer does not do his duty, he would be helpless, and might be improperly arrested without opportunity of preventing it.

On the 28th April the plaintiff again attended at the Police Court, and the matter seems to have been adjourned. Then there seems to have been another hearing fixed for the 19th May, but of what happened then we have no account, though the municipal officers do not complain of the plaintiff not having been present then, and the case was adjourned till the 2nd June, at which time it would appear that the work which had to be done by the plaintiff was not completed to the satisfaction of the municipal officers, but the work seems to have been done all but some small matter which was considered necessary to complete it. On the 31st May the plaintiff was arrested. As to the reason why, no explanation was given; and whether the officer in charge of the warrant suddenly woke up to the consciousness of its being in his possession and got a municipal servant to point the plaintiff out, or whether one of Mr. James' subordinates thought the execution of the warrant would hasten the operations at the plaintiff's place, and so suggested that it should be executed, is left entirely to conjecture. If the latter were shown to be the case, that would be evidence of malice, for the use of a warrant or any other process for the arrest of a person for any indirect object is evidence of malice—*Melia* v *Neute* (1); *Tebbutt* v. *Holt* (2). All we know is that Mr. James says it was not executed by his orders, and from the evidence of the plaintiff that Hormasji Cursetji, a municipal inspector, who has not been called, accompanied by a police sepoy, went to the plaintiff's house about 8 A.M. **[499]** on the 31st May, and pointed the plaintiff out to the sepoy, who arrested him, the warrant seems then to have been in the possession of Hormasji. It also appears that when a police sepoy wants to have any one pointed out to him for the execution of a warrant, he goes to the Ward Office, and some one from the office is sent with him for that purpose. There certainly was a want of reasonable and probable cause for the execution of this warrant at the time it was executed; but the question is, whether the defendant is responsible for its execution? We have these facts proved—that Mr. James, the responsible officer in charge of the case against the plaintiff, did not take steps to have it recalled at a time when, in my opinion, he ought to have done so; he also took no steps to inform

(1) 3 F. & F. 757.

(2) 1 C. and K. 280.

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his office that it was not to be executed, in consequence of which one of his subordinates who, I think, was authorized to do so, pointed out the plaintiff to the police sepoy who arrested him. I do not think that the plaintiff could under the circumstances have brought responsibility home to the defendant by more direct evidence; while, on the other hand, it was open to the defendant to call the whole of the office responsible for this matter and show that the arrest was put in train in a way which did not render him liable for it. For instance, it might have been shown by Hormasji (if such was the case) that the police sepoy came to him of his own motion, and asked him to point out the plaintiff, and that, knowing the plaintiff, he did so as a matter of course; but not even Hormasji was called, though named by the plaintiff in his evidence, and in his letter of 4th June, 1892, (Ex. J) when he asked for an explanation from the defendant as to why he had been arrested. I think, therefore, that the defendant not having shown that this warrant was executed without the knowledge of any of the officers under him must be held responsible for its execution without reasonable and probable cause.

It still remains to determine whether it was also caused to be executed maliciously; for although malice may be presumed from want of reasonable and probable cause, it is not necessarily so to be presumed—*Mitchell* v. *Jenkins*(1). Malice is not merely a wrongful act done without just cause or execuse, but "a wrongful **[500]** act done *intentionally* without just cause or excuse"—*Johnson* v. *Emerson*(2). On the other hand, if what was done was a pure mistake on the part of those for whom the defendant is responsible, that would be no malice. See the summing up of Alderson, B., in *Heath* v. *Heape* (3), which was approved of by the Court in Banco; so, too, if the execution of the warrant was through carelessness—*Spencer* v. *Jacob* (4). There is, as I have said, no evidence to show that the arrest was through mistake or carelessness; consequently it is necessary to consider what is the effect of the omssion of Mr. James to see on the 21st April that the warrant was withdrawn. The case of *Tebbut* v. *Holt*(5), seems to me to be in point. There the defendants, as the attorney of one Eales, who had recovered judgment against the plaintiff, and one Frazer and a third person sued out two warrants of *Ca Sa*, one into London and the other into Surrey. On the former, Frazer was arrested, but was subsequently released by the defendant on his giving a promissory note signed by himself and another for the amount of the debt, and thereby the judgment was satisfied. A few days after the promissory note was given, the plaintiff was arrested in Surrey; and for this arrest he brought the suit. In summing up to the jury, Parke, B., made the following remarks:—"It appears here that the defendant, on the 9th September, took the promissory note of Frazer and another person, payable four months after date, for the amount of debt and costs. This note was a payment of the debt and costs, and was, in point of law, a satisfaction of the judgment as to all the three original defendants. And *prima facie*, it is to be considered the duty of Mr. Holt, the present defendant, to have given some directions to the Sheriff of Surrey not to proceed further against the present plaintiff on the writ which was in his hands; and it has been held that an omission by an attorney to do so is *prima facie* evidence of malice. But you must not find for the plaintiff unless you are satisfied that the defendant was actuated by

(1) 5 B. and Ad. 588. (2) L.R. 6 Ex. 373. (3) 1 H. and N. 479.
(4) 1 Mood and M. 180. (5) 1 C. and K. 280.

what in law is termed malice . . . Still by this *prima facie* evidence of malice, Mr. Holt is called upon to give some explanation, but he does not appear to give any that is very satisfactory. . . . If the defendant has not satisfactorily **[501]** explained the matter to you, by showing you some good reason, why he did not countermand this writ, I think, you ought to find for the plaintiff."

Now that case seems to me to be on all fours with the present. I have held that it was the duty of Mr. James to have withdrawn the warrant against the plaintiff on the 21st April at the latest, but he did not do so, and the consequence was that the plaintiff was wrongfully arrested. The defendant has given no evidence to show why that warrant was not withdrawn or why no notice was given to the office not to point out the plaintiff, and I consider that I as a jury am thereupon entitled to find that there was malice in law.

There is, however, another fact which I discovered on an examination of the warrant itself. The warrant was on the face of it intended to have been executed before the 7th April, for in the direction at the foot as to taking bail, it is stated that the bail to be taken was for the plaintiff's attendance on the 7th April. The words and figures "7th April" have been run through with a pen, and over them "2nd June" has been written. The words "on the 7th April, 1892," seem to have been inserted at the time the warrant was originally issued, and appear to be in the same handwriting as the rest of the writing in the warrant. The words "2nd June" are in a different handwriting and are not verified by the initials or signature of the Magistrate, and as no mention is made in the record of the case as to any renewal of the warrant, I must come to the conclusion that the Magistrate did not authorize the alteration. The hearing before the 2nd June was on the 19th May, and there was no evidence given that the defendant was in default through non-authorized non-appearance on that day; consequently there would have been no ground on that day on which the Magistrate could have issued a fresh warrant or authorized the alteration of the return day of the old one. The date in the warrant must have been altered on or after the 19th May, because it would be on that day that the hearing for the 2nd June would be fixed. The police authorities could not have altered it on their own motion, because they are not in charge of municipal cases and, therefore, would not, except by the merest accident, know to what day the **[502]** hearing of a particular case was adjourned. Consequently, if the police altered it, it must have been from information given them by some one connected with the Municipality; but I do not think the police would thus tamper with a warrant, for such an action is a very serious one. and to my mind comes somewhat near to forgery. I must, therefore, come to the conclusion that it was altered by some one connected with the Drainage Department, and if I were sitting on a jury I should feel myself justified, legally and morally, in coming to the conclusion that the officers of the Department having got tired of the plaintiff's dilatoriness thought it advisable to put pressure on him by causing him to be arrested, and some one, in order to enable the warrant to be executed and bail to be given for the next day of hearing, altered the 7th April into the 2nd June. The want of any explanation as to why the warrant was executed is, as I have shown, sufficient to enable me to find malice, and this episode of the alteration of the date on the warrant shows a probable reason (I do not say known to the defendant or his solicitors) why no explanation on that point was forthcoming.

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I must, therefore, find that the warrant was on the 31st May executed maliciously and without reasonable and probable cause under circumstances which render the defendant liable to the plaintiff in this action. If the inference drawn by me as to the reason of the execution of the warrant was proved by direct evidence, I should give the plaintiff very much heavier damages than I am going to award him, for it is intolerable that process restraining the liberty of the subject should be used for any other purpose than that for which it is directly intended, and where restraining process has been used for indirect objects very exemplary damages should be given. Under all the circumstances of the case I pass a decree for the plaintiff for Rs. 500 and costs.

The defendant appealed

Macpherson and *Scott*, for the appellant (defendant).—From the evidence it appears that the plaintiff's arrest was effected with the assistance of one of the municipal servants who pointed him out to the police. That was not within the scope of his employment, and the defendant is, therefore, not liable for **[503]** the arrest. The plaintiff must show malice; Pollock on Torts (3rd Ed.), p. 204; Addison on Torts (6th Ed.) 148; *Hope* v. *Evered* (1) The defendant had nothing to do with the issue of the warrant of arrest. It was issued because the plaintiff did not appear upon the summons. They cited *Bank of New South Wales* v. *Owston*(2); *Heath* v. *Heape* (3); *Tebbut* v. *Holt* (4).

Russell (with *Lang*, Advocate-General) for the respondent (plaintiff).—They cited *West* v. *Smallwood* (5); *Kelly* v. *Mid. G. W. Rail Co.* (6) *Heaven* v. *Pender* (7); *Johnson* v. *Emerson* (8) *Mitchell* v. *Jenkins* (9).

JUDGMENT.

SARGENT, C. J.—This is an appeal from the decree of the Divisional Court awarding to the plaintiff Rs. 500 as damages for the improper issue of a warrant on the 24th March, 1892, and for the improper arrest of the plaintiff under that warrant on the 31st May, 1892.

The main facts of the case are not disputed. After a protracted correspondence between the Health Department of the Municipality and the plaintiff with respect to the state of his drains, a notice was served on the plaintiff on 21st December, 1891, under s. 232 of Bombay Act III of 1888 requesting him to do certain work. That work not having been done, a summons was issued against him on the 11th February, 1892, for not having complied with the notice and requiring him to attend at the Girgaum Police Court on the 25th February. The plaintiff appeared on that day and the hearing was adjourned to the 10th and then to the 24th March, when plaintiff failed to appear, and the Magistrate then issued the warrant for his arrest, of which the plaintiff complains.

It was scarcely contended that the Health Department was not justified in taking out the summons; but it was said that there was no necessity for going on with it after the plaintiff's letter of 27th February. But that letter was not a compliance with the notice, but an argumentative letter in which the plaintiff left the **[504]** work to be carried out by the Drainage Department at his expense, which the Municipality were not forced to accede to. It was urged, however, that the letter of 23rd March, written by the Municipal Commissioner in answer to plaintiff's letter of

(1) 17 Q. B.D. 338.
(2) 4 Ap. Ca. 270.
(3) 1 H. and N. 478.
(4) 1 C. and K. 280 (288).
(5) 3 M. and W. 418.
(6) 7 Ir. Ch. R. 8.
(7) 11 Q. B. D. 503.
(8) L.R. 6 Ex. 373.
(9) 5 B. and Ad. 588.

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27th February, was the cause of plaintiff's absence on 24th March. That letter no doubt speaks of "a fresh summons" having been issued against the plaintiff for not complying with the notice served on him; but as it was in answer to his letter of the 27th February complaining of a summons being issued, the plaintiff could scarcely have thought that it referred to any other than that summons, although it is termed a "fresh" summons. But in any case we entirely agree with the Divisional Court that having regard to plaintiff's statement in his letter of 22nd March to the Acting Executive Engineer "that he did not see any reason now to attend in the Police Court on 24th instant as he was ready and willing to do the work" it was not the letter of the 23rd March (assuming it to have been received on the forenoon of the 24th March) which determined the plaintiff's non-attendance at the Court. Lastly, there is no reason to doubt that Mr. James, the Drainage Engineer, who attended in Court on 24th March with reference to this summons, had no knowledge of its having been written, or that the use of the word "fresh" was other than a pure mistake.

With reference to the issuing of the warrant, the evidence of Mr. James as to what took place on the 24th March before the Magistrate read in conjunction with the statement of Sitaram Dhakji Wasliker, senior judicial clerk to the Magistrate, can leave no doubt that the warrant was not applied for by Mr. James, or any other official of the Municipality, but was issued by the Magistrate of his own accord for non-appearance, and after making the usual preliminary enquiry as to service of the summons and as to whether the work had been executed. It may be that the warrant so issued was technically invalid, as the Divisional Court pointed out, for not stating that it was on account of plaintiff's non-appearance on the 24th March that it was issued. But it was in the usual form according to the evidence of the senior judicial clerk, and in any case whatever defect there might be on the face of it, it was issued by the Magistrate of his own accord, [505] and the defendant would not be held responsible for its defects (*Hope* v. *Evered* (1).)

It was contended for the plaintiff that it was really issued for non-obedience of the notice and that, therefore, the Magistrate had no authority to issue it; but there is no evidence whatever to support such a view of what took place before the Magistrate; and even if there were, the defendant would not be liable for what was done by the Magistrate. It will be sufficient to refer to the remarks of the Judges in *West* v. *Smallwood*(2), where the Magistrate had issued a warrant without legal authority.

I now pass to the important questions in the case which arise out of the execution of the warrant by the arrest of the plaintiff on the 31st May, 1892. It appears that on the 26th March the plaintiff having heard of the warrant surrendered to it by presenting himself before the Magistrate, who told him to appear on the 7th April; that he did not, however, appear on that day, as Mr. Bragg, of the Drainage Department, told him that the hearing of the summons had been postponed to the 21st April. On the 21st April the plaintiff appeared in the Court, but found that the hearing had been adjourned to the 28th April. He appeared on the 28th when Mr. Bragg gave him to understand, as the plaintiff says, that the matter had been settled. From that time till the morning of the 31st May, when he was arrested, plaintiff says he heard nothing about it; but

(1) 17 Q.B.D. 338.

(2) 3 M. and W. 418.

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on being placed before the Magistrate he was released on depositing Rs. 25 as security for his appearance whenever required. On the 2nd June the case came on again before the Magistrate, both the plaintiff and Mr. James being present, when the hearing was postponed to the 16th June, on which day the work having been completed, the summons was withdrawn by the municipal authorities.

The history of this case, as well as the Magistrate's record of the case, shows, as the Judge of the Division Court points out, that warrants of arrest issued for non-appearance on a certain day are held over by the authorities to be executed at any time during the continuance of the summons proceedings. Whether such a practice is a correct one, it is not necessary to express an opinion, as it is plain, we think, that in the present case after the plaintiff attended before the Magistrate and surrendered to the warrant **[506]** he was told to appear on the 7th April. At any rate on 28th April the warrant in question was a spent warrant and could not be properly executed. As it is no part of the defendant's case that it was renewed by the Magistrate, the question, therefore, is whether the defendant is to be held liable for its execution on the 31st May. As the warrant was issued by the Magistrate of his own accord, the case of *West* v. *Smallwood* (1) shows that the defendant would not be liable for its execution unless he or his subordinates took an active part in it. The mere circumstance that the plaintiff was pointed out to the police officer who executed the warrant by Hormasji Cursetji, a municipal inspector, may not of itself, as the Judge seems to have thought, amount to taking an active part. But here there are other special circumstances which must be taken into consideration in conjunction with it. The long time which elapsed before the warrant was executed, and the alteration in the direction as to taking bail at the foot of it from 7th April to 2nd June, not verified by the Magistrate's initials, nor explained by any entry of renewal in the record of the case and which, we agree with the Division Court, could scarcely have been made by the police who knew nothing of what was going on in the summons proceedings, point to the warrant having been, if not in the actual keeping of the municipal authorities, at any rate to its having been under their control and to the police having been set in motion by them.

Under these circumstances it was incumbent, we think, on the defendant to give rebutting evidence and more especially to call Hormasji to explain the circumstances under which he was sent to accompany the police officer, and to deny, if possible, the statement of the plaintiff that the warrant was in his hand when it was served on the plaintiff. No such evidence has been given, and we feel constrained to come to the conclusion that the municipal authorities did take an active part in the execution of the warrant, and must be held liable for plaintiff's arrest, unless they can give some satisfactory explanation. Their explanation of the arrest is, that it was a mistake on the part of the police. In the view we have taken of the evidence, they have to show that it was a pure mistake on their own part; and we **[507]** agree with the Division Court that the municipal authorities cannot be heard to say that their action was due to a mistake, when they must have known that plaintiff had appeared at any rate on the 28th, if not on the 21st April, and must be credited with the knowledge of what would be the effect of such appearance on the issue of the warrant.

It has been, however, contended before us that the defendant, the Municipal Commissioner, is not liable for the action of his subordinates

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in this matter, and the judgment of the Privy Council in this case of the *Bank of New South Wales* v. *Owston* (1) was relied on. Sir Montague Smith, who delivered the judgment of the Council in that case, states the result of the authorities to be that the authority of a special agent to arrest may be implied when the duties which the officer had to discharge could not be efficiently performed unless he had such power. Looking at the nature of the business which Mr. James' Department was entrusted with, it is plain it would be practically impossible to enforce the provisions of s. 232 of the Municipal Act if one of the most ordinary steps in the proceedings against an offender before the Magistrate, *viz.*, the enforcing attendance by summons of arrest, required the express authority of the Commissioner.

For these reasons we are of opinion that the decree of the Division Court must be confirmed with costs.

Attorneys for the appellant (defendant No. 1).—Messrs. *Crawford, Burder and Company.*

Attorneys for the defendant (plaintiff).—Messrs. *Tyabji, Dayabhai and Company.*

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Before Mr. Justice Farran.

LALJI SHAMJI AND OTHERS (*Plaintiffs*) *v.* WALJI WARDHMAN AND OTHERS (*Defendants*).*

[12th, 18th, 19th and 21st February, 1895.]

Caste—Caste question—Regulation II of 1827. *s.* 21*—Jurisdiction of Civil Court—Majority of caste, right of.*

The plaintiffs and defendants were members of the Kutchi Dossa Oswal caste of Hindus residing in Bombay. The plaintiffs alleged that by a resolution of the caste [508] unanimously passed at a caste meeting held on the 19th September, 1893, a committee, of which they were members, was appointed on behalf of the caste for the purpose of preventing Brahmans from attending the feasts of the caste in the caste oart in Bombay, and that on the 16th and 18th July, 1894, by resolutions unanimously passed the members of the caste were strictly prohibited from feasting any Brahman in the caste oart, and the committee was authorized not to allow any casteman wishing to feast Brahmans in the oart to use the caste oart and caste vessels, and if necessary to take legal steps in the matter. The plaint alleged that the defendants proposed to give a feast in the caste oart to which they had invited Brahmans, and prayed for an injunction and for a declaration that the above resolutions were validly passed and were binding upon the defendants and on the caste. The defendants contended that the subject-matter of the suit was a caste question and not cognizable by a civil Court, and further that the meetings referred to in the plaint had not been duly convened, and that the resolutions were invalid and not binding on those who were not present and who did not consent to them. They alleged that Brahmans had from time immemorial as a matter of course attended the caste feasts, and they denied that the plaintiffs or any members of the caste had now a right to exclude them. The Court found as a fact that a large majority of the caste were in favour of excluding Brahmans from caste feasts.

Held that the majority of the caste having arrived at a *bona fide* decision that the convenience and comfort of the caste were best advanced by the exclusion of the Brahmans from their oart, it was not a case in which the Court could say that the decision was so subversive of the interests of the minority as to amount

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* Suit No. 890 of 1894.

(1) 4 Ap. Ca. 270.

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to a practical confiscation of their property or denial of their rights, and that the Court ought to give effect to it.

The Court accordingly passed a decree in terms of the prayer of the plaint prohibiting the defendants from bringing Brahmans into the oart to dine so long as the resolution of the caste prohibiting the practice continued in force.

The Court does not decline to give effect to the expressed wishes of the majority of a caste as to the management and custody of caste property, which the minority seek to set at naught, by reason of the suit involving a caste question.

In matters relating to the management of caste property and the administration of its affairs the majority of the caste has authority to control the minority. But the Court will not by its decree enable the majority to make a tyrannical use of its power. It would not assist the majority to deprive without cause the minority of their right to use what is the common property of all, or give effect to a resolution passed in violation of the rules of natural justice or of a directly confiscatory nature.

[Appr., 11 Bom. L.R. 1267=4 Ind. Cas. 569; R., 34 B. 467=11 Bom. L.R. 1014=4 Ind. Cas. 108; 9 Bom. L.R. 569.]

SUIT to restrain the defendants from inviting Brahmans to caste feasts or to other feasts held in the caste oart.

The plaintiffs and defendants were members of the Kutchi Dossa Oswal caste resident in Bombay. The plaintiffs (fifteen in number) were described in the plaint as members of a committee appointed by the said caste. The defendants were eight in number.

[509] The plaint stated that the Kutchi Dossa Oswal caste was a Hindu Bania caste, of which about fifteen hundred adult male members resided in Bombay; that at a general meeting of the caste duly held on the 19th September, 1893, thirty-five members of the caste were, by resolution unanimously passed, appointed a committee on behalf of the caste for the purpose of preventing Brahmans from attending the feasts of the caste in the caste oart in Bombay, and that fifteen of such committee should constitute a quorum; that at subsequent meetings held on the 26th November, 1893, the 23rd June, 1894, and 6th July, 1894, the number of the committee was increased from thirty-five to fifty-six, and the plaintiffs were fifteen members of the said committee of fifty-six persons.

On the 16th July, 1894, at a caste meeting at which about 1,000 adult members of the caste were present, and at another meeting on the 18th July, 1894, at which about 800 were present, the following resolutions were unanimously passed :—

"*IX.* The caste hereby confirm and re-appoint the committee of 56 gentlemen appointed on the 9th day of Bhadarwa Sud 1949, and in subsequent meeting, and also confirm all the business done by the said committee up to this day, and specially the meeting of this day called by Mr. Thackersay Dewraj.

"*X.* The castemen are hereby strictly prohibited from feasting any Brahman in the caste oart, and the above committee are hereby fully authorized not to allow any casteman wishing to feast Brahmans in the caste oart to use the caste oart and vessels belonging to the caste. If necessary, they are authorized to take legal steps in the matter."

The plaint, which was filed on the 9th August, 1894, alleged that since the passing of the said resolution two caste feasts had been given at the caste oart: one of them by one of the defendants and the other by one of their supporters, to both of which, notwithstanding the protests by the plaintiffs, many Brahmans and their families were invited and came. The plaint then continued :—

"The plaintiffs and the majority of the caste who are entitled as of right to attend all caste feasts given at the caste oart strongly object to

Brahmans and members of other castes being invited to and attending the feasts there, and they will not attend any feasts to which Brahmans are invited. The plaintiffs say that the majority of the caste are entitled to pass the resolution aforesaid against Brahmans being invited to caste feasts or feasted in the caste oart, and that a small minority of the caste cannot use the caste property in violation of the rule aforesaid.

[510] "10. The caste oart and the caste pots, utensils, dishes and benches used for the caste feasts are all the exclusive property of the said caste, and the plaintiffs say that no one not belonging to the caste is entitled to use them against the wishes of the majority of the caste.

"11. When the Brahmans attend the caste feasts abovementioned they use the cooking pots, utensils, dishes and benches belonging to the said caste, and when they are invited they attend with their wives and families to the number of about 800 or 900. This altogether prevents the wives and families of the majority of the said caste from being conveniently accommodated at such caste feasts.

"12. The plaintiffs have quite recently come to know that the defendants have arranged to give a caste feast in the caste oart at 2 o'clock next Friday, the 10th instant, and notwithstanding the above resolutions they have invited and intend to invite Brahmans to attend the said caste feast, and they intend to feast Brahmans in the said caste oart on the 10th instant and intend to allow the Brahmans to use the said caste oart and other caste property aforesaid.

"13. The plaintiffs further say that Friday the 10th instant corresponds with the native date 9th Shravan Sud, and that the feast which is to be given on that day will be given under the provisions of cl. 15 of the consent decree passed in suit No. 488 of 1888, dated 2nd August, 1890.

"14. The said cl. 15 of the said decree only provides for the giving of a feast to the Kutchi Dossa Oswal Vania caste and to priests, and does not permit Brahmans being invited to attend the feast. The priests are not Brahmans but Gurjis, and do not join the caste in their feasts, but take away their food with them.

"15. The plaintiffs say that the action taken on the part of the defendants above referred to will, unless they are restrained by injunction of this Honourable Court, prevent the plaintiffs and the majority of the caste from attending the said feast."

The plaint then prayed for an injunction restraining the defendants from attending the said caste feast to be given at the caste oart on the 10th August, 1894, and from feasting any Brahmans in the said oart, and from allowing Brahmans to use any portion of the oart or other property of the caste, or from inviting Brahmans to attend any other feast at the said oart, &c., and further for a declaration that the above resolutions were validly passed and they bound the caste and restraining the defendants from acting contrary to them.

The defendants filed a written statement, in which they submitted that the subject-matter of the suit was a caste question and not cognizable by a civil Court. They further contended that the meetings referred to in the plaint had not been duly convened and that the resolutions were invalid and not binding on those who were not present and who did not consent to them. [511] They denied that the plaintiffs were authorized or entitled to bring the suit. They alleged that Brahmans had from time immemorial as a matter of course attended the caste feasts, and they denied that the plaintiffs or any members of the caste had a right now to exclude them: that the Brahmans were absolutely necessary to the caste and had

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always performed ceremonies in connection with marriages, &c., for members of the said caste and that if now excluded the members of the caste would lose religious benefit of their services. They further claimed that any member of the caste had a right (subject only to his obtaining the consent of one Abhechand Raghowji, the principal member of the original donor's family) to the use of the caste oart and vessels both for general and for private feasts and had the right to invite Brahmans to such feasts.

The written statement contained the following paragraph :—

"The defendants admit that Brahmans were invited to and attended the feasts therein referred to as they have always done. The defendants say that the said Brahmans are so invited to their feasts from religious motives, and that there is a vested right in every member of the said caste so to invite the said Brahmans, and that no majority of the said caste is entitled to interfere with the same whether by resolutions or otherwise."

Macpherson (*Inverarity* with him) for the plaintiffs.—The members of this caste are Banias and follow the Jain religion. The caste came from Marwar to Cutch 300 years ago. From thence they went to Jamnagar, and 60 or 70 years ago a few members came to Bombay. As to the history of the caste see *Thackersey Dewraj* v. *Hurbhum Nursey* (1). As to the Jain religion see *Bhagvandas* v. *Rajmal* (2).

The questions raised are no doubt in a sense caste questions, but they do not come within the Regulations, and the jurisdiction of the Court is not excluded. The Court is not precluded from recognising and enforcing the decisions of the caste in matters relating to caste property. In reference to such matters what constitutes the caste? Clearly the majority of its members. The vote of the majority is the vote of the caste. The recalcitrant minority are not the caste. Here it is really the minority who invoke the assistance of the Court to override the will of the caste. **[512]** The Court cannot do this, but will give effect to the decision of the caste, *i. e.*, the decision of the majority. The caste is an autonomous body, and when it comes to a decision which creates rights with regard to property the Court will enforce these rights. A question finally decided by a majority of the caste cannot be said to be a caste question of the class which is withdrawn from the jurisdiction of the civil Court—*Girdhar* v. *Kalya* (3); *Mehta Jethalal* v. *Jamiatram* (4); *A'nandrav* v. *Shankar* (5); *Dullabh* v. *Narayan* (6); *Krishnasami* v. *Virasami* (7); Civil Procedure Code (XIV of 1882), s. 11; Strange's Hindu Law (3rd Ed.), p. 93. As to the user of caste property—*Pragji Kalan* v. *Govind Gopal* (8); *Advocate General* v. *David Haim* (9); *Jagannath Churn* v. *Akali Dassia* (10); *Raghunath* v. *Janardhan* (11); *Dawkins* v. *Antrobus* (12); *Hopkinson* v. *Marquis of Exeter* (13); Suit No. 168 of 1879 (unreported, and No. 367 of 1879 (unreported); *Thackersay Dewraj* v. *Hurbhum Nursey* (1); *Cooper* v. *Gordon* (14). As to the frame of the suit—*Anandrav* v. *Shankar* (5) Lewin on Trusts (9th Ed.), p. 1059; Civil Procedure Code (XIV of 1882). s. 532. The caste can prescribe its own usages—*Attorney General* v. *Guild* (15). The oart is charitable property—*Commissioners of Income Tax* v. *Pemsel* (16).

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(1) 8 B. 432 (444, 472). (2) 10 B. H C. R. 241. (3) 5 B. 83.
(4) 12 B. 225. (5) 7 B. 323 (328 329). (6) 4 B H.C.R. (A.C.J.) 110.
(7) 10 M. 133. (8) 11 B. 534. (9) 11 B. 185 (195).
(10) 21 C. 463. (11) 15 B. 599, (610). (12) 17 Ch. D. 615.
(13) L.R. 5 Eq. 63. (14) L.R. 8.Eq. 249. (15) 28 Beav. 485.
(16) (1891) Ap. Ca. 531 (583).

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Lang (Advocate General), *Loundes* with him, for the defendants.—The authorities clearly show that the questions raised here are caste questions. The fact that the right to property may be involved does not give the Court jurisdiction—*Girdhar* v. *Kalya* (1); *Mehta Jethalal* v. *Jamiatram* (2); *Pragji Kalan* v. *Govind Gopal* (3); *Advocate General* v. *David Haim* (4). The Court cannot interfere in disputes about the division of caste property. The cases in which this Court has held that it has jurisdiction were cases in [513] which the question was as to who should hold the property for the whole caste. It has interfered to protect the property for the caste. See also *Krishnasami* v. *Virasami* (5) This suit relates to charity—*Goodman* v. *Mayor of Saltash* (6); *Attorney General* v. *Lawes* (7); *Gray* v. *Chaplin* (8). The majority cannot divert a charity from the purpose for which it was intended. When this oart was given to the caste it was the practice for Brahmans to attend the caste feasts. The intention of the donor must be assumed to have regard to the caste practice prevailing at the time of gift. The feasting of Brahmans is meritorious—*Lakshmishankar* v. *Vaijnath* (9); *Advocate General* v. *Vishvanath* (10). The majority cannot change the practice contrary to the intention of the founder—*Attorney General* v. *Pearson* (11); *Attorney General* v. *Shore* (12). They also cited *Gopal* v. *Gurain* (13).

JUDGMENT.

FARRAN, J.—The parties to this suit belong to the Kutchi Dossa Oswal caste. The plaintiffs, who allege that they represent a majority of the caste, have, with the permission of the Court, brought the suit under s. 30 of the Civil Procedure Code (XIV of 1882) on behalf of all parties interested, including themselves. The main prayer of the plaint is that the defendants, who are eight in number, may be restrained by injunction from inviting any Brahmans to attend a particular feast which was to have been held on a day now past, and any other feast given at the caste oart to the caste, and from inviting any Brahmans into the caste oart, at any time that a caste feast is being given or otherwise.

Although the evidence which I have recorded in the case occupies many pages of my note book, and the recording of it has taken a considerable time, the facts actually proved may be condensed into a narrow compass. It will be convenient to state them concisely before considering whether the plaintiffs are entitled to, and the Court has jurisdiction, according to the principles which govern its practice, to afford to them the relief which they pray by their plaint.

[514] The Dossa Oswal caste are Jains by religion, though not of the most orthodox kind. The caste originally settled in Marwar, migrated thence about 300 years ago to Cutch, where they are now a numerous body. Thence a portion of them came to Bombay about 80 years ago. This suit concerns only the Bombay section and its property. That section consists now of from 1,400 to 1,500 adult males. When assembled at a caste feast the persons dining number about 2,500 or 2,700 including women and children.

When the caste came to Bombay they had no mahajanwadi, and for some time were without definite rules. Their caste dinners took place

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(1) 5 B. 88. (2) 12 B. 225. (3) 11 B. 534.
(4) 11 B. 185. (5) 10 M. 133. (6) 7 Ap. Ca. 642.
(7) 8 Hare, 32 (41). (8) 2 Sim. and St. 267. (9) 6 B. 24.
(10) 1 B H. C. R. App. 9 (17). (11) 7 Sim. 290 (306).
(12) 7 Sim. 309. (13) 7 W. R. 299.

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in a warehouse of Narsi Natha or in some vacant convenient building. Narsi Natha was the headman or shettia of the caste and was also the banker of its funds as well as of the funds of the temple which was built in his time. His representative for the time being is still recognised as the principal shettia of the caste. He signs in the name of Narsi Natha in caste matters. Narsi Natha died in 1842. His firm of Narsi Natha and Company devolved upon his son Virji Narsi. The present mahajanwadi and building which are at Khadak were purchased and built in Virji's time. It has hitherto been an accepted belief in the caste that Virji Narsi purchased and built the mahajanwadi and presented it to the caste. It was so stated by Kessowji Naik and the other headmen of the caste in 1869 in their written statement in suit No. 298 of 1869, a suit in which the Karad caste sought to share the property of the Dossa Oswals and it was repeated in the written statement in suit No. 424 of 1881. No one in fact thought of questioning the belief until lately. An examination of the books of the firm of Narsi Natha and Company has now unearthed a document (Ex. A) which throws doubt upon the accuracy of this general belief. It is a release given by Virji to Bharmal Tejsi and two other men who had been managing the firm of Narsi Natha and Company for him during his minority. It acknowledges that he (Virji) held two houses and a sum of Rs. 51,000 in trust for certain charitable purposes of which Bharmal Tejsi and the others were to have the management, and then deals with the acquisition of the mahajanwadi as follows:—
"Further the house or *chal* on [515] *Khadak* (road) which was purchased in my name from Memon Dawudbhai Ahmed for Rs. 15,000 has been purchased for the mahajan. On the same the work of repairing and rebuilding having been made (the same) is to be made over to the mahajan and the expense which may have to be incurred and the outlays that may be made in getting the same rebuilt are all duly to be paid by me. And the said *chal* having been turned into a mahajanwadi and a new deed having been got made in the name of Shah Narsi Natha, the same is to be given to the mahajan as a present for the purpose of giving feast and dinners. And in the books of Shah Narsi Natha there is an account of the mahajan. In that account Rs..... are found to be due to the mahajan. The same are to be debited to the account of the mahajan on the 30th of Asso Vad Samvat 1903 (8th November, 1847), and the account is to be kept as squared. No balance is to be struck in the mahajan's accounts as claimable or payable up to 30th Asso Vad Samvat 1903. And the deed relating to the same wadi having been got made in the name of Shah Narsi Natha and the said house having been turned into a mahajanwadi, the same is duly to be made over into the possession of the mahajan. The authority over the same belongs to the mukhtyars of the Bombay mahajan of our caste and the deed relating to the said wadi is to be kept by you. I am not to raise any objection or claim against the same." This document is dated 17th November, 1847.

Previously to this a subscription list had been started in the caste for the purpose of an oart, Rs. 15,784½ had been subscribed by 454 members. The evidence, I think, shows pretty conclusively that the subscriptions were never called up. The subscribers grumbled and Virji Narsi undertook to make up the amount. It was certainly intended that the funds of the caste then in the hands of Narsi Natha and Company available for the purpose should be employed in making the purchase, but the fact of the subscription being got up shows that they were considered insufficient for the

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purpose. The wadi and building cost from Rs. 35,000 to 40,000. A good deal of inconclusive evidence has been given to show what available fund Narsi Natha and Company then held, and how the blank left in Ex. A should [516] be filled up. The books of Narsi Natha and Company are not forthcoming. The temple books do not show the expenditure (if any) made by Narsi Natha and Company, but only the sums paid over to the firm. Ghelabhai Padamsi states that the money of the mahajan which Narsi Natha and Company had in hands was Rs. 2,700; but in the absence of books I cannot accept this sum even as the approximate amount. Nothing has been proved. Exhibit XXIII is not a reliable document. Its non-production in the earlier suits (Exs. A 8, A 9 and A 10) renders it impossible to attach any real weight to it. The last document on this subject is Ex. 7 passed by Harbhum Narsi after the death of Virji to Bharmal Tejsi and two others. It refers to the mahajanwadi thus:—"There is one mahajanwadi at Khadak. That oart has been built and given away as a present to the mahajan for giving feasts. The same has been given to our caste by my deceased brother Virji Narsi for being used as a feasting and feeding place; thereto I and my heirs have no claim whatever."

The inference which I draw from the several documents and the other evidence in the case in connection with the acquisition of the mahajanwadi are these:—The caste purposed to purchase a wadi for feasting purposes out of their surplus funds in the hands of Narsi Natha and Company supplemented by subscriptions; the managers of Narsi Natha and Company purchased a suitable place during the minority of Virji Narsi intending to pay for it eventually out of such funds; and Virji when he came of age and took over the estate undertook not to call in the subscriptions, but to make up any deficiency, beyond the fund in the hands of his firm, out of his own resources, thus squaring the account between his firm and the estate. In that sense he was treated or treated himself as bestowing the oart on the caste; but legally his firm purchased the oart as the agents for the caste, advancing money for the purpose, and he gave up his claim for repayment by the caste beyond the sum which he had in his hands belonging to the caste. The amount of that sum cannot now be determined with certainty.

[517] Under these circumstances it is, I think, impossible to treat the acquisition of the oart otherwise than as a purchase by the caste for the purpose of using it as a caste-feasting oart, or to consider the oart as having any trust impressed upon it by Virji Natha to use it in a particular manner, because he at the *vastu* ceremony and subsequently in common with other numbers of the caste, feasted Brahmans in it along with the caste. It is in the same position, I think, as if the caste had purchased the oart by subscription for a feasting oart, Virji Narsi being the largest contributor to the purchase-money. Since its acquisition by the caste the oart has always been used as a caste feasting place, and is still used as such. Virji and Hurbhum Narsi were in the habit of levying a small fee when a casteman used the oart. This was probably for the cleansing of the oart, and keeping its floor in order. The practice ceased in Samvat 1912 or 1913. No inference can, I think, be drawn from this circumstance. Though it is necessary for a casteman wishing to use the oart for the giving of a caste feast to ask formal permission to do so from the shettias of the caste or, according to Nursi Kessowji, from a mahajan meeting, I think it is clear from the evidence that upon payment of the customary fee to the caste funds, each casteman, in the absence of any special reason, is entitled to

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the use of the oart for such purpose. The regulation of the permission rests with the shettias of the caste or the caste, and not with the representative of Narsi Natha alone. Exhibit A, coupled with the other evidence, is conclusive upon this point. The oart is supplied with cooking utensils which have been purchased out of caste funds. They are used similarly by the members of the caste, also on payment of a small fee, for cooking caste dinners in the oart. They are also similarly used for cooking less important feasts given by the members not in the caste oart.

Though the Dossa Oswal caste follow the Jain religion in matters of doctrine and faith, they have not abandoned all Vishnu ceremonies and practices. Their marriage ceremonies, *ayarni*, and birth ceremonies and certain ceremonies after death are performed by, or in the presence of, Brahmans. From time immemorial—long before the caste came to Bombay—a sect or [518] class of Brahmans called Rajgur Brahmans have been closely connected with the caste and have performed these ceremonies for them. The defendants admit that such ceremonies are of a mundane and not of a religious nature. Shobhan Aspal explains them in detail. The origin of the connection between the Rajgur Brahmans and the Dossa Oswals has not been traced. A legend, invented probably by the former, ascribes it to the Rajgurs having degraded themselves by eating with the Dossa Oswals who are Banias to save the latter from slaughter by Mussalmans. The connection has been beyond doubt very remote. In consequence of this connection or from some other unknown cause these Rajgur Brahmans have been in the habit from very early times of dining with the caste at caste and other feasts. Some Rajgur Brahman families followed the Bombay section of the caste to Bombay and since then they have been accustomed to dine with the Dossa Oswals at their caste and other feasts in addition to performing for them the Vishnu ceremonies which I have mentioned. Since the acquisition of the caste oart they have always dined in it at the caste feasts. Formerly they came to feast by invitation. Exhibit B is a document passed by the Rajgur Brahmans in 1839 undertaking not to attend feasts unless invited. This undertaking was not adhered to, and the Brahmans attended all feasts in the oart whether invited or not. The plaintiffs say that this has for a long time been submitted to, but grumblingly, by a large number of the caste.

In Samvat 1949 this grumbling ripened into action. Under the guidance of the plaintiff Narsi Kessowji and others the section of the caste opposed to the feasting of the Rajgur Brahmans began to hold meetings and appoint committees to get rid of the practice. The movement began with a petition addressed to the caste leaders. On the 18th of September, 1893, a committee of 35 was appointed to take steps in the matter. Further meetings were held on 19th September and on 18th November, 1893. On the 23rd June, 1894, the committee was enlarged. On the 6th July it was resolved to engage barristers. The opponents of the Brahmans now found themselves strong enough to take a decisive step and called a caste meeting in the mahajanwadi [519] for the 16th July. The published notice of this meeting stated that the object was to consider certain accounts and trust matters. A large number of the castemen assembled, probably 900 to 1,000. The evidence of Mr. Morris and Exs. 29 to 32 do not throw any real doubt over this figure or those relating to the next meeting. The advertised objects of the meeting having been disposed of, it was proposed, seconded and carried unanimously, that the castemen should be strictly prohibited

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from feasting Brahmans in the mahajanwadi, and that legal measures should be taken, if necessary, to prevent a casteman from feasting even a single Brahman in the mahajanwadi, or using the mahajanwadi and the pots and vessels.

At the date of this meeting another meeting had been formally convened by Abhechand Raghowji, the leader of the Rajgur Brahman faction, for the 18th July. The chairman called the attention of the meeting of the 16th to that fact and took their sense as to whether they should attend the meeting of the 18th. The meeting resolved to attend it. The result of this meeting of the 16th quickly became known, and on the 17th there was great excitement in the caste. The rival party purported to put off their meeting of the 18th by public notices, but Narsi Kessowji and the anti-Brahmanites, notwithstanding such notices, attended it to the number of about 800. The resolutions passed at the meeting of the 16th July were all read out and confirmed at this meeting unanimously. The feeling of the minority of the caste appears to be not to attend a meeting at which they are sure to be outvoted.

The present leaders of the caste are four—Narsi Kessowji and Cuverji Jewraj, who desire to exclude Rajgur Brahmans from their feasts and caste oart and have followers to the number of about 1,000; and Abhechand Raghowji (who signs Narsi Natha) and Ghellabhai Padamsi, who favour the admission of Brahmans and desire to invite them, and feast them at feasts given by themselves and who have followers to the number of about 350. The latter party now only desire that it shall be optional with the castemen whether to invite Brahmans or not. The defendants having been about to give a feast in the oart as usual [520] on the 10th August, 1894, in accordance with the provisions of a certain trust-deed for feeding the caste, and proposing, as usual, to allow the Rajgur Brahmans to attend, the present suit was filed on the 9th August, 1894, to prevent their doing so, and generally in the future to restrain them from inviting Brahmans.

Since the suit the plaintiffs have convened and held another meeting of the caste on the 3rd November. Full notice of the business to be transacted at this meeting was published. At it the resolutions of the meeting of the 18th July were unanimously confirmed. About 903 members attended that meeting. It is, I think, beyond doubt that the plaintiffs command a large majority of the votes of the caste in favour of the resolution for excluding Brahmans from the feasts and prohibiting the castemen from feasting them in the oart, at least in the proportion of 2 to 1. The defendants do not contest this fact, though they do not admit that the voting represents the real opinion of the caste.

These are the facts. I have now to consider whether upon them the plaintiffs are entitled to a decree. The first point which arises for consideration is whether the Court is prevented from giving redress to the plaintiffs by reason that the question at issue is a caste question, which the Court is precluded from trying. For the purpose of considering that point I must assume that the majority of the caste had power to regulate the use of the mahajanwadi in the way that they have done, and that the defendants desire to use it in an unauthorized manner.

In suit No. 168 of 1879 Vasudev Vithoba and others suing on behalf of themselves and the majority of the caste sought to remove the defendant Hariba from the management of the caste property. The defendant alleged that he had been duly appointed by the caste to manage, and that the caste were still in favour of his continuing to manage. The Court

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(Sargent, J.) directed a caste meeting to be held and, it being found that the majority of the caste—176 to 117—were in favour of removing the defendant from the management, passed a decree directing the defendant to deliver to the plaintiffs possession of the immoveable and moveable property of the caste and restrained [521] him from performing or interiering in the performance of certain ceremonies unless and until he was duly elected a member of the panch of the caste.

In suit No. 367 of 1879, Gopaldas Madhawdas, alleging himself to be shettia of the Kapole Bania caste, sued Sir Mangaldas Nathubhai to recover possession of certain utensils and cooking pots of the caste which the defendant had taken forcible possession of. The defendant claimed to retain them by virtue of the authority given him by the caste. It being found that the majority of the caste were in favour of the defendant having the custody of the articles, the plaintiff's suit was dismissed by Kemball, J. Sir Mangaldas, as elected headman of the caste, also filed a suit (No. 290 of 1880) to recover from Gopaldas possession of some of the caste property. Sir Charles Sargent passed a decree in the plaintiff's favour on the ground that he had been appointed shett of the caste by a majority, and was entitled, therefore, to have the custody of the caste property.

These unreported cases show that this Court does not decline to give effect to the expressed wishes of the majority of a caste as to the management and custody of caste property which the minority seek to set at naught by reason of the suit involving a caste-question.

The Advocate General for the defendants relied upon *Girdhar* v. *Kalya* (1) which followed the Full Bench ruling in *Nemchand* v. *Savaichand* (2). That was a decision that a dispute which had arisen with reference to certain property was a caste-question within the meaning of Regulation II of 1827, s. 21, which provides that it is to be "understood that no interference on the part of the Court in caste-questions is warranted" by the wording of the section which gave the Courts general jurisdiction over all suits and complaints of a civil nature. The wording of this proviso has given rise to many questions of a delicate nature, and fine distinctions have been drawn as to what are and what are not caste-questions, and what does and what does not amount to an interference in such matters within the meaning of the section. The decisions, it must be admitted, are not easily [522] reconcileable with one another. The principal of them are mentioned in the foot-note (3).

The test which ought to be applied is, I think, that applied by Sargent, C. J., in *Murari* v. *Suba* (4), *viz.*, "would the taking cognisance of the matter in dispute be an interference with the autonomy of the caste?" Will the Court be deciding a question which the caste as a self-governing body is entitled to decide for itself? If that be the true principle upon which the cases were decided, it follows, as remarked by West, J., in *Pragji* v. *Govind* (5) that "to take evidence of the customary law of a caste, to recognise that law and the vote of a majority as given effect to by that law, is not to interfere in caste matters. It is simply to recognise the existence of castes as corporations with civil rights and

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(1) 5 B. 83.
(2) 5 B. 84, note.
(3) *Dullabh Jogi* v. *Narayan* (4 B. H. C. R. 110, A.C.J.); *Murar Daya* v. *Nagria* (6 B. H. C. R. 17 A. C. J.); *Girdhar* v. *Kalya* (5 B. 83); *Nemchand* v. *Savaichand* (5 B. 84. note); *Shankara* v. *Hanma* (2 B. 470); *Pragji* v. *Govind* (11 B. 534); *Mehta Jethalal* v. *Jamiatram* (12 B. 225).
(4) 6 B. 725.
(5) 11 B. 534.

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autonomy suitable to the purposes of their existence." In that view, upon the assumption which I have stated, it would not be an interference in a caste question to uphold by the sanction of the Court's decree the right of the majority of the caste in question to regulate the user of the caste oart and to restrain the recalcitrant minority from acting in opposition to a regulation laid down by the majority as to such user. If the decisions to which I have referred passed under the Regulation of 1827 go further than this, and prohibit the Civil Courts altogether from dealing with questions in which caste interests are involved, I consider that sitting on the Original Side of the High Court to which the Regulation does not extend, I should not be bound to follow them, but should rather follow the unreported Original Side decisions which I have mentioned. I must, therefore, disallow the plea raised by the defendants to the jurisdiction.

It is clear upon the authorities that in matters relating to management of caste property and the administration of its affairs the majority of the caste has authority to control the [523] minority. On this question it is sufficient to refer to the same unreported cases and to *Lalsoonder* v. *Sumbhoo*(1), *Mootee* v. *Kuhandas*(2), *Pragji* v. *Govind*(3), *Raghunath* v. *Janardhan* (4). References could be multiplied. But in the absence of a written or proved customary constitution I know not how the affairs of a caste could be administered if the decision of the majority duly arrived at and notified were not held binding upon the minority—*Cooper* v. *Gordon* (5). The proposition, in my opinion, amounts to little less than a legal axiom. This leads me to consider whether the resolutions in this case were duly arrived at and made known. The several meetings which preceded the meeting of the 16th July were of the preliminary character. They were attended only by the adherents of the movement, and were no doubt intended only to be so attended, though they professed to be caste meetings. As already stated, the notice convening the meeting of the 16th July did not mention the Brahman question. The minority of the caste protested against the manner in which the metting was convened, and there was a legal correspondence upon this subject. Ghelabhai Padamsi says that he and his party did not know that the Brahman question was to be discussed at the meeting of the 16th. As this is quite possible, I think that the minority are entitled to contend that the resolution as to Brahmans passed at that meeting was not duly arrived at. It cannot, however, I think, be said that the caste did not as a body know that the Brahman question would be discussed and a vote taken upon it at the meeting of the 18th July. That meeting had been summoned by Abhechand Raghowji for that day. On the 17th, however, there was great excitement in the caste when the purport of the resolution passed at the meeting of the 16th July became known, and I feel assured that Abhechand tried to put off the meeting of the 18th because he knew that the same vote would be taken at it as had been taken on the 16th, and that he and his followers purposely refrained from attending it, knowing that they were in a minority. It appears [524] from the evidence of Narsi Kessowji, who on this point has not been contradicted, that notice of the actual business to be transacted at a meeting of this caste is not usually given before the meeting: but when there is a burning question to be decided, the object of the meeting naturally becomes known beforehand. The notice convening the meeting of

(1) 1 Borr. 419.
(2) 1 Borr. 121.
(3) 11 B. 534.
(4) 15 B. 599 (610).
(5) L.R. 8 Eq. 249.

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the 18th did certainly specify particular business to be transacted at it; but this did not preclude the transaction of other business, nor did it in this instance mislead the caste who, I am satisfied, knew why the meeting was attempted to be postponed and why notwithstanding such notice it was actually to be held. The letter of Little and Company of the 18th July on behalf of Abhechand and his followers shows this very clearly and so do the proceedings at the meeting itself. It is sought to get rid of the effect of the resolution passed on the 18th of July by showing that the meeting was misled by the speeches of Narsi Kessowji and Bharmal Ruttonsi into voting for a resolution of which they did not understand the real import. I think, however, that this was not so. The terms of the resolution were certainly read to the meeting, and there is no real evidence to show that they were not fully understood. By the 3rd of November their full import was certainly known and they were then unanimously approved. If it served any useful purpose it might be possible to hold that there were technical objections to the validity of the resolution of the 18th July, but as the proceedings of the caste are not governed by technical rules and as the resolutions express the wishes of the majority of the caste, and as the minority could have opposed the passing of them if so minded, and would, I doubt not, have done so had they thought that they could have done so successfully, I think that I ought to have regard to substance rather than to technicality in this case and hold that the resolutions were duly arrived at by the caste and promulgated.

The main difficulty which I have felt throughout the case is to determine whether the resolution to exclude Brahmans from the caste oart is really a question of the mere management of the caste property; and whether it is not rather a tyrannical use of their power by the majority which in effect deprives the minority of their right to use the oart because they entertain views upon [525] the subject of the Brahmans different from those of Narsi Kessowji and his school. The Court would not, I apprehend, assist the majority by its decree to deprive without cause the minority of their right to use what is the common property of all. It would not, I apprehend, give effect to a resolution passed in violation of the rules of natural justice or of a directly confiscatory nature—*Jaganath* v. *Akali* (1); *Krishnasami* v. *Virasami* (2), *Dawkins* v. *Antrobus* (3).

The contention on the part of the defendant, is that many, perhaps most, of the feasts given in the oart, and particularly the *Swami Vasthal* feasts are given from a religious motive, the giving of which benefits the soul of the donor in a future state; and it cannot be doubted that the giving of such feasts is inculcated as a primary duty upon followers of the Jain religion. The defendants go a step further and say that the religious efficacy of such feasts is increased if Brahmans are allowed to partake of them. The Jain works of religious authority which have been put in at the hearing and the evidence of the Gorip Nye Sagbur show, I think, that there is nothing in the Jain religion which forbids the feasting of Brahmans, but that the feeding of them, as well as of others, is meritorious, provided that they do not observe practices contrary to the tenets of the Jains. It seems, however, that it is rather because they need food than because they are Brahmans, that the feeding of them is set before the Jains as meritorious. In Ex. 17 they are classed with the poor generally. The Jain writers do not regard Brahmans as a body with any particular

(1) 21 C. 463. (2) 10 M. 133. (3) 17 Ch. D. 615.

respect. The practice of the Dossa Oswal caste has been, as I have said, to allow Rajgur Brahmans to partake of their feasts. Exhibit B shows that the practice has prevailed rather on account of the persistence of the Rajgurs than from the anxiety of the Dossa Oswals for their presence. The further exhibits on this part of the case all tend to show that the Dossa Oswals have been constantly protecting themselves against the encroachments of the Rajgurs, both collective and individual, and regulating their claims and privileges.

[526] Ghelabhai Padamsi and several witnesses for the defendants say that they consider the efficacy of the feasts increased by the presence of the Rajgur Brahmans. They do not, however, allege that the feasts cannot be held without their presence, but they appear to be honestly averse to holding the feasts without them.

The plaintiffs equally honestly and earnestly desire to exclude them on the following grounds :—

(1) That it is superstitious and contrary to the doctrines of the Jain religion to think that religious feasts gain any further merit from the presence of Brahmans, and they think on religious grounds that Brahmans should not be allowed to partake of them.

(2) That they prefer not to have Rajgur Brahmans, who are not particularly clean in their persons, and are alleged not to behave with proper decorum at the dinners, sitting amongst them as members of the caste, and being the unwitting means of introducing people of other castes surreptitiously to the dinners. A caste feast, they say, should be strictly confined to the caste.

(3) That the Brahmans feasting leaves too little room for the caste themselves and crowd their women when dining.

(4) That the feeding of them is an intolerable burden on the poorer members of their community and a tax upon all.

The first objection is probably confined to the leaders and men of advanced views. The masses do not appear to share them. The last objection appeals most to the feelings and pockets of the mass, though they probably join with the leaders in the 2nd and 3rd objections. These latter, though exaggerated, are of some importance (see Ex. J). Balancing the considerations which press themselves upon me on each side of the question and conscious that there is much weight in the defendants' contention, I have nevertheless come to the conclusion that the majority of the caste having arrived at a *bona fide* decision that the convenience and comfort of the caste are best advanced by the exclusion of the Brahmans from their part, it is not a case in which the Court can say that the decision is so subversive of the interests of the minority as to amount to a practical confiscation of their property or denial of their rights, and that the Court ought to give effect [527] to it. I am much influenced in coming to that conclusion by the knowledge that the Vissi Oswal caste has arrived at practically the same result without the aid of a costly and protracted law suit.

I do not think that there is any objection to the plaint on the ground of misjoinder. One relief only is sought against the defendants whether they are considered as trustees or individuals. It is perhaps to be regretted that the defendants are not sued as representing the minority of the caste under s. 30 of the Civil Procedure Code, but that does not prevent the defendants being sued individually. It is not necessary for me to determine whether the decree will affect or can be enforced against members

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of the caste other than the defendants. Lastly, I consider that the decree prayed for will not conflict with the duties of such of the defendants as were parties to the consent decree in suit No. 488 of 1888, or are trustees under the deed of trust, Ex. B. It is quite clear that the terms of the trust deed as they now stand carry out the real intention of the decree and are not inconsistent with its actual wording. The Exs. A 22, A 23, A 21, when carefully considered in connection with the evidence of Bharmal Ruttonsi, make this rather involved question tolerably clear. I do not think that it is necessary for me to explain it in detail. The intention of the defendants to hold a feast in the caste oart and to admit Rajgur Brahmans to it is not denied. The notice to the defendants to desist from doing so is Ex. 38, dated the 9th August, 1894.

There will be a decree in terms of the prayer of the plaint prohibiting the defendants from bringing Brahmans into the oart to dine so long as the resolution of the caste prohibiting the practice continues in force. Seeing that the action of the defendants is backed up by a considerable number of the caste and that the point at issue is an undetermined one, I do not think it is a case for costs.

If I might be allowed to give unjudicial advice, I should suggest to the caste that they should act in accordance with this judgment for at least a year and see how the arrangement works and then call a full meeting and determine whether to continue it or [528] to revert to the former practice. At the end of a year they will approach the subject with calmer minds on each side.

Attorneys for plaintiffs :—Messrs. *Little, Smith, Nicolson and Bowen.*
Attorneys for defendants :—Messrs. *Payne, Gilbert and Sayani.*

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19 B. 528.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

BALKRISHNA MHADSHET (*Original Defendant No.* 1), *Appellant* *v.* VISHVANATH KESHAV JOG (*Original Plaintiff*), *Respondent.**
[26th June, 1894.]

Khasgi (*private or personal*) *land of a khoti sharer—Mortgage of the khoti* takshim (*share*) *—Sale in execution of a decree on the mortgage—Partition among the khoti sharers—Interest acquired by the purchaser at the execution sale—Agreement by the mortgagor to be responsible for the revenue—Agreement coming to an end with the extinction of the equity of redemption.*

Prima facie all land not shown to be alienated is liable to assessment, and the mere fact that no revenue was paid by a khoti co-sharer in respect of *khasgi* (private or personal) land in his occupation is not sufficient to prove its exemption from liability when it has passed into the hands of a stranger.

One Sadashiv, a sharer in a khoti village, mortgaged his *khasgi* land appertaining to his share in the khoti to the plaintiff and undertook to pay the Government dues on it. Plaintiff got a decree on his mortgage and in execution the land was sold, and purchased by defendant in the year 1878. In the year 1881 the khoti sharers effected partition. In 1883 defendant took possession of the land. In 1884 and again in 1885 Sadashiv having mortgaged his *takshim* (share) including the *khasgi* land to plaintiff, the latter as mortgagee brought a suit to recover *makta* (fixed) rent in kind payable for the *khasgi* land purchased by the defendant.

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* Second Appeal No. 733 of 1892.

Held, that as the partition between the khoti sharers took place after the execution sale, only the occupancy of the land was sold to the defendant, and that the plaintiff was entitled under the circumstances to recover a fair assessment.

Held, disallowing the defendant's contention as to exemption from payment of the rent, that the agreement by the mortgagor to be responsible for the revenue came to an end with the extinction of the equity of redemption by the Court sale.

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnagiri, confirming the decree of Rao Saheb B. Y. Gupte, Second Class Subordinate Judge of Sangameshvar in the Ratnagiri District.

[529] The facts of the case were as follows :—

Sadashiv Raghunath Levalekar had a share (*takshim*) in the khoti of the village of Levale. On the 23rd June, 1874, he mortgaged with possession a certain field or *thikan* which was *khasgi* (private) land pertaining to his share situate at the said village to the plaintiff, and undertook to pay the Government assessment thereon. In 1875 the plaintiff obtained a decree on the mortgage, and on 24th January, 1878, in execution of the decree, the field was sold and purchased by the first defendant, Balkrishna.

In 1881 the khoti sharers in the village effected a partition in which the field in question was allotted to Sadashiv.

In 1883 the first defendant took possession of the field.

In 1884, and again in 1885, Sadashiv mortgaged with possession his share to the plaintiff who, in the year 1890, as mortgagee, brought the present suit against the first defendant and Sadashiv to recover *makta* (fixed) rent in kind and the local fund cess, Rs. 55-8-0, for the years 1886-87 to 1888-89 in respect of the *thikan*.

The first defendant set up his purchase at the execution sale, and contended that as the mortgage bond on which the decree was passed and property was sold contained no stipulation for the payment of the *makta* rent and the local fund cess, he was exempted from the payment of the same, and that the rent claimed was excessive.

The Subordinate Judge allowed the claim to the extent of Rs. 38-12-9. The following is an extract from his judgment :—

"The question, however, remains whether the first defendant is liable to pay any such rent. Defendant No. 1 pleads exemption from that rent on a double ground. His first contention is that he is not liable to pay any such rent because he purchased the land in execution of a decree obtained by the plaintiff on a mortgage-bond which stipulated that no Government revenue or rent should be paid in respect of the land. There is no dispute that the decree which led to the auction-sale was obtained on such a bond, and Ex. 15, which is a copy of the bond, shows that the plaintiff was not to pay any revenue or rent in respect of the land during the continuance of the mortgage. But I do not think that the stipulation can avail the first defendant. The stipulation was to bind the plaintiff and Sadashiv during the continuance of the mortgage transaction only, and I apprehend that it would not have exempted the plaintiff from the payment of the Government revenue on the land after the [530] extinction of the mortgage, if he had purchased the land. The liability to pay the Government revenue on a land is annexed to it and the real purport or signification of the stipulation under consideration was that Sadashiv was to pay the Government revenue on the land as

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long as the plaintiff should continue to hold the land as his mortgagee. In other words, Sadashiv was to pay the assessment on the land only as long as he held the equity of redemption in it. Sadashiv's liability to pay that assessment or rent ceased as soon as he lost the equity of redemption. It is true that where a mortgagee obtains a decree on his mortgage and brings the mortgaged property to sale for the purpose of satisfying the mortgage-debt, the interest of both the mortgagor and mortgagee passes to the purchaser as laid down in *Sheshgiri Shanbhog* v. *Salvador Vas* (1); but the first defendant's acquisition of such interest in no way affects his obligation to pay the Government revenue on the land, which is at all times annexed to the land. Defendant No. 1 could not have escaped his liability to pay the assessment on the land if it had been situate in a dharekari village, and it makes no material difference in the nature of the payment because it is styled *makta* by reason of the situation of the land in an inam village."

On appeal by the first defendant the Judge confirmed the decree on the ground that the defendant had by his purchase at the execution sale obtained only the right of occupancy of the land, and that Sadashiv's khoti rights therein had remained unaffected.

The first defendant preferred a second appeal.

Manekshah, J. Taleyarkhan, for the appellant (defendant No. 1).—Sadashiv mortgaged the field as his own. Being a khoti sharer, he had not to pay anything in respect of the land to anybody, nor could he as a khot recover rent from himself as tenant. Whatever rights Sadashiv had, passed to us by the Court sale; the plaintiff himself as mortgagee caused the land to be sold. Under the mortgage-deed he was exempt from the payment of assessment. He cannot, after the sale, seek to recover assessment from the purchaser. A grantor cannot derogate from his own grant —Elphinstone on the Interpretation of Deeds, rule 57. The plaintiff acquired no right over the field, as it was not mentioned in his deed. The partition effected by the khoti sharers in 1881 cannot affect us. The managing khot pays the assessment and recovers the rents in a khoti village. But the plaintiff's suit is not to recover assessment on the ground that he has paid it to the inamdar or that he is liable to pay it; nor does he say that he is the managing khot of the village.

[531] *Vasudev G. Bhandarkar*, for the respondent (plaintiff).—A khot in possession of *khasgi* land is a tenant in respect of that land of the whole khoti co-parcenery including himself—*Ramchandra* v. *The Collector of Ratnagiri* (2). In the absence of a special agreement among the khots, a khoti sharer is liable to pay rent in respect of the *khasgi* land in his possession, though as a matter of arrangement it may not be levied from him; but a purchaser from him is liable to pay rent—*Ramchandra* v. *Visaji* (3). By the Court sale defendant No. 1 only acquired the tenant right of Sadashiv over the land, and the plaintiff, who is mortgagee of Sadashiv's khoti *takshim*, is entitled to recover rent from him, as it has not been suggested that there was any special agreement among the khoti sharers exempting the land from payment of rent. The agreement in the mortgage-deed came to an end when the *thikan* was sold. The objection on the ground that the plaintiff was not a managing khot was not taken in either of the lower Courts.

(1) 5 B. 5. (2) 7 B.H.C.R.A.C.J. 41. (3) P. J. (1880), p. 297.

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JUDGMENT.

FULTON, J.—As the sale of the *thikan* to the first defendant took place in 1878 while the partition of the khoti between Sadashiv and his co-sharers was not effected till 1881, we agree with the Assistant Judge in thinking that only the occupancy of the land was sold, and that the rights of the body of khots, which have now by reason of the partition and subsequent mortgages become vested, so far as this *thikan* is concerned, in the plaintiff remained unaffected. It was indeed contended that the *thikan* was not specifically mentioned in the mortgage deeds, and that, therefore, the plaintiff had not acquired any interest in it; but this argument fails, because, as pointed out by the Subordinate Judge, it was comprised in Sadashiv's share, the whole of which was mortgaged.

Under these circumstances, we think the lower Courts were right in holding the plaintiff entitled to recover a fair assessment. *Prima facie* all land not shown to be alienated is liable to assessment, and the case of *Ramchandra* v. *Visaji* (2) is authority for holding that the mere fact of no revenue being paid by a khoti co-sharer in respect of *khasgi* land in his occupation is insufficient to prove its exemption from liability when it has passed into the [532] hands of a stranger. In the present case no special custom or circumstances have been put forward to establish such exemption. The agreement of the mortgagor to be responsible for the revenue while tending to show that the land was not considered exempt, came to an end, as explained by the Subordinate Judge, with the extinction of the equity of redemption by the Court sale which transferred to the purchaser both the personal rights and liabilities of the judgment-debtor.

We must, therefore, confirm the decree with costs.

Decree confirmed.

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19 B. 532.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

BHIVRAV (*Original Defendant*), *Appellant v.* SITARAM (*Original Plaintiff*), *Respondent.** [2nd July, 1894.]

Hindu law—Joint family—Partition—Accounts—Manager's liability to account—Right to mesne profits previous to partition—Mesne profits subsequent to partition, how recoverable—Civil Procedure Code (Act XIV of 1882), ss. 13, 224.

Although as a general rule, no member of an undivided Hindu family can have any claim to mesne profits previous to partition, yet mesne profits may be allowed on partition where one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member who claimed to treat it as impartible, and, therefore, exclusively his own.

Where a decree for partition is silent about mesne profits subsequent to the institution of the suit, a party is at liberty to assert his right to such profits by a separate suit. Section 244, para. 2 of the Code of Civil Procedure (Act XIV of 1882) expressly reserves such a right of suit.

[F., 32 C. 118; Appl., 21 A. 425 (F.B.).]

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, in appeal No. 88 of 1892.

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* Second Appeal No. 741 of 1892.

(1) P. J. (1880), p. 297.

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The plaintiff, Sitaram Balvant Potnis, sued to recover Rs. 1,288-11-10 on account of his share in certain cash allowances payable to the defendant Bhivrao Madhavrao from the Government treasuries at Poona, Ahmednagar, Shrigonda, Sholapur, Barsi, Mangi, and Dadegaon.

[533] The parties to the present suit belonged to the Potnis family. Defendant was the representative of the eldest branch.

In 1881 one Atmaram Keshav, a member of the Potnis family, filed a suit for partition of the family estate consisting (*inter alia*) of the cash allowances in dispute in the present case.

The present defendant was defendant No. 1 in the partition suit, while the present plaintiff was defendant No. 5 in that suit.

The present defendant contended in that suit that the bulk of the property was saranjam and, therefore, not liable to partition according to the custom of the country.

The partition suit was ultimately decided by the High Court on 2nd December, 1890 (see I. L. R., 15 Bom. 519).

The High Court held that the property in dispute was partible, and ordered a partition among all the co-sharers according to their respective shares. The present plaintiff (who was defendant No. 5 in that suit) was declared along with his two brothers to be entitled to a third share. But no order was made in regard to mesne profits.

In 1891 the plaintiff filed the present suit to recover his share of the cash allowances received by the defendant from Government during the years 1887, 1888 and 1889, *i.e.*, during the three years preceding the decision of the High Court in the partition suit.

Defendant pleaded (*inter alia*) that as no order for mesne profits had been made in the partition suit, the present suit was barred by ss. 13 and 244 of the Code of Civil Procedure (XIV of 1882).

The Court of first instance overruled this objection and awarded the plaintiff's claim.

This decision was upheld on appeal by the District Judge.

The defendant thereupon preferred a second appeal to the High Court.

Mahadev Chimnaji Apte, for appellant.

Manekshah Jahangirshah, for respondent.

[534] The following authorities were cited in argument :—*Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1), *Konerrav* v. *Gurrav* (2), *Sakharam* v. *Hari* (3), *Jugmohandas* v. *Sir Mangaldas* (4), *Madan Mohan Lal* v. *Lala Sheo Sanker* (5), *Venkoba* v. *Subbanna* (6), *Ranganmani Dasi* v. *Kashinath Dutt* (7), *Raja Venkata* v. *Raja Rajagopala* (8), *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (9), *Domodardas* v. *Uttamram Maneklal* (10).

JUDGMENT.

RANADE, J.—The main contentions urged by the appellant have direct reference to the proceedings in the partition suit No. 458 of 1881, which came up in appeal before this Court, and was finally decided on 2nd December, 1890. This partition suit was brought by one Atmaram Keshav, a sub-sharer of the Potnis family, to which the parties in the suit before us belong, for a partition of his shares in certain properties including saranjam cash allowance, together with the mesne

(1) 1 B. 561. (2) 5 B. 589. (3) 6 B. 113. (4) 10 B. 528.
(5) 12 C. 482. (6) 11 M. 151. (7) 3 B.L.R. O. C. J. 1.
(8) 9 I.A. 125. (9) 17 C. 968. (10) 17 B. 271.

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profits of the same. The present defendant was defendant No. 1 in the partition suit, and the present plaintiff was defendant No. 5, and he filed a written statement, in which he urged that he had himself a 1/9th share, which had not been separated by the present defendant No. 1's father, and that if his share were separated, he had no objection to allow partition of Atmaram's 1/27th share. In the partition suit, the Court of first instance awarded Atmaram the shares and the amounts claimed by him, subject to certain deductions and conditions. The present defendant appealed from that decree, and so also the present plaintiff with some of the other defendants preferred a separate appeal, and one of the grounds urged in this latter appeal was that the lower Court had erred in not directing a partition of the whole property between all the sharers, according to their respective shares. The High Court reversed the decree of the lower Court, and declared the respective shares of Atmaram, and of the defendant and plaintiff in the present suit, as also of the other sharers in the Potnis family. The present plaintiff, who was, as stated above, defendant [535] No. 5 in the partition suit, was declared, along with his two brothers, defendants Nos. 6, 7 in that suit, to be owner of a $\frac{1}{3}$rd share. No order was made in regard to mesne profits.

The present suit was brought by defendant No. 5 in the partition suit in 1891 to recover from defendant, who represents the eldest branch, the amount due for plaintiff's 1/9th share of the saranjam cash allowances paid to the defendant from the Government treasuries of Poona, Ahmednagar and Sholapur, and the claim was made for the three years preceding the decision of the partition suit in the High Court, namely (1887-1889). Defendant, among other objections, urged that as no order about mesne profits had been made in the partition suit, plaintiff's claim for the same was not maintainable under ss. 13 and 244 of the Code of Civil Procedure. The Court of first instance overruled this objection, and allowed plaintiff's claim in part, and this decree was affirmed in appeal.

Before us, the appellant's pleader mainly rested his contention on the third and fourth grounds set forth in the memorandum of appeal. He urged that the Potnis family must be regarded as having remained joint till the decision of the partition suit in December, 1890, and as the final decree only declared the shares, and did not allow mesne profits, plaintiff's present claim could not be maintained. It was contended before us that all the parties in a partition suit are both plaintiffs and defendants as against one another, and that it has been settled by a long course of decisions that, as a rule, the sharers are not liable to be called upon to account for past receipts or disbursements, and that the present plaintiff had no right to claim his share of the receipts for the three years preceding the final partition decree of 1890, since it was really a claim for mesne profits, and that claim was not reserved or allowed by the decree. In support of these contentions, the following authorities were cited:—*Lakshman Dada Naik* v. *Ramachandra Dada Naik* (1), *Konerrav* v. *Gurrav* (2), *Sakharam* v. *Hari* (3), *Jugmohandas* v. *Sir Mangaldas* (4), *Madan* [536] *Mohan* v. *Lala Sheo Sanker* (5), *Venkoba* v. *Subbanna* (6). On behalf of the respondent Mr. Manekshah cited the following rulings.—*Ranganmani Dasi* v. *Kasinath Dutt* (7), *Raja Venkata* v. *Rajah Rojagopala* (8),

(1) 1 B. 561—5 B. 48, in Ap. (P.C.).
(2) 5 B. 589.
(3) 6 B. 11[illegible]
(4) 10 B. 528.
(5) 12 C. 482.
(6) 11 M. 15[illegible]
(7) 8 B.L.R. O. C. J. 1.
(8) 9 I.A. 125.

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Mon Mohun Sirkar v. *The Secretary of State for India in Council* (1), *Damodardas* v. *Uttamram Maneklal* (2).

On a careful consideration of these authorities, we feel satisfied that (1) while, as a general rule, it is true in the words of Mr. Mayne (5th Ed., para. 429) that "no member" of an undivided Hindu family "can have any claim to mesne profits previous to partition, because it is assumed that all surplus profits have, from time to time, been applied for the benefit" of the family, yet (2) that this is only a presumption, and that "mesne profits may be allowed on partition when one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member of the family who claimed a right to treat it as impartible, and therefore exclusively his own." This latter condition is fulfilled by the defendant in this case, for he has all along contended that the saranjam property is impartible, and in his written statement he urged that even the High Court's decree was not final, as he intended to prefer an appeal to the Privy Council. Mr. Mayne cites in his text as authorities for his second statement *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (3), and *Konerrav* v. *Gurrav* (4). In the first case this Court only decided that the defendant, who was a brother of the plaintiff seeking partition, was not liable to account for moneys received by him from his father while living in commensality with him and his brother, unless the circumstances suggested fraud. In the second case, the Court held that in the case of joint enjoyment, or enjoyment by different members of different portions of the family properly, the Court will not, except under special circumstances, order an account to be taken of past transactions, but will make division of the property actually existing at the date of partition. Melvill, J., remarked (p. 595) in the course of the judgment delivered by **[537]** him, that "the ordinary rule, no doubt, is that the members of an undivided Hindu family are not entitled to an account of past transactions," yet "where one member of the family has been entirely excluded, there might be good grounds for ordering an account." The decision in *Sakharam* v. *Hari* (5) only ruled that the Court of appeal could vary the decree of the lower Court in a partition suit, if such variation was rendered necessary by the death of one of the sharers before the appeal was finally decided. This ruling does not conflict with the decision in *Jugmohandas* v. *Sir Mangaldas* (6), where it was held that the partition must be made of the property as it exists at the date of the partition suit. None of the authorities cited by the appellant's pleader thus supports the extreme position taken up by him. The proposition he contends for is only true as a general rule, but it is based on a presumption which may be rebutted.

The whole question of a manager's liability to account was considered in the judgment of Sargent, C. J., in *Damodardas* v. *Uttamram Maneklal* (8). It was there held, after a review of all the previous decisions, that besides the two cases noted by Melvill, J., in *Konerrav* v. *Gurrav* (4), a manager may be called upon to render an account if any of the plaintiffs were minors, and he had obtained a certificate of administration. This last exception has no bearing in the present case, but the Chief Justice laid down the much larger proposition that there was nothing "in the custom of the Hindu family which would justify the manager in refusing to give any account whatever of his management on the occasion of

(1) 17 C. 963.
(2) 17 B. 271.
(3) 1 B. 561.
(4) 5 B. 589.
(5) 6 B. 113.
(6) 10 B. 528 (561).

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a partition." In a Calcutta case—*Ranganmani Dasi* v. *Kasinath Dutt* (1)—such an account was ordered where the property was a banking business, the profits of which were divided in certain proportions among the undivided members. Mesne profits were similarly allowed by their Lordships of the Privy Council in the partition of a Zemindari, where the defendant claimed that the Zemindari, was impartible—*Raja Venkata* v. *Rajah Rajagopala* (2). This is exactly [538] the case in the present instance. It may, therefore, be safely held that the general rule has no application in the present case, which falls naturally within one or other of the exceptions noted above, more especially in the extract from the judgment of Melvill, J., in *Konerrav* v. *Gurrav* (3).

It was, however, contended that though defendant might have been liable to account in the partition suit, yet as no such order was made by this Court in 1890, plaintiff has no right to claim his share of the profits for the preceding three years. It appears to us that this contention also is not well founded. In the partition suit, the present plaintiff was only a co-defendant, and though in his written statement filed in 1881, and in his appeal in 1884, the present plaintiff claimed a separation of his share, he made no claim for mesne profits. The plaintiff could not well be expected to make a claim in 1881 and 1884 for his share of the profits of 1887-89. The decision in *Venkoba* v. *Subbanna* (4) relates only to a claim for mesne profits prior to the date of the suit, and it was there held that if a plaintiff omitted to claim mesne profits or rent for such prior years, he could not under s. 43 bring a separate suit for them. The ruling of the Privy Council in *Madan Mohun* v. *Lala Sheo Sanker* (5), also had reference to the profits which had already accrued due at the institution of the suit. The reason assigned for disallowing such a claim is that the plaintiff could have joined the claim for profits along with his claim for the property. This reason does not hold good in respect of subsequent profits. All doubts, however, are removed by the latest ruling of the Calcutta High Court in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (6), where it was expressly held that "where a decree for possession is silent as to the mesne profits between the date of the institution of the suit and the delivery of possession, a separate suit will lie for such subsequent mesne profits, and ss. 13 and 244 of the Code are no bar to such a suit." The Privy Council decision in *Sadasiva Pillai* v. *Ramalinga Pillai* (7), was to the same effect, as it laid down that where the decree [539] was silent about mesne profits subsequent to the institution of the suit, plaintiff was at liberty to assert his right to such profits in a separate suit. See also *Mussummat Bebea Sahodra* v. *Roy Jung Bahadur* (8). There is in fact no room for a difference of opinion on this point, as para. 2 of s. 244 expressly reserves such a right of suit. We must, therefore, overrule this contention of the appellant.

There was only one other contention urged by the appellant, and that related to the *vadilki* allowance. The defendant claimed a right to deduct 1,200 rupees reserved to him by the partition decree out of the moneys received by him, and contended that no deduction should have been made in respect of the proportion chargeable to the allowance received from the Satara Treasury, which was not included in the

(1) 3 B.L.R. O.C.J. 1. (2) 9 I. A. 125. (3) 5 B. 589.
(4) 11 M. 151. (5) 12 C. 482. (6) 17 C. 968.
(7) 2 I. A, 219. (8) 8 I.A. 210.

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plaintiff's claim. We are not disposed to hold that the defendant has a first charge of the sort contended for by him. The *vadilki* allowance must be rateably apportioned. We accordingly reject the appeal, and confirm the decree of the lower Court with costs on appellant.

Appeal rejected.

19 B. 539.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

ANDANAPA (*Purchaser*) *Applicant v.* BHIMRAO ANNAJI AND ANOTHER (*Decree-holders*), *Opponents.** [3rd July, 1894.]

Execution—Decree—Decrees of different Courts against same judgment-debtor—Leave given by both Courts to the judgment-debtor to raise amount by private sale—Civil Procedure Code (Act XIV of 1882), s. 305—Confirmation of such sale by one Court—Subsequent application for confirmation to other Court—Practice—Procedure.

Panchlingapa Baslingapa obtained a decree against Venubai in the Court of the Second Class Subordinate Judge at Saundatti. He applied (darkhast of 1892) for execution, but Venubai, on 19th April, 1893, obtained permission, under s. 305 of the Civil Procedure Code (Act XIV of 1882), to raise the amount of the decree by private sale on or before the 6th June, 1893, the day fixed for the sale. She obtained a certificate of leave under s. 305.

[540] Another decree was obtained against Venubai in the Court of the First Class Subordinate Judge at Belgaum by one Annaji Ramchandra, and he attached in execution (darkhast 351 of 1892) the same lands, which were already attached by the Saundatti Court. From the Belgaum Court, however, Venubai also obtained a certificate under s. 305 of the Civil Procedure Code, on 22nd April, 1893, authorizing a private sale.

Relying on these two certificates Venubai sold the lands under attachment to the applicant Andanapa bin Rachapa for Rs. 2,000 by deed dated 25th May, 1893. On the 28th June, 1893, Andanapa applied to the First Class Subordinate Judge in Belgaum, under s. 305 of the Civil Procedure Code, for confirmation of the sale and that the purchase-money paid by him should be distributed as follows, *viz.*, Rs. 518-14-2 in satisfaction of the decree of the Belgaum Court, Rs. 128-7-10 in satisfaction of the decree of the Saundatti Court, and the balance, Rs. 1,352-10 0, to be paid to Venubai. The Court of Belgaum granted the application and directed that the above sum of Rs. 128-7-10 should be paid into the Court of Saundatti. On the 17th July, 1893, Andanapa applied to the Court at Saundatti to confirm the sale already confirmed by the Belgaum Court, and he brought into Court the said sum of Rs. 128-7-10. On the 19th June, 1893, while the above proceedings were going on, a third decree-holder (the opponent) had applied to the Second Class Subordinate Judge at Saundatti for execution of his decree. He objected to the confirmation of the sale applied for by the applicant. The Subordinate Judge allowed the objection and refused confirmation of the sale. The applicant then applied to the High Court under its extraordinary jurisdiction.

Held, that the application to the Saundatti Court by Andanapa was superfluous and ought to have been rejected inasmuch as the sale had already been confirmed by a competent Court (*viz.*, the Court of Belgaum) and nothing further remained to be done in regard to it.

[R., 11 C.L.J. 69=3 Ind. Cas. 105 ; 14 C.W.N. 396.]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Rao Saheb G. V. Patwardhan, Subordinate Judge of Saundatti, in an execution proceeding.

* Application No. 8 of 1894 under extraordinary jurisdiction.

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Panchlingapa Baslingapa obtained a decree against Venubai in the Court of the Second Class Subordinate Judge at Saundatti. He applied (darkhast 232 of 1892) for execution, but Venubai, on 19th April, 1893, obtained permission under s. 305 of the Civil Procedure Code (Act XIV of 1882) to raise the amount of the decree by private sale on or before the 6th June, 1893, the day fixed for the sale. She obtained a certificate of leave under s. 305.

Another decree was obtained against Venubai in the Court of the First Class Subordinate Judge at Belgaum by one Annaji Ramchandra, and he attached in execution (darkhast 351 of [541] 1892), the same lands which were already attached by the Saundatti Court. From the Belgaum Court, however, Venubai also obtained a certificate under s. 305 of the Civil Procedure Code, on 22nd April, 1893, authorizing a private sale.

Relying on these two certificates Venubai sold the lands under attachment to the applicant Andanapa bin Rachapa for Rs. 2,000 by deed dated 25th May, 1893. On the 20th June, 1893, Andanapa produced the deed in the Court of the First Class Subordinate Judge at Belgaum and applied for confirmation of the sale as required by s. 305 of the Civil Procedure Code. He asked that the purchase-money paid by him should be distributed as follows, *viz.*:—Rs. 518-14-2 in satisfaction of the darkhast in the First Class Subordinate Judge's Court, Belgaum; Rs. 128-7-10 in satisfaction of the darkhast in the Saundatti Subordinate Judge's Court, and Rs. 1,352-10-0 for payment to Venubai.

The First Class Subordinate Judge of Belgaum on the application confirmed the sale, and ordered that Rs. 518-14-2 should be paid into Court at Belgaum under darkhast No. 351 of 1892, and that the amount due under the darkhast (No. 252 of 1892) of the Saundatti Court should be paid into that Court. In the order the Court stated that there was no objection to the balance being paid to Venubai.

Andanapa accordingly paid Rs. 1,352-10-0 to Venubai on that day and obtained her receipt.

On 17th July, 1893, Andanapa applied to the Second Class Subordinate Judge at Saundatti to confirm the sale, which, as above stated, had already been confirmed by the Belgaum Court. He brought in the money due (Rs. 128-7-10) under Panchlingapa's darkhast No. 232 of 1892.

On 19th June, 1893, while the above proceedings were going on, a third decree-holder (the opponent) had applied (under darkhast No. 295 of 1893) to the Saundatti Court for execution of his decree. He objected to the private sale being confirmed, contending that the whole money realized had not been produced in Court.

[542] The Saundatti Court allowed the objection and rejected the application to confirm the sale. The following is an extract from the judgment of that Court:—

"I think the objection must prevail. Under s. 295, Civil Procedure Code, this decree-holder is entitled to a rateable share in the money realized by the private sale under s. 305, for his darkhast was presented on 19th June and the applicant produced the money and sale-deed on 17th July, 1893. Under s. 305, Civil Procedure Code, it is provided that all the money payable under the private sale must be paid into Court and not to the judgment-debtor. Applicant ought to have, therefore, produced the money that remained with him after satisfying the darkhast of the Belgaum Court into this Court, and ought not to have paid to Venubai without the permission of this Court. The decree-holder in darkhast No. 295 of 1893

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was certainly prejudiced by the applicant having paid the money to Venubai without producing it into this Court. I, therefore, must decline to confirm the sale to applicant by Venubai by the sale-deed, Ex. 35, unless the whole money paid to Venubai is produced into this Court.

"As the sale does not become absolute, the Rs. 128-7-10 produced by applicant in this Court cannot be applied towards the satisfaction of any decree; and the lands must be again put up to sale unless applicant produces the money paid to Venubai into this Court."

Against the said order the applicant presented an application under the extraordinary jurisdiction of the High Court and obtained a rule *nisi* calling on the opponents Bhimrav Annaji and another to show cause why the order should not be set aside on the following among other grounds: —That the Court of the First Class Subordinate Judge of Belgaum, being a Court of superior grade to that of the Second Class Subordinate Judge of Saundatti, and that Court having confirmed the sale to the applicant, the Saundatti Court had no jurisdiction to re-open the question, and that the sale having been confirmed by the Court of the superior grade, there was no interest left in Venubai with respect to the property which could be sold over again.

Branson (with *Vasudeo G. Bhandarkar*), for the applicant in support of the rule:—The Court at Saundatti had no jurisdiction to sell the property again. Even our application to that Court for the confirmation of the sale was superfluous, and the rejection of that application does not in any way affect our title.

Shamrav Vithal, for the opponents, showed cause:—The sale was not valid until confirmed by both the Courts. Execution was pending in both Courts and both of them gave time **[543]** under s. 305 of the Civil Procedure Code (Act XIV of 1882) to raise the money by private sale. The confirmation of both the Courts was, therefore, necessary to validate the sale. After the sale was confirmed by the Belgaum Court the applicant himself applied to the Saundatti Court for confirmation, and that Court not having confirmed the sale, the property was liable to be sold again. Section 285 of the Civil Procedure Code is not applicable to such a case. The applicant was bound to pay the money into the Saundatti Court instead of paying it to the judgment-debtor. Although we did not apply to the Belgaum Court which was the Court of a higher grade, nor apply for the transfer of our application to that Court, still we are entitled to share rateably in the money payable into Court. The Saundatti Court had power to act on the application made to it to execute the decree, although there was another application pending in the Belgaum Court—*Clark* v. *Alexander* (1); *Patel Naranji* v. *Haridas Navalram* (2).

JUDGMENT.

FULTON, J.—The facts are sufficiently stated in the Subordinate Judge's judgment. We think that the First Class Subordinate Judge having, under s. 305 of the Civil Procedure Code, confirmed the sale to the applicant, there remained in the judgment-debtor Venubai no interest which could be sold to satisfy the opponents' decree.

Mr. Shamrav contended that having regard to the fact that on the 19th June the opponents had applied to the Saundatti Court to execute their decree against Venubai, it was not competent to the First Class Subordinate Judge to confirm the sale without taking cognizance of their

(1) 21 C. 200. (2) 18 B. 458.

application, but having regard to Mr. Justice Farran's judgment in the case of *Nimbaji* v. *Vadia* (1) we cannot adopt this view inasmuch as they had neither obtained the transfer of their decree to the First Class Subordinate Court nor applied to that Court under s. 295.

Our attention was called to the judgment of this Court in *Patel Naranji* v. *Haridas Navalram* (2); but although this decision may be regarded as the authority for the proposition that a sale **[544]** ordered by an inferior Court before the attachment of such property by a Court of higher grade is not null and void in consequence of such attachment, it does not follow that the latter Court has not also power to sell the property or confirm the sale under s. 305, nor is there any section of the Code which can be referred to in support of this proposition. It may be inconvenient that two Courts should have jurisdiction to sell the same property; but however this may be, it cannot, we think, be doubted that the Court of higher grade had at least concurrent jurisdiction to confirm the sale, and that having exercised its jurisdiction the applicant acquired a good title to the property sold.

Under these circumstances the application made by the applicant to the Subordinate Judge of Soundatti to confirm the sale under s. 305 was superfluous and ought to have been rejected, not for the reasons given by the Subordinate Judge, but on the ground that as the sale had already been confirmed by a competent Court there remained nothing more to be done in regard to it.

The question as to the disposal of the item of Rs. 128-7-10 is the matter between the rival judgment-creditors on which we can express no opinion in this application.

Subject to the above remarks we discharge the order directing the lands to be again put up to sale, but confirm the order rejecting the prayer to confirm the sale. Parties to pay their own costs throughout.

Rule discharged.

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19 B. 544.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice and Mr. Justice Fulton.

NATHUBHAI MULCHAND AND OTHERS (*Original Plaintiffs*) *Applicants v.* NANA BABU AND ANOTHER (*Original Defendants*), *Opponents.**

[3rd July, 1894.]

Decree against wrong person as representative—Execution, application for—Objection to application by person not party to decree—Failure of exercise of jurisdiction vested by law—Extraordinary jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 622.

A person, not a party to a suit, is not entitled to object to the issue of an order for execution of the decree.

[545] A Judge having at the instance of a person not a party to a suit refused to pass an order for the execution of the decree on the judgment-creditor's application.

Held, that in omitting to make such an order the Judge failed to exercise a jurisdiction vested in him by law and that s. 622 of the Civil Procedure Code (Act XIV of 1882) was, therefore, applicable.

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* Application No. 27 of 1893, under the extraordinary jurisdiction.

(1) 16 B. 683.

(2) 18 B. 458.

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19 B. 544.

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against an order of A. Steward, District Judge of Khandesh, in an execution proceeding.

In June, 1889, Nathubhai Mulchand (a firm at Jalgaon) obtained a decree against Vithoba Babu as heir and legal representative of his deceased brother Nana Babu. The plaintiffs applied for execution of the decree, and their application was opposed by Bapu Nana on the ground that Vithoba Babu was not the legal representative of the deceased Nana, but that he (the opponent) being the adopted son of the said Nana Babu was his legal heir and representative.

The Subordinate Judge rejected the plaintiffs' application for execution on the ground that the opponent had been adopted prior to the institution of the plaintiffs' suit; the decree could not, therefore, be enforced.

On appeal by the plaintiffs the Judge confirmed the decree. Pending appeal Bapu Nana (the opponent) having died, the name of his mother Lakshmibai was substituted as his heir.

Plaintiffs applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* to set aside the order of the lower Courts.

Ghanasham N. Nadkarni appeared for the applicants (plaintiffs) in support of the rule.—We merely presented an application for the execution of the decree, and before any order for attachment or sale was passed on the application, the opponent intervened and resisted an application. He had no *locus standi* to do so. We are entitled to have execution issued, and if the opponent thinks that his rights are affected by the execution proceedings, he may then come in, and make his claim.

[546] *Narayan V. Gokhale* appeared for the opponent to show cause.—The plaintiff applied for execution against the wrong person and we intervened in order to save further litigation.

Even if the present order is wrong, still as the Court had jurisdiction to pass it, it cannot be interfered with by the High Court in its extraordinary jurisdiction under s. 622 of the Civil Procedure Code (Act XIV of 1882)—*Amir Hassan Khan* v. *Sheo Baksh Singh* (1); *Krishna Mohini Dossee* v. *Kedarnath Chuckerbutty* (2).

JUDGMENT.

BAYLEY, C. J. (Acting).—Without prejudice to the rights of Laxmibai (if any) to apply to raise any attachment which may be obtained by the judgment-creditor, we think that the deceased Bapu not being a party to suit No. 507 of 1888 was not entitled to object to the issue of an order for execution of the decree, and that in omitting to make such order the Subordinate Court failed to exercise a jurisdiction vested in it by law.

We, therefore, discharge the orders of the Courts below dismissing the application for execution, and direct that the Subordinate Court do proceed with execution according to law. The opponent must pay all costs throughout.

Order discharged.

(1) 11 C. 6.

(2) 15 C. 446.

19 B. 546.

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APPELLATE CIVIL.

APPEL-LATE CIVIL.

19 B. 546.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

HARI RAGHUNATH JOSHI AND OTHERS (*Original Plaintiffs*), *Appellants v.* KRISHNAJI ANANT JOSHI (*Original Defendants*), *Respondents.** [9th July, 1894.]

Decree—Compromise of decree—Effect of compromise—Mode of enforcing agreement of compromise—Contract—Reciprocal promises—Right to sue—Decree for performance of whole contract—Contract Act (IX of 1872), s. 51.

A decree for partition having been compromised by an agreement, made by the parties, and communicated to the Court which passed the decree.

[547] *Held*, that the effect of the decree was extinguished by the agreement, which could only be enforced by a fresh suit, and not by an application for execution of the former decree.

An agreement consisting of reciprocal promises to be performed by the plaintiffs and the defendant can be sued upon by the plaintiffs when they have not refused to carry out their promises, though they may not have put an allegation in the plaint saying that they are ready and willing to do so, s. 51 of the Indian Contract Act being no bar to such a suit.

When the plaintiffs are entitled to ask for the performance of the part of the contract in which they are interested and the defendant claims execution of the whole to which the plaintiffs do not object, the Court ought to pass a decree directing execution of the whole contract, instead of rejecting the claim.

[R., 20 Ind. Cas. 903 = 14 M. L. T. 157 = (1914) M. W. N. 144.]

THIS was a second appeal from the decision of T. Hamilton, District Judge of Thana, confirming the decree of Rao Saheb Moreshvar N. Ovalekar, Subordinate Judge of Pen.

The plaintiff obtained a decree in suit No. 787 of 1883 for partition of certain family property. The defendants applied for execution, but the decree was subsequently compromised by an agreement which provided that a certain quantity of the land should be given to each of the parties. The Court was duly informed of this agreement by the parties, who by a joint petition applied to the Court to strike off the execution proceedings.

The plaintiff subsequently brought this suit to recover so much of certain specified land as would make up the quantity allotted to them by the agreement.

The defendants pleaded that the agreement contained promises on the part of the plaintiffs to perform certain acts, and that not having performed them they were not entitled to sue for the land.

The Subordinate Judge rejected the claim, holding that the compromise contained reciprocal promises, that under s. 51 of the Contract Act (IX of 1872) unless the plaintiffs were ready and willing to perform their promises they could not ask the defendant to perform his promises, and that there being no allegation in the plaint that they were ready and willing to give effect to their promises, they were not entitled to institute the suit.

[548] On appeal by the plaintiffs the Judge held that the plaintiffs ought to have sought relief in the execution of the decree in the terms of the agreement, and that no separate suit would lie. He, therefore, confirmed the decree. The following is an extract from his judgment :—

(After stating the facts of the case). " Now there is no provision in the Code of Civil Procedure for striking off a darkhast in this way. Such

* Second Appeal No. 770 of 1892.

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19 B. 546.

an order appears to be no bar to a revival of execution-proceedings. There is no endorsement of satisfaction—11 Cal. L. R. 17 ; I. L. R., 10 Calc. 416.

"The proper course for plaintiffs to pursue in the event of the agreement not being carried into effect would be to apply to the Court to execute the decree in terms of that agreement. I am of opinion that no separate suit will lie.

"However in the present case the plaintiff has not stated how much land, if any, is required by him to make up his 6½ *pands* ; he does not specifically state how much he lost by erasion. The agreement was not absolutely that defendant should give up 3½ *pands*, but so much, not exceeding 3½ *pands*, as was required to compensate plaintiff for the loss by erasion, so as to give each party 6½ *pands*. Again, there are clear acts as stated in cl. 7 of the notice, Ex. 18, which plaintiff was to perform on his part."

The plaintiffs preferred a second appeal.

Vasudeo G. Bhandarkar, for the appellants (plaintiffs):—The objection that we ought to have taken steps to execute the decree and that our present suit cannot lie was not taken in the written statement nor in the first Court. It was urged for the first time by way of cross-objection in appeal in the District Court. Admitting for the sake of argument that we could have got relief by executing the former decree, still the execution proceeding would have been taken cognisance of by the same Subordinate Judge who tried the present suit. The filing of the present suit was, therefore, merely an irregularity which did not affect the jurisdiction of the Court, and an objection to such an irregularity, which is merely a mistake in procedure, cannot be taken for the first time in appeal.

Further, our present suit is based upon the agreement. The agreement gave a distinct cause of action, and the relief which we claim in this suit could not have been obtained in the execution of the former decree, because the present suit relates to land which was not included in the former suit— *Debi Rai* v. **[549]** *Gokal Prasad* (1), *Ramlakhan Rai* v. *Bakhtaur Rai* (2). In this suit we really seek for specific performance of a part of the agreement; and if it be held that such a suit cannot lie, we should be allowed to amend the plaint and to sue for specific performance of the whole agreement, or we should be allowed to withdraw the suit with liberty to bring a fresh one, so that the bar of s. 43 of the Civil Procedure Code (Act XIV of 1882) may not arise. The agreement contains reciprocal promises, and unless the defendant was ready and willing to give effect to his promises, we could not do anything to carry out our promises. Even the written statement does not allege that the defendant was ready and willing to act up to the agreement.

Ghanasham N. Nadkarni, for the respondent (defendant).—The suit is barred under s. 244 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs' remedy lay in the execution of the former decree. Further, the plaintiffs are not entitled to bring the present suit, because they have not performed nor offered to perform their part of the agreement. If the suit be considered as one for specific performance of the agreement, then it is barred under art. 113, sch. II of the Limitation Act (XV of 1877). The suit ought to have been filed within three years of the date of the agreement which must be considered to be the date on which we refused to give

(1) 3 A. 585. (2) 6 A. 623.

effect to the agreement, as according to the plaintiffs' allegation we were never ready and willing to carry out our agreement.

JUDGMENT.

FULTON, J.—We are unable to concur with the District Judge in thinking that the plaintiffs should have proceeded by application for execution of the former decree instead of by separate suit. The effect of the decree in the former suit was extinguished by the compromise contained in Exs. 15, 18 and 19, which was communicated to the Court by the joint petition of the parties embodied in Ex. 15. This compromise formed a fresh agreement which could only be enforced by a fresh suit.

We are also unable to concur with the Courts below that the plaintiffs are precluded from recovering possession of the land secured to them by the 7th clause of Ex. 18, because they [550] have not put an allegation in the plaint that they are willing and ready to give effect to their promises. The agreement to measure the rest of the village and to divide equally certain other lands imposed no special obligation on the plaintiffs for its execution. Both parties were equally bound to give effect to it, and without the defendant's concurrence the plaintiffs could not act upon it. It is not suggested in the written statement that the defendant had ever asked the plaintiffs to carry out the partition and had been refused, and in the examination of the plaintiff Hari Raghunath Joshi (Ex. 24) he distinctly states that he is ready to abide by the statements contained in Exs. 15, 18 and 19. Under these circumstances s. 51 of the Contract Act is no bar to this suit which has been brought in the proper form. The plaintiffs were entitled to ask for the performance of the part of the contract in which they were interested, and on the defendant claiming execution of the whole, and the plaintiffs raising no objection, the Courts below ought to have passed a decree directing execution of the whole contract, instead of rejecting the claim.

In argument reference was made to art. 113 of sch. II of the Limitation Act, but as it is not suggested that three years had elapsed between the first refusal of the defendant to perform his part of the agreement and the institution of the suit, it is clear that no question of limitation arises.

We now reverse the decrees of the Courts below, and remand the case to the Court of first instance, which, after examining the parties or their pleaders and any witnesses they may wish to produce, and ascertaining in detail which of the terms of the agreement embodied in Exs. 15, 18 and 19 have not yet been carried out, will pass a decree directing the performance of all such terms (which should be clearly specified in the decree) and providing that on the application of either party execution of the whole decree shall be granted by the Court. The defendants must pay all costs in both Courts of appeal. The costs of the Court of first instance will be awarded by that Court when passing its final decree.

Decree reversed and case remanded.

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19 B. 551.

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[551] APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice and Mr. Justice Fulton.

RAMCHANDRA GOVIND MANIK (*Original Defendant No.* 1), *Appellant v.* SONO SADASHIV SARKHOT AND ANOTHER (*Original Plaintiffs*), *Respondents.** [9th July, 1894.]

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), *ss.* 566, 569, 574—*Remand—Findings on issues - Duty of appellate Court to form its own opinion on the evidence or record reasons for findings.*

In certifying to the High Court the findings on issues sent back on remand and found by the Court of first instance, the lower appellate Court is, in the absence of any admission by the party against whom the issues have been found, bound to form its own opinion on the evidence and record its findings with the reasons for them.

[F., 20 M. 496=7 M.L.J. 236 ; R., 31 M. 469=18 M.L.J. 34=3 M.L.T. 71.]

SECOND APPEAL from the decision of C.E.G. Crawford, District Judge of Ratnagiri.

The plaintiffs obtained a decree against two brothers, Govind and Narayan, for possession of certain land. Govind's son, Ramchandra (defendant No. 1), obstructed them in taking possession, and they accordingly applied, under s. 328 of the Civil Procedure Code (Act XIV of 1882), for removal of the obstruction, and after the necessary investigation the Court numbered and registered the plaintiffs' application as a suit between the plaintiffs and Ramchandra as defendant under s. 331 of the Civil Procedure Code.

Ramchandra contended that his father Govind had given the land to him for his separate enjoyment; that he knew nothing of the decree, and that the plaintiffs must sue for partition.

The Subordinate Judge (Rao Saheb S. M. Kale) found that the defendant was bound by the decree, and awarded the plaintiffs' claim.

On appeal by the defendant the Judge (Rao Bahadur Kashinath Balkrishna Marathe, First Class-Subordinate Judge with appellate powers) confirmed the decree.

The defendant preferred a second appeal and the High Court sent back certain issues to be tried (see Printed Judgments for **[552]** 1893, pp. 479-80) on which the Subordinate Judge took further evidence and found in favour of the plaintiffs.

The District Judge on receipt of the findings from the Subordinate Judge confirmed them on the 6th March, 1894, for the following reasons:—

"Messrs. Damle and Bhate, who appeared for Ramchandra at the original hearing of the appeal, state that they have received no instructions to contest these findings of the lower Court. They were received by this Court on the 29th January, so that there has been ample time for them to be instructed.

"In the absence of argument, my findings upon the issues sent down are the same as those of the lower Court."

The defendant contended that the District Judge ought to have considered the evidence himself.

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* Second Appeal No. 133 of 1892.

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Narayan G. Chandavarkar, for the appellant (defendant) :—The Judge has committed an error in law in upholding the findings of the Subordinate Judge merely because no argument was addressed to him against them. He ought to have himself weighed the evidence and formed his opinion upon it—*Bhagvan* v. *Kesur Kuverji* (1), *Umed Ali* v. *Salima Bibi* (2), *Mumtaz* v. *Futeh Husain* (3) and *Balkrishna* v. *Narayan* (4).

Manekshah J. Taleyarkhan, for the respondents (plaintiffs).—If the defendant was dissatisfied with the findings of the Subordinate Judge, he ought to have instructed his pleaders in appeal in the District Court to raise objections. The Judge asked his pleaders whether they desired to object, and they pleaded want of instructions. The defendant must, therefore, be considered to have acquiesced in the findings of the Subordinate Judge, and the Judge confirmed them.

JUDGMENT.

BAYLEY, Acting C. J.—In the absence of any distinct admission by the first defendant's pleader, that the finding of the Subordinate Judge on the issues was correct, we think the District Judge was bound to form his own opinion on the evidence and record his finding with the reasons therefor—*Bhagvan* v. *Kesur Kuverji* (1), *Umed Ali* v. *Salima Bibi* (2), *Mumtaz* v. *Futeh Husain* (3) and *Balkrishna* v. *Narayan* (4). We must, therefore, return the papers to **[553]** the District Court with instructions to record its finding according to law. The proceedings should be returned within two months.

Papers returned.

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Before Mr. Justice Bayley, Acting Chief Justice and Mr. Justice Fulton.

DHONDI (*Original Plaintiff*), *Appellant v.* LAKSHMAN (*Original Defendant*), *Respondent.** [9th July, 1894.]

The Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13, cls. (b), (d), and s. 15 (5)—Mortgage —Redemption suit —Account —Principal debt how ascertained — Arbitration.

In a redemption suit under the Dekkhan Agriculturists' Relief Act (XVII of 1879) the Court should, in taking an account, form its own opinion on the subject. As the law stands, a mere guess as to the sum of money actually advanced cannot be made in **[554]** favour either of one side or the other. If there are no materials from which the Court can satisfy itself as to the amount which should be allowed on account of principal, whether under cl. (*b*) or cl. (*d*) of s. 13 of the Act, it is open to it to have recourse to arbitration under the provisions of s. 15.

* Second Appeal No. 780 of 1892.

(1) 17 B. 428. (2) 6 A. 383. (3) 6 A. 391. (4) P. J. (1881) 331.

(5) Section 13, cls. (*b*), (*d*) and s. 15 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) :—

13. When the Court inquires into the history and merits of a case under section twelve, it shall—

notwithstanding any agreement between the parties or the persons (if any) through whom they claim, as to allowing compound interest or setting off the profits of mortgaged property without an account in lieu of interest, or otherwise determining the manner of taking the account,

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Mahadu v. *Rajaram* (1) considered.
Maloji v. *Vithu* (2) referred to.

THIS was a second appeal from the decision of Rao Bahadur C. N. Bhat, First Class Subordinate Judge of Poona, with appellate powers.

The plaintiff sued to redeem and recover possession of certain lands mortgaged to the defendant by two deeds, *viz.*, one for Rs. 1,995, dated the 24th October, 1866, and a second for Rs. 1,300, dated the 16th July, 1869. He alleged that the loans actually received were only Rs. 25 and that the rest was accumulated interest. He prayed that an account of the rents and profits received by the defendant should be taken, and after deducting them from the mortgage-debt due by the plaintiff, the balance of the debt, if any, should be made payable by instalments.

The defendant denied the plaintiffs' allegations and stated that he was willing to restore the land on payment of Rs. 3,295.

The Subordinate Judge relying on *Mahadu* v. *Rajaram* (1) treated the amounts mentioned in the mortgage-bonds as principal, and ordered that the same be paid with costs by yearly instalments of rupees two hundred with interest at rupees six per cent. per annum on the amount of the debt due, or at once, and in case of [555] default in the payment of the amount of any instalment and that the plaintiff should be put in possession of the mortgaged property after the then standing crops were reaped.

On appeal by the plaintiff the Judge confirmed the decree.

The plaintiff preferred a second appeal.

Manekshah J. Taleyarkhan, for the appellant (plaintiff) :—The Judge ought to have gone into the history of the transaction and ascertained the real sum due as directed by the Dekkhan Agriculturists' Relief Act. The Courts have assumed that the amounts mentioned in the two bonds constituted the principal debt. This is a very wrong mode of dealing with the case under the provisions of the Dekkhan Agriculturists' Relief Act.

There was no appearance for the respondent (defendant).

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and notwithstanding any statement or settlement of account or any contract purporting to close previous dealings and create a new obligation open the account between the parties from the commencement of the transactions and take that account according to the following rules (that is to say) :—

(*a*) . . . .

(*b*) in the account of principal there shall be debited to the debtor such money as may from time to time have been actually received by him or on his account from the creditor, and the price of goods, if any, sold to him by the creditor as part of the transactions :

(*c*) . . . .

(*d*) in the account of principal there shall not be debited to the debtor any accumulated interest which has been converted into principal at any statement or settlement of account or by any contract made in the course of the transactions, unless the Court, for reasons to be recorded by it in writing, deems such debit to be reasonable.

15. Instead of inquiring into the history and merits of a case under section twelve, or if upon so inquiring the Court is unable to satisfy itself as to the amount which should be allowed on account of principal or interest, or both, the Court may, of its own motion, direct that such amount be ascertained by arbitration.

If the parties are willing to nominate arbitrators, the arbitrators shall be nominated by them in such manner as may be agreed upon between them : if the parties are unwilling to nominate arbitrators, or cannot agree in respect of such nomination, the Court shall appoint any three persons it thinks fit.

Provided that if all the parties reside in the same village, town or city, and, in the opinion of the Court, three fit persons can be found among the residents of such village, town or city, it shall appoint residents of such village, town or city.

The provisions of ss. 508 to 522 (both inclusive) of the Code of Civil Procedure shall apply to every reference to arbitration under this section.

(1) P. J. (1887) 216.

(2) 9 B. 520.

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JUDGMENT.

FULTON, J.—In this case the plaintiff, who is an agriculturist, sued to redeem two mortgages created by bonds, dated respectively the 24th October, 1866, and the 16th July, 1869. On enquiring into the history from the commencement of the transactions and taking an account the Court of first instance wrote as follows:—

"The first deed was passed by plaintiff's deceased father to defendant's grand-uncle for Rs. 1,995. The recital made in the deed itself goes to show that the deed was passed for old debts, including probably a considerable amount of accumulated interest. The second bond seems to have been passed for a cash consideration.....Defendant informed the Court that he or she had no accounts or other means to show how the consideration was made up and was not aware whether Krishnaji Govindrav Jadhav, a near relation of defendant, possessed any accounts. Krishnaji Govindrav was one of the witnesses cited by plaintiff, but he did not put in his appearance, and a warrant was ordered to be issued for his arrest. Plaintiff, however, failed to give the requisite process fees, and no warrant was issued. The Court has, therefore, to determine the point on what materials it has before it in the shape of mortgage-deeds... ...Defendant's grand-uncle was not a money-lender by profession, and there was hardly any necessity for him to keep regular accounts. Plaintiff has [356] put in a few old bonds, the oldest being for Rs. 25; but his pleader is unable to explain the several links which are undoubtedly wanting to give a fair idea as to how the accounts were made from time to time. In fact, several of the connecting links have long perished. A Court inquiring into the history of a case under s. 12 of the Dekkhan Agriculturists' Relief Act is not intended to eke out by mere guesses a history which is defective. The proper course is to start from the point where reasonable certainty begins—P. J., 1887, p. 216. On the authority of the above ruling, as I find nothing to rely on behind the mortgage transaction of 1866, I decide that Rs. 1,995 and Rs. 1,300 must be taken as the principal."

In dealing with the question the appellate Court, after pointing out that the evidence was insufficient to connect certain old bonds with the transactions in dispute, proceeded as follows:—"There is nothing to show that the defendant has withheld account books. The plaintiff himself looked up to one Krishnaji Govind Jadhav to produce accounts, but the plaintiff himself did not persevere in getting him or the accounts alleged to be with him into the Court. The lower Court has, therefore, properly held that the sums mentioned in the mortgage-bonds, Exs. 28 and 29, were to be treated as the principal (1)."

From these extracts it appears that both Courts seem to have considered that they were bound by some rule of law to come to the conclusion at which they arrived. In holding that the item of Rs. 1,955 was all principal, the Second Class Subordinate Judge does not appear to have acted on his own opinion of what was probable, as he thought the deed was passed for old debts, including probably a considerable amount of accumulated interest. The appellate Court's judgment was not equally explicit; but from the reference to the case reported in the printed judgment, it seems that the Judge considered that it laid down a general principle by which Courts were bound when taking accounts under the Dekkhan Agriculturists' Relief Act. An examination of that case, however,

(1) P.J. (1887), 216.

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does not show that any general principle was prescribed, excepting that the Act did not intend a defective [557] history to be supplemented by mere guesses. Nothing is said about the "proper course" to follow. Their Lordships merely dealt with the facts before them which were held to justify the finding of the District Judge in appeal. No rule was laid down as to the conclusions which other Judges of fact might draw from the evidence before them in cases with which they might have to deal. The words "proper course" quoted by the Second Class Subordinate Judge seem taken from the summary in the Index to the Judgments for 1887, and are not to be found in the judgment itself.

In a case like the present a serious difficulty undoubtedly arises in determining the amount of principal, but the Court must nevertheless endeavour to form its own opinion on the subject. As the law stands, mere guesses as to the sum of money actually advanced cannot be made in favour either of one side or the other. If there are no materials from which the Court can satisfy itself as to the amount which should be allowed on account of principal, whether under cl. (*b*) or cl. (*d*) of s. 13 of the Act, it is open to it, as pointed out in *Moloji* v. *Vithu* (1), to have recourse to arbitration under the provisions of s. 15.

Under these circumstances, as the account has not been taken in accordance with the Act, we must reverse the decree of the lower appellate Court and remand the appeal for a fresh decision in reference to the above remarks.

Decree reversed.

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ORIGINAL CIVIL.

Before Mr. Justice Farran.

MACMILLAN AND OTHERS (*Plaintiffs*) *v.* KHAN BAHADUR SHAMSUL ULAMA M. ZAKA (*Defendant*).* [25th February, 1895.]

Copyright—Infringement—Translations—Jurisdiction—Statute 5 *and* 6 *Vict., cap.* 45 *—Order for books sent from Bombay to Delhi—Value payable post—Registration of copyright—Notice of disputed proprietorship—Act XX of* 1847, *s.* 8—*Practice—Procedure.*

The plaintiffs were publishers in London. The defendant carried on a printing and publishing business at Delhi. Between the years 1869 and 1891 the defendant translated [558] certain English works (*e. g.* Todhunter's Mensuration, Barnard Smith's Algebra, &c.) into the Urdu language for the use of native students, and sold and distributed copies of such translations in various parts of India. The plaintiffs alleged that they were the proprietors of the copyright in the said books, and they sued in Bombay for a declaration of their ownership, and that the said books printed and sold by the defendant were an infringement of the said copyright, and for an injunction, &c. It appeared that in June, 1894, the plaintiffs' agent, who was then in India, instructed the Bombay firm of Sunder Pandurang to order copies of the said translations from the defendant. A letter was accordingly sent by Sunder Pandurang to the defendant at Delhi requesting him to send the books to Bombay by value payable post, which the defendant did, and he received payment for them from the Post Office at Delhi. The defendant pleaded (*inter alia*) that the High Court of Bombay had no jurisdiction, and he denied that he infringed the plaintiffs' copyright.

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* Suit No. 607 of 1894.

(1) 9 B. 520.

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Held, that no part of plaintiffs' cause of action arose in Bombay, and that the Hight Court of Bombay had no jurisdiction. The act of Sunder Pandurang in paying for and receiving the goods formed no part of the defendant's offence, which was completed when he posted the books at Delhi.

The English Copyright Act (Stat. 5 and 6 Vict., cap. 45) extends to all parts of India. Having regard to s. 15 of that Act it is clear that a person who infringes copyright must be sued, if he offends in India, not only within the limits of that country, but also in that part of India in which the offence has been committed. See also s. 13 of the Indian Act XX of 1847.

Held, also, that translations are not copies, and that the defendant by translating the books had not infringed the plaintiffs' copyright.

The plaintiffs had registered themselves as the proprietors of the copyright of the books in question both in London and in India. The defendant had not given notice of his intention to dispute the plaintiffs' copyright as required by s. 8 of Act XX of 1847.

Held, that the plaintiffs' copyright in the book had been established.

SUIT to restrain the infringement of copyright.

The plaintiffs, who carried on the business of publishers in London under the name of Macmillan and Company, sued (through their attorney, R. Gilbert) the defendant, who resided at Delhi, to restrain him from printing and selling certain school books, of the copyright of which they were the registered proprietors in England and in India.

The plaint alleged that the plaintiffs were the proprietors of the copyright in the books in question, *viz.*, (1) "Mensuration and Surveying for Beginners" by J. Todhunter; (2) "Algebra" by Barnard Smith; (3) "Arithmetic for schools" by Barnard Smith; (4) "Elementary Lessons in Physical Geography" by **[559]** Geikie; (5) "Rudiments of Physical Geography" by Blandford, and that the defendant had printed or caused to be printed copies of the said books in the Urdu language, which he sold and distributed in different parts of India including the town and island of Bombay. In particular it was alleged that in the month of June, 1894, the defendant sold and delivered to one Sunder Pandurang, in Bombay, copies of the said books, which were piracies.

The plaint further stated that it was the intention of the plaintiffs themselves to publish the aforesaid books in the Urdu language.

The plaintiffs prayed for a declaration that they were the owners of the copyright in the said books, and that the books printed and sold by the defendant as aforesaid were an infringement of the plaintiffs' copyright; for an injunction and an account, &c.

The defendant filed a written statement as follows:—

"2. The defendant denies that he has printed or caused to be printed copies of the said books as in the 2nd paragraph of the plaint alleged; but with respect to the first three of the said books (*viz.* Mensuration and Surveying for Beginners by J. Todhunter, Algebra by Barnard Smith, and Arithmetic for Schools by Barnard Smith) the defendant admits that he has with the expenditure of much labour and skill translated the same into Urdu language, and has from time to time printed and published and sold copies of such translations in Delhi outside the jurisdiction of this Honourable Court. With respect to the fourth book in the said paragraph referred to (*viz.* Elementary Lessons in Physical Geography by Giekie), the defendant admits that he has composed and printed and published in Delhi aforesaid and there sold copies of a treatise in the Urdu language entitled 'Jugrophia Tobai' for the purpose of which he has borrowed and adapted certain information from the said book in common with other books of a kindred nature. The defendant denies that he has either translated or

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printed or published translations of the fifth book in the said paragraph referred to (*viz.*, Rudiments of Physical Geography by Blandford). The defendant also denies that he has sold or distributed in the town or island of Bombay any copies, translations or adaptations of the said books whatsoever.

"3. With reference to the 4th paragraph of the plaint, the defendant says that on or about the 25th day of June, 1894, he received in Delhi an order for (*inter alia*) certain of his Urdu works from one Sunder Pandurang of Bombay, and that he on the same day executed the said order in Delhi by forwarding to the said Sunder Pandurang, by value payable post, in the ordinary course of business, such of the said works or translations as he was then able to supply. Translations of two only of [560] the books referred to in the plaint, *viz.*, the two works by Barnard Smith, were among the works he sent.

"4. The defendant submits that under the circumstances hereinbefore set out, no cause of action has accrued to the plaintiffs within the jurisdiction of this Honourable Court.

"5. Without waiving the contentions in the last preceding paragraph hereof raised, the defendant says, with reference to the book entitled Mensuration and Surveying for Beginners by J. Todhunter in the first paragraph of the plaint referred to, that in or about the year 1870 the defendant wrote to the said J. Todhunter asking permission to translate his works into the Urdu language, and that the same was then accorded to the defendant with the knowledge and consent of the plaintiffs, and that the plaintiffs have no right now to raise any question with respect thereto. A copy of a letter received by the defendant from the said J. Todhunter, dated the 18th October, 1870, is hereto annexed.

"6. The defendant further says that on the 4th day of January, 1891, he sold and assigned all his rights in the treatise entitled, 'Jugrophia Tobai' in the second paragraph hereof mentioned, to one Lala Gulab Sing, Curator and Superintendent of the Punjab Book Depot at Lahore, and that since that date he has neither printed, nor caused to be printed, nor had in his possession for sale or hire any copies or copy of the same.

"7. With reference to the 4th paragraph of the plaint, the defendant submits that, if and so far as the copyright of the books in the first paragraph of the plaint referred to is the property of the plaintiffs, the same has been in no way infringed by the defendant.

"9. With reference to the 6th paragraph of the plaint, the defendant submits that he has valuable and subsisting rights and interests in his aforesaid Urdu works or translations, and that the same can in no way be affected by any future intentions of the plaintiffs with respect to the said books.

"10. The defendant does not admit that the plaintiffs only became aware in the beginning of 1894, that the defendant had printed and sold or was printing and selling his said Urdu works or translations as in the first paragraph of the plaint alleged. The defendant says that he printed and published his translation of Mensuration and Surveying for Beginners by J. Todhunter, in fourteen editions, between the years 1870 and 1891, and his translation of Algebra by Barnard Smith, in three editions, between the years 1871 and 1884, and his translation of the Arithmetic for Schools by Barnard Smith, in twenty-one editions, between the years 1871 and 1893 without objection or claim on behalf of the plaintiffs, and that it would be inequitable now to restrain him from selling the same.

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"11. The defendant submits that the claim of the plaintiffs is barred by limitation."

The following issues were raised at the hearing :—

1. Whether the Court has jurisdiction in respect of any and which of the matter complained of in plaint ?

[561] 2. Whether plaintiffs are proprietors of copyright in any and which of the five books referred to in the first paragraph of the plaint ?

3. Whether defendant has infringed the plaintiffs' copyright in any and which of the said books ?

4. Whether plaintiffs' claim is not barred by limitation?

5. Whether plaintiffs are not precluded by delay from obtaining relief in the suit ?

6. Whether with regard to the works of Todhunter, the defendant has not translated same with consent of Todhunter and plaintiffs ?

Macpherson and *Inverarity* for plaintiffs.—They referred to Act XX of 1847 ; Act IX of 1871 ; Statute 5 and 6 Vict., cap. 45, ss. 15, 24 and 26 ; *Munshi Shaik Abdurruhman* v. *Mirza Mahomed* (1) ; *Murray* v. *Bogue* (2) ; Scrutton on Copyright ; *Nicols* v. *Pitman* (3) ; *Warne* v. *Seebohm* (4) ; *Hanfstaengl* v. *Empire Palace. &c.* (5) ; *Gonband* v. *Wallace* (6) ; Limitation Act (XV of 1877), sch. II, art. 40.

Lang (Advocate General) and *Lowndes*, for the defendant.—They cited *Wyatt* v. *Barnard* (7) ; *Millar* v. *Taylor* (8) ; *Burnett* v. *Chetwood* (9) ; *Prince Albert* v. *Strange* (10) ; *Macmillan* v. *Suresh Chunder Deb* (11).

JUDGMENT.

FARRAN, J.—This suit, which was heard on the 25th February last, raises questions of some interest as to jurisdiction in copyright actions, and as to whether unauthorised translations constitute an infringement of copyright.

The facts are these : The plaintiffs are publishers in London. They have brought out the following among other educational works :—(1) Mensuration and Surveying for Beginners, by Todhunter; (2) Arithmetic for Schools, by Barnard Smith ; (3) Arithmetic and Algebra, by Barnard Smith. The plaint complains of the infringement, by the defendant, of the plaintiffs' copyright in two other works, but as admittedly the plaintiffs did not prove, at the hearing, any cause of action as to them [562] cognisable by this Court, no further reference need be made to them in this judgment.

The defendant (who was formerly Professor of Vernacular Science and Literature in the Muir Central College at Allahabad, but now enjoys a pension from Government) resides at Delhi, and carries on a printing and publishing business there. In 1851 he began, for profit and in order to assist native students, to translate English Mathematical works into the Urdu language. In 1869 he so translated Todhunter's Mensuration and Surveying. Of this he printed and published fourteen editions between that time and 1891. In or about the year 1871, he translated Barnard Smith's Arithmetic and Algebra, of which he printed and published three editions between 1871 and 1884, and in or about the year 1871 he translated Barnard Smith's Arithmetic for Schools, of which he printed and published twenty-one editions between 1871 and 1893.

(1) 14 B. 586. (2) 1 Dr. 353 (367). (3) 26 Ch. D. 374.
(4) 39 Ch. D. 73. (5) L.R. (1894) 3 Ch. 109. (6) 36 L.T. 704.
(7) 3 V. & B. 77. (8) 4 Burr. 2344. (9) 2 Mer. 441.
(10) 2 DeG. & Sm. 692. (11) 17 C. 951.

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Soon after publishing the translations of Todhunter's works in 1869, the defendant wrote to Dr. Todhunter at Cambridge, asking for his permission to publish it, and received a reply purporting to come from Dr. Todhunter, and to be written and signed by him. In it the writer states that he had consulted his publishers, and continues:—"They of course agree with me in the natural regret that the translation of books into a foreign language should bring no remuneration to those who have expended their time and capital in the original production of them. But of course, as we have no control over the circumstances, we cannot refuse the permission which you seek." He then went on to ask the defendant to send his (Dr. Todhunter's) publishers two copies of any translation of his works which the defendant might issue. The defendant says that he sent the copies asked for. This letter has been objected to by the plaintiffs on the ground that it has not been proved to have been written by Dr. Todhunter, but I have no doubt as to his having written it, and that it is admissible in evidence: Taylor on Evidence, para. 1864.

No objection was ever taken to the defendant's translations until that which I am about to refer to. In October, 1892, **[563]** Mr. John A. Stagg came out to India as plaintiffs' agent; and in December, 1893, when at Lahore, he learned that the defendant had been publishing the translations into Urdu, of which the plaintiffs complain. He saw the defendant on the subject at Delhi. The defendant admitted that he had published the translations, but contended that he had a right to do so. After this, a correspondence took place between the defendant and the plaintiffs in London, in which the defendant, with extreme courtesy, upheld his right to publish the translations in question, but the plaintiffs expressed their inability to accept his views, and their determination to enforce their legal rights. On the 22nd June, 1894, the plaintiffs' agent, Mr. Stagg, instructed the Bombay firm of Sunder Pandurang to order the translations published by the defendant. Sunder Pandurang accordingly wrote the following letter to the defendant at Delhi:—"Dear Sir,—Please send me the undermentioned books per value-payable post, allowing the usual trade discount, and oblige." The list comprised, among others, the defendant's translations of the three works which I have named. The defendant, in reply, wrote: "I have despatched to your address a book-packet by value-payable post containing the following books." The list comprised translations of the two works by Barnard Smith, but of a different work by Todhunter. Sunder Pandurang received, and paid through the post office for, the books, which the defendant sent to Bombay by value-payable post, and the defendant received the amount from the post office at Delhi.

The first question which arises on these facts is, "whether this Court has jurisdiction in respect of any, and which of the matters complained of in the plaint." The English Copyright Act, 5th and 6th Vict., cap. 45, extends (s. 29) to the United Kingdom of Great Britain and Ireland, and to every part of the British dominions; and (by s. 2), British dominions include all parts of the East and West Indies. The Act, therefore, extends to all parts of India, which must, I think, be taken, for the purposes of the statute, not as a homogeneous whole, but as divided into parts. Section 15 deals with jurisdiction, and enacts "that if any person shall in any part of the British dominions after the passing of the Act print or cause to be printed either for sale or **[564]** exportation any book in which there shall be subsisting copyright without the consent of the proprietor thereof * * * or shall sell, publish or expose to sale or hire * * * or cause

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to be sold, published or exposed to sale or hire or shall have in his possession for sale or hire any such book so unlawfully printed * * * without such consent, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright to be brought in any Court of record in that part of the British dominions in which the offence shall be committed." It is to my mind clear that the offender must be sued, if he offends in India, not only within the limits of that country, but in that part of India in which the offence is committed. If, therefore, he offends in Delhi, he cannot, by virtue of the provisions of this statute, be sued in Bombay. He must, I think, if sued in a Court of record, be sued in that Court of record which has jurisdiction in that part of India where the offence is committed. If the aid of the Indian Act XX of 1847, s. 13, can be used to explain the English statute, the case is clear beyond all doubt; but I think that even without such aid there can be no reasonable doubt as to construction of the statute. So far, therefore, as the suit relates to the translations of Todhunter's work, which are complained of in it, and which were not sent to Bombay, I am of opinion that the Court has no jurisdiction to hear it.

I now proceed to consider whether the sending, by the defendant, of the translations of Barnard Smith's works, by value-payable post, to Sunder Pandurang in Bombay, gives rise to a cause of action here, assuming for this purpose that publication of such translations constitutes a breach of the plaintiffs' copyright. The unauthorised sale is the cause of action. The statute makes such unauthorised sale an offence. The question for solution, is where was that offence committed?

Now, in the case of a sale of unascertained goods, the property in the goods does not pass: the sale is not completed until the goods are finally appropriated to the contract, but where they are so appropriated, the sale is complete, and the property passes: the obligation of the purchaser to pay the price, being the consideration for the **[565]** sale.(1) Where, from the terms of an executory agreement to sell unspecified goods, the vendor is to despatch the goods he. . . has the right to choose what the goods shall be; and the property is transferred the moment the despatch has commenced (2). So far the law is, I think, clear. Cotton, L. J., in *Mirabita* v. *Imperial Ottoman Bank* (3), states it in the following words (p. 172) :—"Under a contract for sale of chattels not specified, the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier * * is an appropriation sufficient to pass the property."

In the case, however, of a vendor shipping goods he may, by taking the bill of lading in his own name, reserve to himself what is commonly called a *jus disponendi*, in which case he shows his intention that the property shall not pass until the price is paid or some other condition is fulfilled by the purchaser—*Wait* v. *Baker*(4); *Ogg* v. *Shuter*(5); *Mirabita* v. *Imperial Ottoman Bank*(3). Up to that time he can deal with the goods so as to defeat the purchaser's rights under his contract, leaving the latter to his action for damages for breach of contract. I think, however, that

(1) Benjamin on Sales, Bk. II, Chaps. 2 and 5 (4th Ed.).
(2) Benjamin on Sales (4th Ed.), p. 320.
(3) 3 Ex. D. 164. (4) L. R. 2 Ex. 1. (5) 1 C. P. D. 47.

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it must also be that, when delivering the goods to a common carrier, he could similarly, by sufficiently declaring his intention, prevent the property in the goods from passing. The question in each case is a question of intention. In the case of goods ordered to be sent by value payable post, I think that the intention must be that the property vests in the purchaser from the time the goods are posted. The vendor by posting them parts absolutely with the goods. He cannot reclaim them, nor does he, I think, retain any *jus disponendi* over them, and on the purchaser paying for the goods when the post office tenders them to him, the purchaser becomes absolutely entitled to receive them, a title which the vendor cannot, I think, defeat. The fact that [566] the vendor retains through the post office a *quasi* lien over the goods or right to refuse delivery until payment, is not, in my opinion, sufficient to prevent the property in the goods vesting in the purchaser from the time of their appropriation.

If this be the correct way of regarding the transaction, as I think it is, it follows that the sale of the books in question took place at Delhi when the books were posted, and that the offence was complete there. Delivery to the purchaser and payment of the price in Bombay does not constitute the sale. Sale and delivery are two distinct acts, though the latter is the completion of the former. The common count for goods bargained and sold, as distinguished from the common count for goods sold and delivered, marks the distinction.

From this I think it also follows that no part of the plaintiffs' cause of action arose in Bombay so as to give them a right to sue under cl. 12 of the Letters Patent. The act of Sunder Pandurang in paying for and receiving the goods forms no part of the defendant's offence, which, as I have showed, was, in my opinion, completed when he posted the books at Delhi. I have, therefore, come to the conclusion that the Court has no jurisdiction over the defendant in this matter.

The question is, however, such a doubtful one that I think that I ought to consider the other issues in the case in order to avoid a remand in case a higher Court should come to a different conclusion upon it. The defendant has raised an issue as to the plaintiffs' copyright in the books complained of. The plaintiffs have, however, registered themselves as the proprietors of the copyright in both London and India ; and s. 16 of the statute 5 and 6 Vict., cap. 45, and s. 8 of Act XX of 1847 prevent the defendant from raising this question at the hearing without previous notice. The defendant in this case has given no such notice, but has, on the contrary, virtually admitted the plaintiffs' title previous to the suit. I must hold that the plaintiffs' copyright in the books in question has been established.

The important question still to be considered in this case is whether the defendant's translations into Urdu of Barnard Smith's two works are an infringement of the plaintiffs' copyright [567] therein. It is strange that the question has not been long since authoritatively decided. The cases of *Stowe* v. *Thomas* in the United States in 1853 and of *Munshi Shaik Abdurruhman* v. *Mirza* (1) decided by Mr. Justice Parsons in this Court in 1890, are the only actual decisions upon the subject which have been cited to me : the only ones that, I believe, have been passed. They both determine the question in the negative. The text-book writers take the opposite view. Under these circumstances, and as the decision of

(1) 14 B. 586.

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Mr. Justice Parsons was upon the Indian Act and not under the English statute, I ought, I think, to come to an independent conclusion upon the subject.

Whether copyright existed at common law before the statute of Anne (8 Anne, cap. 19) has long been a question much debated by lawyers ; but since the decision of the House of Lords in *Jeffreys* v. *Boosey* (1), it must, I think, be assumed by Courts of law dealing with questions of copyright that no such right existed before that statute. The question must, therefore, depend upon the construction of the statutes for the time being relating to copyright, and by considering what rights they confer upon its proprietor without taking into consideration what benefits the author of a work ought or ought not to derive from the creation of his brain and pen. After publication, the works of a writer are *publici juris*, but the statutes confer upon him or his assignee certain exclusive privileges, the boundaries and extent of which are defined and limited by the statutes which confer them. The statute at present in force is 5 and 6 Vict., cap. 45, of which the Indian Act XX of 1847 is a reproduction with certain necessary alterations. It will be sufficient to consider the terms of the English statute. Copyright is defined by it to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is therein applied"—copies for the purpose of this suit of any "book,"—and "book" includes every volume, part or division of a volume separately published. Section 15 makes it an offence giving rise to an action for any person to print or cause to be printed for sale or exportation, &c., any book in which there shall be subsisting copyright without the consent in writing of the proprietor thereof. [568] Section 23 enacts that all copies of any book wherein there shall be copyright, unlawfully printed or imported, shall become the property of the proprietor of the copyright. Translations of copyrighted books are not referred to in the Act. It is difficult to understand why they should not be mentioned in the Act if they were intended to be prohibited by it.

Two years subsequently, an International Copyright Act was passed, 7 and 8 Vict., cap. 12. Its 18th section provided that nothing in the Act should be construed to prevent the printing, publication, or sale of any translation of any book, the author whereof and his assigns might be entitled to the benefit of the Act. This rather tends to show that, in the opinion of the Legislature of that time, different considerations applied to translations from those which applied to the making of mere copies. Judicial opinion certainly tended in the same direction. Before the passing of the statute, and when the Act of Anne was in force, Lord Macclesfield, in 1720, entertained a strong opinion that a translation might not be the same as the reprinting of the original on account of the translator having bestowed care and pains upon it, and so not within the prohibition of the Act—*Barnett* v. *Chetwood* (2). In 1769, Lord Mansfield, in the case of *Millar* v. *Taylor* (3), said: "If any man should turn the Psalms or the writings of Solomon or Job into verse, the king could not stop the printing or sale of such a work. It is the author's work." Mr. J. Willis said: "Certainly *bona-fide* imitations, translations and abridgments are different, and in respect of the property, may be considered as new works;" and Aston, J., added: "The right of the copy (after publication) still remains in the author . . . . He (the purchaser) may improve

(1) 4 H. L. C. 815. (2) 2 Mer. 441. (3) 4 Burr. 2348 (2405).

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upon it, imitate it, transalate it, oppose its statements, but he buys no right to publish the identical works." In 1814, Lord Eldon treated translations as original works, but these were translations from foreign works not protected by the Copyright Act—*Wyatt* v. *Barnard* (1).

At the date of the Act of 1842 (Stat. 5 and 6 Vict., cap. 45), therefore, there had been a current of judicial opinions to the effect **[569]** that translations were not copies, and that a person, by translating a work, did not infringe the author's copyright. It would be strange, then, if the Legislature in that year intended to prohibit translations, that they should not have used some apt words to effect their purpose. Soon after the passing of the Act, Vice-Chancellor Knight Bruce, in 1849, used similar language. A published work, he said, "may be liable to be translated, abridged, analysed, exhibited in morsels, complimented and otherwise treated in a manner that an unpublished manuscript is not"—*Prince Albert* v. *Strange* (2). In 1853, this was actually decided in the United States in the case of *Stowe* v. *Thomas*, already referred to.

In *Murray* v. *Bogue* (3) Vice-Chancellor Kindersley assumed that, if an English work protected by copyright had been translated into German and such German work had been retranslated into English, the latter translation would be an infringement of the original work. That is manifestly so, for it would still be a copy of it though made through the medium of a German translation. This assumption offers no assistance in coming to a decision in the present case. The case of *Nicols* v. *Pitman* (4) also does not touch the present question. There the defendant printed in short-hand characters a lecture which had not been "published" by the author. It was held that he had no right to print it at all. It would have made no difference, I think, if he had published it in German or Chinese. The lecture had not been given to the world. It was still the private property of the author.

The case of *Warne* v. *Seebohm* (5) is more nearly in point. There the defendant dramatised "Little Lord Fauntleroy." This, it was admitted, he was entitled to do. In doing this, he copied passages from the original work, and published a few of such copies. He was ordered to expunge the copied matter from his drama. The decision was in accordance with the earlier cases on the same subject. All were based upon the same ground, namely, that substantial parts of the plaintiff's book had been copied into **[570]** the new drama—*Timsby* v. *Lacy* (6) and *Reade* v. *Lacy* (7). It has always been held that the publication of an extract from a book, if used for an unauthorized purpose, is within the prohibition of the statute—*Rooney* v. *Kelly* (8). I have also considered the judgment in the case of *Hanfstaengl* v. *The Empire Palace* (9), but have not derived much assistance from it. No other cases have been cited to me. The current of judicial *dicta* since the passing of Act 5 and 6 Vict., cap. 45, has not, I think, changed from its previous direction. If we read the words of the statute in their ordinary natural meaning, they do not, I think, cover translations. It would be a strained and unnatural use of language to say that translations are "copies." To my understanding they are essentially different productions—one is intellectual, the other mechanical. It may be—doubtless is—desirable to afford to authors protection in respect of translations of their works if they desire it; but, I think, that it must

(1) 3 Ves. and B. 77. (2) 2 DeG. and Sm. 693. (3) 1 Dr. 367.
(4) 26. Ch. D. 374. (5) 39 Ch. D. 73. (6) 1 H. & M. 744.
(7) 1 J. & H. 524. (8) 12 Ir. C. L. 158. (9) 3 Ch. Div. (1894), 109.

be conceded that such translations stand on a different footing from copies. They are rarely, if ever, made by the author of the original work: they circulate, as a rule, among a different class of readers, a class to which the original works are as completely sealed as if they had not been written. There is here a conflict of rights and interests; a conflict between the intellectual interests of the persons for whom the translations are intended, and the caprice or possible pecuniary interest of the proprietor of the copyright, if he shall not, or shall, intend to translate the work himself, or cause it to be translated. There is no hardship on him; he can always protect himself by being first in the field with a translation. In matters of copyright, the Legislature has always kept the interest of the public before it. Section 5 of the Original Act, ch. 5 and 6 Victoria, shows this; and when the Legislature provided in the later International Copyright Acts 15 and 16 Vict., cap. 12, for translations, it took care (s. 2) that the public should not be neglected by being left without them; and translations in this Act are dealt with in an entirely different manner from copies.

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[571] I have read the text books on copyright cited to me on this subject—Drone, p. 445 *et seq.*; Copinger, p. 108; and Scrutton, p. 128. They, more especially the first, have not really dealt with the subject on the construction of the statute, but on *a priori* grounds have argued what the law ought to have been rather than considered what it was.

I must follow the ruling of Mr. Justice Parsons in *Munshi Shaik Abdurruhman* v. *Mirza Mahomed* (1), and dismiss the suit with costs.

Attorneys for plaintiff:—Messrs. *Payne, Gilbert and Sayani.*

Attorney for the defendant:—Mr. *M.H. Khan.*

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19 B. 571.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

CURSANDAS NATHA AND OTHERS (*Plaintiffs*) *v.* LADKAVAHU AND OTHERS (*Defendants.*)* [28th February, 1895.]

Minor—Infant—Decree against minor—Review—Right of minor to impeach decree—Practice—Procedure.

One Kessowji Jadowji in his will directed his daughter-in-law Ladkavahu (defendant No. 1) to adopt his nephew Karamsi Madhowji (defendant No. 2), and he devised the residue of his estate to him. The executors of Kessowji's will subsequently brought this suit to have the will construed and the rights of Karamsi Madhowji in the testator's estate ascertained and declared. A decree was made on the 1st October, 1887, by which it was declared that Karamsi's adoption was a condition precedent to his inheritance, and that, unless he was adopted, he was not entitled to any part of the testator's property. On 22nd October, 1894, Karamsi Madhowji (defendant No. 2) filed a petition of review, stating that at the date of the decree he was a minor and had only recently, *viz.*, on the 14th December, 1894, attained the age of eighteen years. He contended that there was error apparent on the face of the decree, inasmuch as it did not provide that he should have an opportunity of showing cause against it in so far as it affected his interests after he attained his majority.

Held, that the review could not be granted. The Courts in India after deciding an issue in which an infant, party to a suit, is interested, have no power to reserve to the infant the right of questioning such decision. At all events a decree is not erroneous for not containing such a provision when the issue in which the infant is interested has been fully gone into and argued before the Court. A decree passed against an infant properly represented is binding

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* Suit No. 185 of 1887.

(1) 14 B. 586.

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upon him like a decree passed against an adult, but it is open to the infant to impeach such decree by a suit in cases where his guardian has been guilty of fraud or negligence in allowing the decree to be passed against him.

[R., 24 B. 547 ; D., 5 O.C. 199.]

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[572] RULE *nisi* for review.

The judgment and decree, of which the review in this case was sought, were passed by Farran, J., on the 1st October, 1887. A report of the case will be found in I. L. R., 12 Bom. 185.

The rule *nisi* for review was obtained on the 22nd December, 1894, by the second defendant Karamsi Madhowji, who was the adopted son of the first defendant Ladkavabu. She was the widow of one Liladhar Kessowji, the son of Kessowji Jadhowji, a wealthy Hindu inhabitant of Bombay, who died in 1886 leaving a will, of which he appointed the plaintiffs his executors.

In his will the testator had directed that his daughter-in-law, the first defendant (the widow of his son Liladhar), should adopt the second defendant Karamsi (who was the testator's nephew), and he devised the residue of his estate to him.

In April, 1887, the executors brought this suit to have the will construed. The plaint (*inter alia*) prayed that the rights and interest of the second defendant Karamsi Madhowji in the testator's estate might be ascertained and declared.

Farran, J., held that upon the second defendant's adoption by Ladkavahu he would become entitled to the residue of the testator's estate to be made over to him on his attaining the age of twenty-one. No decision, however, was given as to the *quantum* of the estate taken by Karamsi in the residue. The learned Judge also found that until his adoption Karamsi Madhowji was not entitled to the whole or any part of the residue of the said estate. (See I. L. R., 12 Bom., at pp. 201-2.)

On the 22nd December, 1894, the second defendant Karamsi Madhowji filed a petition of review in which he set forth the portions of the decree to which he objected, and stated that at the date of the decree he was a minor and had only recently, *viz.*, on the 14th December, 1894, attained the age of eighteen years. The following are the material clauses of the petition :—

"That the said Karamsi Madhowji is advised and believes that the said decree should in accordance with the practice of Courts of equity have provided that he should be given an opportunity, after attaining his age of majority, of showing cause against the said decree in so far as it affected his interests, and that according to the said practice of the Court of equity the said Karamsi Madhowji should have been [573] allowed a period of six months at least from the date of his attaining his majority for the purpose of showing cause as aforesaid.

"5. That the said Karamsi Madhowji is advised that by reason of the omission of the said provision from the said decree there is an error apparent upon the face of the record entitling him to a review of the said decree and judgment upon which it was founded.

"6. That the father of the said Karamsi Madhowji is a poor and illiterate man and has no means sufficient to enable him to obtain proper legal advice, and that the said Karamsi Madhowji was, when he attained his majority, wholly dependent upon his said father, and had not the means of obtaining legal advice as to his rights in respect of the said decree, and has only obtained funds for the purpose of making this application and

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the further prosecution of legal proceedings through the assistance of a friend who declined to advance any money for the purpose aforesaid until the opinion had been obtained as to the chances of success from a barrister of his own selection whose opinion was received in Bombay on or about the 16th of December, 1894.

"7. That by reason of the circumstances in the last preceding paragraph set forth, the said Karamsi Madhowji is advised and submits that he has sufficient cause for not making this application at any earlier date.

"8. That the said Karamsi Madhowji is aggrieved by the said decree for the following amongst other reasons:—(*a*) That the said learned Judge held that the adoption of the said Karamsi Madhowji by the said Ladkavahu was a condition precedent to the accrual of his rights under the said will of the said Kessowji Jadhowji, whereas the said learned Judge ought to have held that the said Karamsi Madhowji was entitled to the residue of the estate of the said Kessowji Jadhowji, irrespective of his adoption or non-adoption by the said Ladkavahu, on the ground that he was named as heir in the said will and took as a personal designation; (*b*) that the said learned Judge erred in holding that the case was undistinguishable from that of *Shamavahoo* v. *Dwarkadas*, I. L. R., 12 Bom., 202; (*c*) that by reason of the magnitude of the property at stake and in the interests of the said Karamsi Madhowji an appeal should have been preferred against the said decree of the said learned Judge, and the case should, if necessary, have been carried to Her Majesty's Council for final decision, but no step was taken by any of the adult parties to the suit to test the correctness of the decision of the said learned Judge; (*d*) that the said Ladkavahu was, in fact, ready to adopt the said Karamsi Madhowji as directed by the said will of the said Kessowji Jadhowji, and the parents of the said Karamsi Madhowji were ready to give him in adoption, when the said Ladkavahu being on a pilgrimage suddenly died, and the said Karamsi Madhowji was deprived of all chance of taking as heir of the said Kessowji Jadhowji according to the provisions of the said will, unless the said decree of the said learned Judge were varied or reversed in appeal.

"The said Karamsi Madhowji, therefore, prays that a review of the said decree may be granted, and that the said decree may be rectified, and that he may be afforded an opportunity of showing cause against the said decree."

On the presentation of the above petition a rule *nisi* was granted calling on the plaintiffs to show cause why a review of [574] judgment should not be granted. The rule now came on for hearing.

Mapherson and *Inverarity*, for the plaintiffs, showed cause. They relied on the affidavits and cited the following authorities:—Limitation Act (XV of 1877), s. 5 and sch. II, art. 162; Seton on Decrees, Vol. II, p. 830; Simpson on Infants, p. 511; Mayne's Hindu Law (5th Ed.), para. 197; *Mungniram* v. *Mohunt Gursahai* (1); *Mirali* v. *Rehmubhoy* (2).

Lang (Advocate General) and *Starling*, *contra*:—A review is the proper remedy under the circumstances—*Kelsall* v. *Kelsall* (3). An infant may within six months after he attains his majority apply to set aside

(1) 16 I. A. 195. (2) 15 B. 594. (3) 2 M. & K. 409.

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an order passed against him during minority—*Musleah* v. *Musleah* (1). They cited *Penny* v. *Phillips* (2); *Srimati Padmamoni* v. *Srimati Jagdamba* (3).

JUDGMENT.

FARRAN, J. :—In this suit, which was a suit for the construction of the will of the late Kessowji Jadhowji, a decree was passed on the 1st October, 1887, declaring (*inter alia*) that the defendant Karamsi Madhowji was not entitled to the residue of the estate of the testator, or to any sum for his maintenance, or education, until his adoption. The defendant Karamsi Madhowji was a minor at the date of that decree, but was represented by his guardian *ad litem*, his father Madhowji Katchra, who put in a written statement and instructed counsel at the hearing on the minor's behalf.

On the 22nd of December last, Karamsi Madhowji, having then attained his majority, presented a petition for review of the above decree and obtained a rule *nisi*, against which cause was shown by the plaintiffs on Thursday last.

The petition states that Karamsi Madhowji attained the age of eighteen years on or about the 14th of December, 1894. As originally drawn, it stated that he had recently attained that age, and its sixth paragraph shows that when the petition was drafted it was intended to excuse the delay between his coming of age and the presentation of the petition by the poverty of his father, the [575] necessity of obtaining assistance from a friend, and the need which the friend felt of obtaining an opinion from counsel of his own, situate out of Bombay. The plaintiffs have produced a birth certificate which shows that a son was born to Madhowji Katchra on the 27th May, 1876. This, coupled with the entry in the books of the testator under date the 5th June, 1876, which shows that a customary present was then made to Madhowji Katchra on the birth of a son, with the fact that the petition as originally drawn is only consistent with the boy having attained his majority some months before the 14th of December, 1894, and with the circumstance that no certificate of the boy's birth in December, 1876, is produced on his behalf, leaves no doubt on my mind, notwithstanding the affidavits of Madhowji, Katchra and Manakbai, that the boy was born on or about the 27th of May, 1876, and that consequently he attained his majority on or about the 27th of May, 1894.

The main ground upon which the petition of review is based is that the decree does not provide that the defendant Karamsi Madhowji should have an opportunity of showing cause against it, in so far as it affects his interest, after his attaining majority. This, it is contended, is a mistake or error apparent on the face of the decree. I an unable to accept that contention. The Code of Civil Procedure neither in its chapter relating to minors (ch. XXXI) nor elsewhere contains any provision for the giving of such an opportunity to a minor, nor has it been the practice of this Court to insert such a reservation in favour of minors in its decrees. I have never in the course of my experience known it to be done, and I much doubt whether it is in the power of the Court so to reserve a minor's rights. In the judgment of the Privy Council in *Watson* v. *Collector of Rajshahye* (4), it was pointed out that

(1) 1 Boulnois Rep. 58, 234.
(2) 17 Ves. 178.
(3) 6 B. L. R. 134.
(4) 13 M.I.A. 160.

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the Courts in India had not the power which Courts of equity in England occasionally exercise of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. That was a mofussil case under the old Code; but the new Code, which has been made applicable to the High Courts, is similar in this respect, and I apprehend that the observation of [576] the Privy Council would now be applicable to all Indian Courts. Similarly I think that the Courts in India after deciding an issue in which an infant, party to a suit, is interested, have no power to reserve to the infant the right of questioning such decision. The Code makes elaborate provisions for having infants' interests duly protected, but does not, in my judgment, extend this particular form of protection to them. At all events I am clear that a decree is not erroneous for not containing such a provision when the issue in which the infant is interested has been fully gone into and argued before the Court.

I have not been able to satisfy myself under what circumstances the reservation of infants' rights is inserted in decrees in Courts of equity in England. In the two cases referred to in Simpson on Infants—*Elsey* v. *Lutyens* (1) and *Lane* v. *Hardwich* (2)—the infant's common answer only was put in and the infant's case was treated as not having been gone into. It may be that it is under such circumstances only that this reservation is inserted. In foreclosure suits it appears to be the practice to pass only a decree *nisi* against an infant defendant, giving him time after he comes of age to show cause against the decree: Seton on Decrees, Vol. II, p. 711, (Ed. 1879).

It has been contended that without such a reservation an infant may show cause against a decree of the High Court or put in a new defence after attaining his majority. It was the practice in Courts of equity in England to allow an infant within six months after attaining majority to show cause against a decree passed against him. Whether this rule prevailed down to 1879 (the date of the edition of his work above referred to) Mr. Seton says was open to some question. Simpson in his Work on Infants does not notice this as a privilege of infants still subsisting; but whether it exists in English Courts or not, I feel quite clear that it is not one which is preserved to infants by the Code of Civil Procedure. In truth, a decree passed against an infant properly represented is binding upon him like a decree passed against an adult, but it is open to the infant to impeach such decree by a separate suit in cases where his guardian has been guilty of fraud or negligence [577] in allowing the decree to be passed against him. For the former part of this proposition I refer to *Mungniram* v. *Muhunt Gursahi* (3) and *Eshan Chundra* v. *Nundamoni*(4), and for the latter portion of it to *Mirali* v. *Rehmoobhoy* (5) and *Lalla Sheo* v. *Ramnandan* (6).

The present application must, therefore, be treated like all other applications for view, save that the Court might perhaps scan with a more indulgent eye the grounds for review made by a defendant seeking to set right a decree passed against him in his infancy, than it would do in the case of an adult litigant.

The first objection made to the application is that it is barred by limitation under art. 162 of the Limitation Act (XV of 1877). Having regard to the date at which the applicant attained his majority, which I

(1) 8 Hare. 159. (2) 9 Beav. 148. (3) 16 I.A. 195.
(4) 10 C. 357. (5) 15 B. 594. (6) 22 C. 8.

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have found to be the 27th May, 1894, there is no doubt but that the application is out of time. On the other side I am asked to say under s. 5 of the Act that there has been sufficient cause shown for the application not being made in time. This will be more conveniently dealt with after I have considered the grounds for the application on its merits. Independently, however, of the objection to the decree in form which I have already dealt with, the petition of review does not disclose any ground, other than a puerile one, for supposing that there has been a mistake made in the decree; nor has it been contended before me that any fresh argument can be adduced or new cause shown for altering my decision. The same counsel supports this application who originally argued for the infant. That being so, it is clear that the review is sought, not in the expectation that the decree will or ought to be varied at the rehearing, but in order that the defendant Karamsi may have an opportunity afforded to him of appealing from the decree when it is re-affirmed. I ought not, I think, under these circumstances to extend the time for allowing the application to be made under the provisions of s. 5. To do so would be to arrogate to myself the functions of an appellate Court and in effect to extend the time for appealing. Without, therefore, expressing an opinion whether I should [578] deem the grounds put forward in the petition sufficient to warrant me under the peculiar circumstances of the case in holding that the applicant had sufficient cause for not making the application in time I must refuse it. I presume that the executors will not ask for costs.

Rule discharged.

Attorneys for the plaintiff:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for the defendant:—Messrs. *Nanu and Hormasji.*

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19 B. 578.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

GOPAL NANA SHET (*Original Judgment-debtor and Defendant*), *Appellant* *v.* JOHARMAL (*Decree-holder, Assignee and Plaintiff*), *Respondent.**

[10th July, 1894.]

Decree—Execution — Stay of execution on giving security — Subsequent execution—Default of judgment-debtor—Surety—Liability of surety in execution.

The execution of a decree for partition was stayed pending appeal on the defendant giving security that he would satisfy such decree as might ultimately be passed against him by the appellate Court. That Court confirmed the decree of the lower Court. In obedience of the decree the judgment-debtor deposited in Court certain property in his possession consisting of bonds, decrees and other articles. But as he did not produce the whole of the property as ordered by the decree, the Court directed execution to proceed against his surety. The surety paid into Court the full sum stipulated in the surety bond. Thereupon the judgment-debtor applied that the property deposited by him in Court should be valued and made over to the decree-holder in part satisfaction of the decree *pro tanto*, and that only the balance then remaining due should be paid out of the money paid in by the surety. The Court refused, holding that the decree-holder was entitled to be paid over the whole sum paid in by the surety. On appeal,

* Appeal No. 43 of 1894.

Held (reversing the order of the lower Court) that the property already produced in Court by the judgment-debtor should be first applied towards the satisfaction of the partition decree, and that if the decree-holder did not obtain complete satisfaction in this way, the money paid in by the surety should then be made available.

[R., 10 C. P. L. R. 73.]

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APPELLATE CIVIL.

19 B. 578.

APPEAL from the decision of Rao Bahadur G. V. Bhanap, First Class Subordinate Judge of Nasik, in dharkast No. 166 of 1890.

[579] In suit No. 340 of 1880 a decree for the plaintiff was passed ordering partition of certain property belonging to a joint Hindu family. The defendant appealed and, pending the appeal, obtained a stay of execution upon giving security that he would satisfy such decree as might be passed against him by the appellate Court. That Court confirmed the decree of the lower Court.

In execution of the decree the defendant deposited in Court certain bonds, decrees and other articles, which were in his possession. He did not, however, produce the whole of the property for which he was liable under the decree, and the Court, therefore, ordered execution to proceed against his surety. The surety paid into Court Rs. 4,080-11-9, being the total amount of the surety bond.

The defendant (the judgment-debtor) contended that the whole sum so paid in by the surety should not be applied in satisfaction of the decree, but only so much as was necessary to make up the balance due after giving credit for the total value of the property which he (the judgment-debtor) had himself produced in execution. The Subordinate Judge, however, decided that the whole sum should be applied in satisfaction of the decree. His judgment was as follows :—

"The surety Shankar Nana having paid the money into Court and not having raised any sort of objection to its payment by the Court to the opponent (who is the assignee of the decree-holder), nor having claimed a credit for the articles alleged to be in deposit with the Court, the opponent is entitled to receive the money in question.....The petitioner (Gopal) not having produced the property as required by the Court, the Court ordered execution against his surety, and the latter has paid the money into Court, and the petitioner has no right to produce any more property or to claim a deduction of the value of the property already produced by him against the amount produced and paid by his surety."

Against this order the defendant Gopal appealed to the High Court.

Shivram V. Bhandarkar for appellant :—The defendant (judgment-debtor) has deposited property in Court in pursuance of the decree. That should be applied in satisfaction of the decree *pro tanto*, and the surety can only be required to pay any balance that may be left unsatisfied. The decree-holder has no right to **[580]** take the money paid in by the surety until he has exhausted all his remedies against the principal debtor, especially when the principal debtor is ready and willing to satisfy the decree in full.

Daji Abaji Khare for respondent (decree-holder) :—The judgment-debtor has no right to interfere after the Court has ordered execution to proceed against the surety. So long as that order stands unreversed, the money paid in by the surety must be applied towards satisfaction of the decree.

JUDGMENT.

JARDINE, J.—Certain decrees, bonds and articles, which had been included in the partition decree, happened to be in the custody of the

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Court below during the litigation. Default being made by the defendant (now appellant) in satisfying the decree, the decree-holder took proceedings against the surety, who thereon, in satisfaction of the order made against him by the Court, paid the amount of cash stipulated in the surety-bond. After this payment into Court the defendant applied to have the property in Court valued and made over to the decree-holder to satisfy the decree so far as the property would go. The Court refused, holding that the decree-holder was entitled to be paid over the cash paid in by the surety without deduction of the value of the property.

It is argued for the defendant-appellant by Mr. Shivram that so long as the money paid by the surety into Court had not been paid over, he was entitled to apply to get the property mentioned in the partition decree made available to the extent of its value. No authorities have been cited on either side. It is the rule of the English law embodied in s. 137 of the Contract Act, (IX of 1872) that, in the absence of express stipulation to that effect, a creditor who holds securities from the principal debtor for his debt need not first resort to them before suing the surety. But the bond under our civil procedure makes the surety directly liable to the Court and not merely to the judgment-creditor—*Venkapa* v. *Baslingapa* (1). Nor is the surety a party to the present appeal which is preferred by the defendant against the decree-holder. Treating the matter as one solely [581] arising between them, we are of opinion, in the absence of authorities, that the Court below ought to treat the amount paid in by the surety as an asset available in execution of the partition decree. But as the guiding principle of an executing Court's procedure is to see that the decree is executed according to its terms, we are of opinion that the decrees, bonds and other property now in the custody of the Court should be brought into partition and the respondent be satisfied out of them as far as can be according to the terms of the partition decree. If the respondent does not obtain complete satisfaction in this way, the money paid into Court by the surety can then be made available. This procedure is, in our opinion, the one most consistent with equity.

For these reasons we reverse the order of the Court below and direct it to pass a new order in accordance with this judgment; but as the point now decided is new, and not without difficulty, we direct each party to pay his own costs in both Courts.

Order reversed.

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Before Mr. Justice Jardine and Mr. Justice Ranade.

ANANTACHARYA (*Original Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (*Original Defendants*), *Respondents.** [12th July, 1894.]

Watan—Bombay Act III of 1874, *s.* 17—*Collector's power to determine the amount of payments of a fluctuating character—Act X of* 1876, *s.* 4, *cl.* (*c*)—*Jurisdiction.*

The payments referred to in s. 17 of Bombay Act III of 1874 are those mentioned in s. 4, namely, "customary fees or perquisites in money or in kind whether at fixed times or otherwise." It is the commutation of these customary and fluctuating payments that is provided for by ss. 17—21. But the Collector has no power under s. 17 to impose new burdens on the landowner in cases where the payment being constant already there is nothing to determine.

Plaintiff was the inamdar of a certain village. Defendant No. 3 was the watandar kulkarni of the village. He enjoyed for the performance of his duties some inam lands and a cash allowance of Rs. 5 paid annually by the inamdar. In 1884 defendant [582] No. 3 having failed to perform the service in person or by deputy, the Collector appointed defendant No. 2 to act as kulkarni. Defendant No. 2 officiated from 20th November, 1884, to 4th December, 1886. On the application of defendant No. 2 the Collector increased his remuneration according to the scale fixed for Government villages, known as the Wingate scale, and ordered plaintiff to pay the increased remuneration, so as to make up the amount due under that scale. On 26th September, 1890, the Collector recovered the sum of Rs. 171 from the plaintiff by attachment of his property. The plaintiff thereupon sued the Secretary of State for India in Council to recover this amount as being illegally levied. The defendant pleaded that the Collector, having determined the amount of defendant No. 2's remuneration under s. 17 of Bombay Act III of 1874 (1), the plaintiff had no cause of action against him, and that the suit was barred under s. 4, cl. 3 of Act X of 1876.

Held, that as the cash payment made by the plaintiff to the watandar was certain, and not of a fluctuating or indeterminate character, the Collector had no power to increase the remuneration of the officiator under s. 17 of Bombay Act III of 1874.

Held, also that the suit was not barred by s. 4 (*c*) of Act X of 1876.

APPEAL from the decision of Venkatrao R. Inamdar, Assistant Judge at Bijapur, in suit No. 1 of 1891.

The plaintiff sued to recover back Rs. 171 as money illegally levied from him by the Collector by attachment of his property under the following circumstances :—

Plaintiff was the inamdar of the village of Ankalgi in the Bijapur district.

Defendant No. 3 was the watandar kulkarni of the village. An annual allowance of Rs. 5 payable by the inamdar and certain inam lands were attached to his office as remuneration for his services.

In 1884 defendant No. 3 having failed to perform the services of his watan either in person or by deputy, defendant No. 2 was appointed by

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* Appeal No. 62 of 1893.

(1) Bombay Act III of 1874, s. 17 :—

When all or any of the property of a watan consists of payments of whatever description, whether in money or kind, made by Jagirdars, Inamdars, Mewasi chiefs, or others owning or occupying immoveable property wholly or partially free from assessment, the Collector may from time to time determine the amount of such payments recoverable ; provided that no larger demand shall be made than one equivalent to the amount that would be payable under the scale in force for the time being in the case of Government villages.

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Government to officiate as kulkarni of the village. Defendant No. 2 acted as kulkarni from 20th November, 1884, to 4th December, 1896.

[583] When defendant No. 2 was appointed to the office of kulkarni, the Collector found that the watan property was not sufficient to provide adequate remuneration. He, therefore, proceeded under s. 17 of Bombay Act III of 1874 and increased the amount of his remuneration according to the scale fixed for Government villages, known as the "Wingate scale."

On 2nd December, 1887, the Collector ordered the plaintiff to pay the increased remuneration so as to make up the amount due under the Wingate scale.

On 26th September, 1890, a sum of Rs. 171 was levied from the plaintiff by attachment of his property.

Thereupon the plaintiff filed the present suit to recover back the sum of Rs. 171 with interest, on the ground that it had been illegally and wrongfully levied from him.

Defendant No. 1 (the Secretary of State for India, contended (*inter alia*) that the Collector had authority under s. 17 of Bombay Act III of 1874 to increase the amount of remuneration payable to defendant No. 2, and levy the same from the plaintiff under s. 81 of the Act, and also that the suit was barred under para. 3 of s. 4 of Act X of 1876.

Defendant No. 2 pleaded that the plaintiff had no cause of action against him. Defendant No. 3 did not appear to contest the claim.

The Assistant Judge dismissed the suit, holding that the plaintiff was bound to pay the increased remuneration as ordered by the Collector.

The plaintiff appealed from this decision to the High Court.

Shamrao Vithal for appellant :—The question in this case is whether the Collector can levy from the inamdar any sum over and above that which he has hitherto paid as remuneration to the kulkarni. Section 17 of Bombay Act III of 1874 does not apply to a case like this, where the inamdar pays a fixed sum of money to the village kulkarni. It is only where the watan property consists of customary fees or perquisites, which are fluctuating in their character, that the Collector can substitute in their place a fixed determinate amount under [584] s. 17 of the Act. The kulkarni watan in this village is a *kadim* or old watan, older than the grant of the village to the plaintiff's ancestors. The watandar enjoys the profits of certain inam lands and an annual cash payment of Rs. 5 made by the inamdar. The plaintiff as inamdar is liable to make this payment only and nothing more. The Collector has no power to place any additional burden on him. Even assuming that the Collector could interfere under s. 17, he ought to have determined the amount after holding the inquiry contemplated by s. 73, and after obtaining the sanction of Government under ss. 21 and 23 of the Act. No such inquiry was held, and no sanction obtained. The Collector's order was, therefore, illegal and *ultra vires*.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the respondent No. 1 :—Defendant No. 3 is a watani kulkarni who failed to appoint a deputy when called on to do so. The Collector, therefore, appointed defendant No. 2 under Part VIII of Bombay Act III of 1874. The remuneration was fixed according to what is known as Wingate's scale quoted in Nairne's Hand-book, pp. 551-556. This remuneration was in the first instance payable from the watan property to which defendant No. 3 was entitled, and if this was insufficient, the plaintiff was liable to make good the deficiency. Section 17 of the Watan Act applies to this case.

[JARDINE, J.—Defendant No. 3 is a *kadim* kulkarni. Plaintiff gets nothing out of the lands held by him.]

"watan property" within the meaning of s. 4 of the Watan Act just as the fees and perquisites which the kulkarni gets on watan property. They are the emoluments of his office. His enjoyment of the lands in plaintiff's village by virtue, and in consideration of his office, is a payment to him of an equivalent in kind within the meaning of s. 17.

[JARDINE, J.—What power has the Collector to deal with the cash payment of Rs. 5 made by the plaintiff to defendant No. 3?]

The Collector has the power to "determine" the amount of the officiator's emoluments "from time to time," which implies the power to increase or decrease the amount according to the [585] exigencies of the case. This is a matter entirely within the discretion of the Collector. If the officiator was not paid his remuneration by the person liable to pay, he was entitled to the assistance of the revenue authorities to enforce the payment. The amount is recoverable under s. 81 of the Watan Act as arrears of land revenue. Such assistance was given to defendant No. 2 in the present case. Moreover, the suit is barred under s. 4 (*c*) of Act X of 1876.

JUDGMENT.

RANADE, J.—In this case the appellant (original plaintiff) is the inamdar of Ankalgi in Bijapur Taluka. Respondent (defendant No. 3) is the watandar kulkarni of the village, the watan being described as Kadim Watan. The watan property, held for the performance of the duties of a kulkarni, consists of a cash payment of Rs. 5, and inam lands assessed at Rs. 60. Defendant No. 3 failed to perform the service himself, or to appoint a deputy. The Secretary of State (defendant No. 1), represented by the Collector of Bijapur, thereupon appointed defendant No. 2 as deputy, and defendant No. 2 officiated from 20th November, 1884, to 4th December, 1886. Defendant No. 2 applied for suitable remuneration, and defendant No. 3 agreed to pay him Rs. 80 a year, which sum was accordingly paid in part by, and levied in part from, defendant No. 3. Subsequently defendant No. 2 applied to the Collector for an increased remuneration according to the scale fixed for Government villages, and the Collector on 2nd December, 1887, ordered the plaintiff to pay the increased remuneration so as to make up the full amount due under the Wingate scale, and on 26th September, 1890, a sum of Rs. 171 was recovered from the inamdar plaintiff. Plaintiff claims that this sum was illegally levied from him, and he seeks in this suit to recover the same with interest.

Defendant No. 1 pleaded that, on the application of defendant No. 2, the Collector, acting under s. 17 of Bombay Act III of 1874, determined the amount payable by plaintiff as remuneration to defendant No. 2, and under s. 81 levied that amount. The amount awarded was Rs. 158-15-8, and the sum levied was Rs. 171. Defendant No. 1 gave notice to the plaintiff to take back the excess (Rs. 21-6-4), but he refused to do so at [586] the time, though the sum was, since the institution of the suit, received by the plaintiff. Defendant No. 1 contended that he was not liable to the plaintiff, who had no cause of action as against him. At a late stage, it was also urged that the suit could not be maintained under para. 3, s. 4 of Act X of 1876.

Defendant No. 2 urged that plaintiff had no cause of action against him, as he was entitled to receive the remuneration fixed according to the scale.

Defendant No. 3 did not appear to defend the suit.

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The Assistant Judge held (1) that the suit was not barred under s. 4 of Act X of 1876; (2) that plaintiff, and not defendant No. 3, was liable to make good the remuneration as fixed by the Collector; and (3) that plaintiff's claim could not be awarded.

Plaintiff appealed from this decree on several grounds, which it is not necessary here to state in full, as his pleader chiefly relied upon the contentions raised in the 3rd and 5th objections in the memorandum of appeal—namely, that the Collector had no power to raise the scale of payment, and that the Assistant Judge erred in not finding expressly whether the Collector could, under s. 17 of the Watandars' Act, order plaintiff to pay the enhanced amount. Mr. Shamrao, the appellant's pleader, urged that the plaintiff, as inamdar, could not be saddled with any payment not included in the sanad, and that the Collector's procedure was defective in that he held no inquiry under s. 73 before he passed his order, and further that the Collector was bound to obtain the sanction of Government under s. 21 of the Watandars' Act. He also urged that s. 17 of the Act applied only to old customary payments in kind or money, and at the most under s. 23 the Collector could grant increased remuneration from the watan property only, and he had no power to levy the same from the revenues of the village.

The Collector professedly passed his order under s. 17 of the Watandars' Act, and the chief question we have to consider is, whether that section, or any other section, gave authority to the Collector to require plaintiff to make up the deficient [587] amount of defendant No. 2's remuneration according to the scale in Government villages.

On a careful consideration of the several provisions of Bombay Act III of 1874, we feel satisfied that appellant's contention is well-sustained, and that neither s. 17, nor any of the other provisions of the Act, authorized the procedure followed, and the order issued by the Collector. Section 17 must be read along with the other sections which together form Part 3—headed the Commutation of Watans, as opposed to Part 4, which relates to the creation or lapse of a watan. This heading of commutation is itself suggestive of a strict restriction on the exercise of the powers conferred on the Collector. Section 15 empowers the Collector to relieve a watandar of his liability to perform service, but this relief is under s. 16 not to affect the rights of individuals or village communities to exact customary services from village servants, the relief extending only to the service due to the State. Next comes s. 17 with its complementary ss. 18 and 19, the former applying to payments in kind or money made to watandars by jaghirdars, inamdars, Mevasi chiefs, or others, owning or occupying immoveable property wholly or partially free from assessment, while the latter sections relate to the inferior watans, where the payments in money or kind are due to the watandar from individuals generally, without any particular specification. In the case of the holders of alienated lands, the Collector is himself to determine the amount of the payments due to the watandars. In the case of cultivators generally, the inquiry is to be entrusted to a panchayat, and if the panchayat fixes the profits, which are of a fluctuating nature, the Collector is empowered to determine the amount payable. The words used both in ss. 17 and 19 are exactly the same, and they must be construed alike. These amounts so determined under ss. 17—19 are, moreover, to hold good for such periods as the Governor in Council may from time to time direct.

It is thus plain that s. 17 clearly relates to the power of the Collector to determine payments of a fluctuating character. The word watan property, as defined in s. 4, expressly [588] includes not only property assigned or held for service, but also a right to levy customary fees or perquisites in money or kind, whether at fixed times or otherwise. It is the commutation of these customary and fluctuating demands which is provided for in ss. 17—21. Unless the payments claimed already formed part of the watan property by force of custom, there is no foundation for the exercise of the authority to determine their amount conferred by these sections. The payments and the right must exist beforehand, and then, if the payments or the right are of a fluctuating or indeterminate character, the Collector in the one case, and the panchayat in the other, can determine the amounts of such payments (s. 17), and *such* rights and duties (s. 18). In the present case, it is admitted that the inamdar has only been paying Rs. 5 in cash to the watandar. The Collector had, therefore, no occasion to determine the amount, as it was not of a fluctuating nature. It does not follow from the fact of this payment of Rs. 5 in cash, that the Collector had authority under s. 17, while professing to determine the amount, to raise the cash payment from Rs. 5 to Rs. 80. The Collector can only determine the amounts of *such* payments as were already payable, and it is not open to him under this section to increase the amounts as he has done in this case.

This view of the scope of the section is strengthened by the fact that in the first draft of the Bill, the words used were that "it shall be lawful for the Collector to assess the amount of *such* payments recoverable upon an average of the ten years next preceding." This limit of ten years' average was subsequently given up, and in its place the proviso was added that the amount to be determined was to be equivalent to the amount payable under the scale in force for the time being in the case of Government villages. These words were not intended to refer to the scale of remuneration fixed by Government, known as the Wingate scale, for this latter scale has no reference to uncertain customary payments of the kind contemplated in ss. 17—21. Under s. 216 of the Land Revenue Code the holder of an alienated village is not bound by the provisions of Chap. VIII relating to survey settlement, not introduced with his consent, which was the case in plaintiff's village.

[589] A number of opinions of the Legal Remembrancer to Government have been filed in this case on defendant No. 1's behalf. Such opinions cannot well be admitted in evidence, as they are opinions given in a one-sided inquiry. Such as they are, they do not go far enough to support defendant's contention. In one, Ex. 22, however, it is stated that there can be no objection to the Collector proceeding under s. 17, and if the inamdar objects, he is required to report for further orders. In another, Ex. 20, it is stated that there can be no injustice in *prima facie* holding that s. 17 applies, and the inamdar may be left to show cause to the contrary. In a third it is directed that the defect in the law should be noted when the Act is next amended. No value can attach to opinions so obviously one-sided and halting.

We feel satisfied accordingly that s. 17 cannot be regarded as authorizing the interference of the Collector in this case. We have next to see if any other section can be held to support it. The Collector had no doubt power under s. 46 to appoint a deputy, and such a deputy would be an officiator under s. 3. Under s. 23, the Collector had power to fix the annual

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emoluments of the deputy, and to direct the payment thereof to the officiator. These words are large enough to cover the order issued by the Collector in this case, but the second para. of this same section provides a limitation on this power, in that it directs the Collector to assign watan property or the profits thereof towards the emoluments of officiators. The emolument is to come from the profits of the watan. This was in fact the procedure followed by the Collector in this case in the first instance, when he directed defendant No. 3 to increase the amount of the remuneration payable to defendant No. 2. Section 23 did not authorize the subsequent procedure of the Collector when he ordered plaintiff to make good the deficiency. The scale in British territory was not obligatory on the plaintiff. It was, moreover, only a maximum limit. Defendant No. 3's inam land was assessed at Rs. 60. Plaintiff, however, was not bound by this limit, as he did not accept the survey settlement. Plaintiff in fact asserted that the land yielded a profit of Rs 105, and his assertion was not challenged by defendant No. 3. This **[590]** resource was open to the Collector to make good the deficiency. Anyhow neither s. 23 nor s. 17 authorized the Collector's procedure so far as plaintiff was concerned. Section 16 of the Land Revenue Code also does not provide for the present case, because it does not extend to alienated villages. We accordingly hold that the levy of Rs. 171 made by the Collector was one not authorized by law, and that, under the circumstances, plaintiff had a right to recover the amount minus the sum of Rs. 21-6-8 already received by plaintiff. Defendants Nos. 2 and 3 need not have been made parties to this suit.

At a late stage of the suit, as also in the argument before us, it was urged that the present suit was not maintainable under para. 3, s. 4, of Act X of 1876. If the Collector had *prima facie* jurisdiction to pass the order he did, plaintiff would certainly have no right to sue to set aside or avoid the order. As it is, the Collector had no power to levy the money from plaintiff as ordered by him. The order was not passed by Government, and the Collector cannot be regarded as having been duly authorized to act illegally and without jurisdiction.

We accordingly reverse the decree and direct defendant No. 1 to pay Rs. 149-9-4 with costs to plaintiff. We disallow interest. Defendant No. 1 should bear his own costs, and plaintiff should pay the costs of other defendants Nos. 2—3.

JARDINE, J.—This appears to be the first case in which the construction of s. 17 of Bombay Act III of 1874 has come before this Court. I concur with Mr. Justice Ranade in holding that the order made by the Collector is not one that can be made under Bombay Act III of 1874, and that it is *ultra vires* of s. 17, which is pleaded for the Collector as giving warrant of law. I am of opinion that the payments to which s. 17 refers are those mentioned in s. 4, where it is said that the term watan property "includes a right to levy customary fees or perquisites, in money or in kind, whether at fixed times or otherwise." What the Collector did is analogous to what may be done under s. 22; but while that section places the cost of creating new watan on the Government, the Collector has placed that of the additional watan property his order seeks to **[591]** create, upon the inamdar. The words of the two ss. 17 and 22 differ much; and we may, therefore, infer a different meaning in each, especially as s. 23 limits the Collector to the existing watan and its profits in assigning emoluments to the officiator. Under s. 17 "the Collector may from

time to time determine the amount of such payments recoverable" from the inamdar. As the scope of the section appears to be misunderstood, perhaps because the old order of things be changed, I may refer to the earlier printed records of Government where the nature of these payments is described. In Mountstuart Elphinstone's Report on the Deccan, the following statements are made:—that the patels are entitled to lands and fees, and have various little privileges and distinctions, of which they are as tenacious as of their land; that the kulkarni has lands but oftener fees; that the deshmukh, besides percentages on the revenues collected, has various claims in kind, as a pair of shoes every year from each shoe-maker, a portion of ghee from those who make that preparation, &c., &c., that the watchman was paid by a small share of the grain and similar property belonging to each house, which kept him always on the watch to ascertain his fees, whereby he knew all that took place. In the appendix to Mr. Elphinstone's report is one from Captain Grant, Political Agent at Satara, which refers to payments in grain or money to patels and kulkarnis, called Mushaira and Sirpao. The knowledge of these customary payments was present in 1874 to the framers of the Watan Act; and in such a matter I can hardly refer to a higher authority than the Hon'ble A. Rogers, then Revenue Member of Council, who gave his reason for proposing the inclusion of customary fees in s. 4 by making an historical statement as follows on the 24th August, 1874, when s. 17 was finally settled by the Bombay Legislative Council. "In different parts of the country it was the custom to levy fees and perquisites for service in various ways, sometimes in money and sometimes in kind." I notice too that on the 15th October, 1874, when the Bill passed, the Hon. F. S. Chapman, then Chief Secretary to Government, spoke of it as intended to build up from their foundations the ancient village forms of Government: and one means of doing this was by making the Collector's [592] kacheri a tribunal where the village servants of inferior status, like the Mhars, could enforce their rights to their customary fees from the rayats.

This look into the past revenue history enables us to find appropriate meaning for s. 17; and fortifies the conclusion we arrive at through the rules for interpreting statutes. The function of the Collector does not extend to the whole watan property but only to what is meant by the words "such payments." It is merely one of commutation of payments of uncertain amount by ascertaining a fixed equivalent therefor, which apparently he may express either in money or kind. There is no warrant whatever, in the language of s. 17, for supposing that he could thereby impose new burdens on the landowner in a case like this where the payment being constant already there was nothing to determine. He resembles the Land Commissioners in England under the Tithe Commutation Act or the Copyhold Acts where provision is made for ascertaining the value of such rights as heriots. But though it is not necessary for our decision to interpret the word minutely, I think the addition of the word "recoverable" in s. 17 has reference to s. 81 (though possibly it may be argued that it bars civil suit, a matter on which I express no opinion); and that what the Collector fixes is the amount which may be recovered by revenue process; he is not to recover more from the inamdar than is payable in Government villages for the same thing or on the same occasion. Thus the coercive action of the Collector is limited by the customary scale of the country as in some other revenue matters. The Collector's award of commutation appears not to be so final a judgment, as a decision under s. 18. But for the addition of the word

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" recoverable " I would interpret the word " determine " as was done in *Queen* v. *Land Commissioners of England* (1), where that word in the Copyhold Act 50 and 51 Vict., c. 73, was held to give finality.

We agree that the plaintiff has no cause of action against the defendants Nos. 2 and 3 ; and in the decree to be made by this Court.

Decree reversed.

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[593] APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

CHANVIRAPA *(Original Plaintiff), Appellant* v. DANAVA AND OTHERS *(Original Defendants) Respondents.** [19th July, 1894.]

Hindu law—Partition—Minor—Partition made during minority—Partition by minor's mother as guardian—Fraud—Pleadings—Suit to set aside a partition deed—Limitation Act (XV of 1877), sch. II, arts. 91 and 95.

A partition made by a mother as the guardian of her minor son, a member of an undivided Hindu family, is valid, and if just and legal, will bind the minor. When the minor arrives at full age, he may apply to have the division set aside if it can be shown to be illegal or fraudulent, or even if it was made in such an informal manner that there are no means of testing its validity.

Where fraud is charged against the defendant, the plaintiff must set forth the particulars of the fraud which he alleges.

A suit to set aside a deed of partition on the ground of fraud is governed by art. 91 or 95, sch. II of the Limitation Act (XV of 1877), and must be brought within three years after the minor plaintiff has attained majority according to s. 7 of the Act.

[R., 27 A. 203=2 A.L.J. 720; 24 A.W.N. 244; 11 C.P L.R. 49.]

FIRST APPEAL from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge of Dharwar.

Suit for a declaration that the plaintiff, as the sole surviving male member of his family, was entitled to the whole of the family property, and that a partition, which was alleged to have been effected by his mother during his minority, was invalid and not binding upon him.

The plaintiff was the son of one Malsiddapa, who died eighteen years before suit, leaving the plaintiff, his minor son, him surviving. Malsiddapa had two brothers, *viz.*, Dodmallapa and Revansidapa, but Revansidapa separated and took his share of the property in 1872, leaving the other two still joint and undivided.

Dodmallapa, having no son, adopted one Baslingapa and died in 1887. Baslingapa (his adopted son) died childless in 1889, leaving his widow, Danava (the first defendant), him surviving.

On the 24th August, 1889, the plaintiff brought this suit claiming to be the sole surviving male member of his family and, as such, to be entitled to all the family property. He alleged that he was twenty years of age.

[594] The first defendant, Danava, alleged that in 1877 a partition had taken place between Dodmallapa and the mother of the plaintiff who was the plaintiff's guardian, and she contended that the partition had been made in good faith and was valid and binding on the plaintiff. She

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* Appeal No. 125 of 1891.

(1) 23 Q. B. D. 59.

further pleaded, that on the death of her husband Baslingapa she had adopted Malapa, who was entitled to her husband's share. She also alleged that the plaintiff was twenty-six years of age, and contended that his claim was now barred by limitation.

The Subordinate Judge held that the plaintiff was twenty-six years of age and that the suit was not barred by limitation, and that the adoption of Malapa by Danava (defendant No. 1) was illegal, as he was the only son of his parents. He, however, also held that the alleged partition between the plaintiff's mother and Dodmallapa was proved and was valid and binding on the plaintiff, who, by his conduct, had ratified it. He, therefore, dismissed the suit.

The plaintiff appealed.

Inverarity (with *Shamrav Vithal*), for the appellant (plaintiff) :—We say that there was no partition, but if there was, the question is whether it is binding upon us. We contend that it was fraudulent and improper. Having been effected during our minority, the defendants must show that the partition was a fair one. But no attempt has been made to prove that it was fair and legal. The burden of proof lay heavily upon the defendant by reason of our minority, and also because the partition was effected with an illiterate woman. The mere production of the partition-deed would not assist the defendants and would not be an answer to our case—*Dharmaji* v. *Gurrav* (1). The defendants have not produced books of account. If they had done so, we would have been in a position to show that the partition was not fair. Unless the partition is proved beyond doubt to be fair and legal we are not bound by it—*Kalee Sunkur* v. *Denendro* (2).

Lang (Advocate General with *Manekshah J. Taleyarkhan*), for respondent No. 1 (defendant No. 1, Danava) :—This suit is to recover certain specified property and not for the rectification or [595] setting aside of the partition. The plaintiff being a minor at the time of the partition, his mother acted as his guardian. A partition by an infant's guardian has the same effect as a partition by an adult member of the family. In the plaint there are vague allegations of fraud, but such vague allegations cannot entitle the plaintiff to relief. Fraud must be distinctly and specifically stated and proved. There is no allegation in the plaint that the plaintiff did not get a fair share of the property. The partition is binding on the plaintiff until he proves that it was fraudulent and unequal. The fact that the plaintiff was a minor at the time of the partition is by itself not sufficient to set aside the partition—Mayne's Hindu Law (5th Ed.), para. 435 ; *Deowanti* v. *Dwarkanath*(3) ; *Nallapa Reddi* v. *Balammal*(4) ; *Lakshmibai* v. *Ganpat Moroba*(5); *Hassan Ali* v. *Nazo* (6) ; *Rao Bahadur Singh* v. *Jowahir Kuar* (7). As to limitation, the Judge found that the suit was not time-barred. We contend that it is time-barred. The Judge found that the plaintiff was, at the time of the institution of the suit in 1889, twenty-six years old. Plaintiff then attained majority in 1881, and he ought to have brought the suit within three years from that time—S. 7 of the Limitation Act (XIV of 1877).

Balaji A. Bhagvat, for respondents Nos. 3 and 4 (original defendants Nos. 3 and 4, Mallapa and Kotrapa).

Inverarity, in reply :—We do not recognize the alleged partition and, therefore, the suit is not one to set it aside. In fact, we claim the property

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(1) 10 B. H.C.R. 311. (2) 23 W.R. 68. (3) 8 B.L.R. 363 (note).
(4) 2 M.H.C.R. 182. (5) 4 B.H.C.R. O.C.J. 150 (159).
(6) 11 A. 456. (7) 11 I. A. 75.

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as the sole surviving male member of the family. Such a suit is governed by twelve years' limitation, and as we attained majority in 1881, the suit is in time. Further, we say in our deposition that we came to know of the partition deed in 1889, and that being so, the suit is within time even if it be held to be one for setting aside the partition, and governed by three years' limitation under art. 91, sch. II of the Limitation Act.

JUDGMENT.

BAYLEY, C. J. (Acting) :—By the plaint presented on the 24th August, 1889, to the Court of the First Class Subordinate Judge [596] of Dharwar, the plaintiff, describing himself as by caste Lingayat, his age at about twenty years, and his occupation money-lending, sues as the sole owner of all undivided family property, which formerly belonged to three brothers, Dodmallapa, Revansiddapa and Malsiddapa (the plaintiff's father), Revansiddapa having divided the family property with Dodmallapa in 1872; and after alleging that his father Malsiddapa died about eighteen years ago when the plaintiff was a minor; that the family estate had not been divided amongst Dodmallapa (the father-in-law of the minor defendant) Basalingapa, who was the adopted son of Dodmallapa (the husband of the first defendant), and the plaintiff, and that Dodmallapa died about two years ago, and Basalingapa in April, 1889, each of such two last mentioned persons having left no issue; he prayed:

(1) that the Court would declare that he had full right and ownership over all the moveable and immoveable property of the family of the plaintiff that had been in the *wahiwat* of Dodmallapa and Baslingapa;

(2) that if the defendant should contend that Dodmallapa or Basalingapa had obtained a *farkat* from the mother of the plaintiff, the Court would declare that the plaintiff having been a minor at that time, that that transaction was improper and fraudulent, that it did not bind the plaintiff and did not affect his right, claiming to obtain a declaration of the plaintiff's ownership over all the property thereinafter mentioned.

The particulars of the property claimed not having been given in the plaint, and it not having been therein mentioned whether or not the property had been in the plaintiff's possession, the Court, on the 24th August, 1889, ordered that his pleader should state whether or not the possession of the property had been with the plaintiff. On a subsequent day the plaintiff's pleader gave the particulars of the property, and on presenting an application praying that the suit should be treated as one for possession, the plaint was ordered to be registered. The property claimed was finally valued in the plaint at Rs. 60,000.

The first defendant in her written statement said that the plaintiff's claim was false, and was barred by limitation. That in [597] 1877 a partition was made between Chanawirapa, mother of the plaintiff, and Dodmallapa, and the document made in respect of it had been registered. That in accordance therewith the plaintiff and his mother had been in possession of the property allotted to their respective shares and had been carrying on the *wahiwat* separately. That the plaintiff was fully aware that the transaction of the partition and the *farkhat* made in respect thereof were made in good faith, openly, and without any fraud, and that since such partition the plaintiff had no right to bring this suit, and she asked that the plaintiff's claim might be rejected, and costs awarded to her.

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Upon issues framed, the Subordinate Judge found that the claim was not barred by limitation; that the plaintiff was twenty-six years old at the institution of the suit; that there was a valid partition between the plaintiff's mother acting on behalf of the plaintiff and Dodmallapa; that the plaintiff ratified it by his conduct or acquiescence, and that it should be held binding as against him; that the plaintiff could not recover the property claimed or obtain the declaration or order he sought, and he rejected the claim with costs.

The plaintiff appealed to the High Court, and among other grounds of objection to the decision of the Subordinate Judge, alleged that the same was contrary to law and against the weight of evidence; that there was no evidence to show that the plaintiff's mother signed the deed with full knowledge of its contents and that she had independent advice at the time she executed it; that the *onus* ought to have been thrown on defendants to show that the partition was a legal and proper one; and that the Court erred in holding the plaintiff bound by the partition without determining whether such partition was legally and properly made; and that the lower Court had held without any evidence whatever that plaintiff had ratified the alleged partition after he attained his majority.

At the hearing before us it was argued by Mr. Inverarity on behalf of the appellant that the plaintiff did not admit that the partition deed was executed; that he treated it as a nullity; that the *onus* lay on those who set up the partition; and that defendant must produce materials sufficient to test the validity **[598]** of the partition; that it was not alleged that there was any examination of accounts on behalf of plaintiff's mother, and that the partition was made between a woman of small intelligence, and Dodmallapa, then the manager of the family, and who was described by the Subordinate Judge as an adventurous trader who made a large addition to the family property.

First as to the plaintiff's age. The defendants having alleged that the plaintiff was considerably older than in his plaint he represented himself to be, the Subordinate Judge, when the case first came before him in June, 1890, framed an issue "Is the plaintiff twenty or twenty-eight years old at present?" and when he decided the case in June, 1891, found that the plaintiff was twenty-six at the institution of the suit, *i.e.*, that he was born in 1863, so that at the date of the partition in 1877 he was fourteen years old. I see no reason to dissent from that finding, based as it was upon a deposition of the plaintiff taken down by the Mamlatdar of Ranebennur in August, 1887, (Ex. 71) when the plaintiff stated that he was then twenty-four. He, therefore, completed his eighteenth year and attained his majority in 1881.

I will next consider the frame of the suit. The execution of the deed of partition of the 28th August, 1877, (Ex. 114), having, in my opinion, been duly proved, one of the attesting witnesses thereof was a brother of the plaintiff's mother, can the plaintiff be allowed for the purposes of this suit to treat that instrument as a nullity, and throw the burden of proving that the partition was a just and fair one upon those who set it up? As stated in Mayne's Treatise on Hindu Law (5th Ed.), s. 435: "It is now quite settled that a partition made during the minority of one of the members will be valid, and if just and legal, will bind him, and when he arrives at full age he may apply to have the division set aside as regards himself, if it can be shown to have been illegal or fraudulent, or even if it was made in such an informal manner that there are no means of testing its validity." The evidence shows that the partition was

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acted on from the time that it was effected, not only by the defendants, but by the plaintiff's mother, and afterwards by him, his mother stating before the Registrar when she admitted execution of the deed that as guardian of the plaintiff, she had received the share allotted [599] to him of the value of Rs. 25,700. No issue was raised or asked for in the lower Court as to whether the partition was illegal as regards the plaintiff, and I agree with the Subordinate Judge that there was no proof that it was unfair or unjust as regards him.

The argument on behalf of the plaintiff is that it is not necessary to set aside the partition, as he seeks to recover possession of the family property on his title as the last surviving male member of the family,—an argument, no doubt, of much dexterity, but in my opinion clearly an unsound one. A similar contention was put forward in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1) where an adoption was relied on in answer to a claim made by the plaintiffs as heirs. The Judicial Committee of the Privy Council say (p. 92): "It is ingeniously argued for the plaintiffs that they are suing, not to set aside any adoption, but to recover possession on their *prima facie* title as heirs, that it is the defendants who have to allege and prove adoption, and that on their failure to do so, it will not be set aside, but taken as never having existed. But the answer is that the defendants are in possession in the character of adopted sons; the *prima facie* title is with them, and until that is displaced they ought to retain possession.....But whatever the mode of pleading, there is but one issue on the merits of the case, namely, the validity or invalidity of the adoptions, by virtue of which alone the defendants hold their property. If the validity is proved, the plaintiffs cannot succeed in their claim." Their Lordships state (p. 93) that in the earliest case cited at the bar from the Sadar Divani Adalat Reports for 1850, it was held that the plaintiffs had a cause of action when possession was taken under colour of an adoption, Mr. Justice Colvin saying "The plain remedy for the plaintiff was to sue to set aside the succession by adoption as declared and perfected. The present plaint is a mere attempt to evade the consequences of that neglect, and to bring the adoption to an issue under colour of a statement of continued possession of the adopting widow." Their Lordships, therefore, held that the suit by the reversionary heirs, of the husband brought more than twelve years after the adoption [600] was barred by art. 129 of Act IX of 1871, the article dealing with suits to establish or set aside an adoption.

The same point came again before the Privy Council in 1892—*Mohesh Narain Munshi* v. *Taruck Nath Moitra* (2). Their Lordships say (p. 35): "The present is not a suit in which the plaintiff expressly asks for a decree to 'set aside' the defendant's adoption, or to obtain a declaration that the 'adoption was invalid,'" which would probably be a more apt expression to use. The plaintiff merely asks for a declaration of his right, and that possession may be given to him of the properties in dispute. But this, in the circumstances, obviously involves the setting aside of the defendant's adoption, or in effect a judgment or finding by the Court that the adoption is invalid, for the defence of possession founded on the adoption directly involves the decision of the question—was the adoption invalid? In the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1), which was very fully argued and carefully considered, it was settled that a suit to set aside an adoption within the meaning

(1) 13 I. A. 84.

(2) 20 I. A. 30.

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of these words in the Limitation Act need not be a suit having declaratory conclusions, but that any suit in which the decree prayed for involves the decision of the question of validity of an adoption set up in defence, is a suit to set aside an adoption.

In a case decided by the High Court at Allahabad in 1889, *Hasan Ali* v. *Nazo* (1), a Mahomedan, who in October, 1875, executed a deed of gift of his property to his two daughters, the defendants, under which possession was taken by them, died in 1885, never having taken any steps to have the deed of gift set aside. In 1886 a suit was brought by his nephew, claiming a share in the donor's estate by right of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was held that as a suit by the donor to set aside the deed would at the time of his death be barred by art. 91 of the Limitation Act (XV of 1877), such a suit was also barred against the plaintiff, who claimed through him, the cancelment of the deed being a substantial and necessary incident of the claim, and the necessity which rested on the plaintiff for **[601]** obtaining such cancelment before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. The Court relied upon the case I have already referred to—*Jagadamba Chowdhrani* v. *Dakdina Mohun* (2).

The present suit must, in my opinion, be regarded as one to set aside the deed of partition executed by the plaintiff's mother on his behalf on the 28th August, 1877, on the ground that it was unfair and fraudulent as against him. In the 2nd para. of his prayer, as already pointed out, the plaintiff asks that if the defendant should contend that a *farkhat*, *i.e.*, the deed of partition, had been obtained from his mother, the Court will declare that the plaintiff having been a minor at that time, such transaction was improper and fraudulent, and that it does not bind the plaintiff or affect his right. The plaint, however, until the 2nd para. of the prayer is reached, does not charge any fraud, or allude in any manner to the partition effected in 1877. It was, however, held by the Privy Council in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (3), that where fraud is the ground of action, the particulars thereof must be set forth in the plaint, which otherwise should be ordered under s. 53 of the Civil Procedure Code to be amended or rejected. Their Lordships say (p. 121): "When fraud is charged against the defendants it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. Lord Selborne said in *Wallingford* v. *Mutual Society* (4): 'With regard to fraud, if there be any principle, which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.'" The suit in that case had been brought in the Court of the Subordinate Judge of the zilla Goalpara, in the Bengal Presidency, where efficient legal advice would doubtless be more difficult to procure than it would be in Calcutta. See also a recent decision on the same point in this Court—*Krishnaji* v. *Wamanji* (5). The present suit, having regard to its real nature, appears to be defective, disclosing no **[602]** cause of action, as no particulars of the fraud, which form the ground of the suit, are set forth in the plaint.

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(1) 11 A. 456. (2) 13 I. A. 84. (3) 15 I. A. 119.
(4) 5 App. Cas. 697. (5) 18 B. 144.

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Assuming, however, that the suit is well framed, I am of opinion that it is barred by the law of limitation. The suit being substantially one to set aside the deed of partition of August, 1877, art. 95 or 91 of Act XV of 1877 would apply, as it is either a suit for relief on the ground of fraud, or to cancel or set aside an instrument not provided for, which must be brought within three years from the time when the fraud becomes known to the party wronged, or when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. Under s. 7 of that Act the plaintiff could institute his suit within the same period after his disability as a minor had ceased as would otherwise have been allowed from the time prescribed therefor, *viz.*, three years. Having attained his majority in 1881, he should, assuming that he had full knowledge of the facts, have brought his suit in or before 1884. Not having brought it until the 24th August, 1889, and having been fully aware of the circumstances entitling him (if at all) to have the instrument cancelled or set aside, and of the fraud and unfairness which he alleges were practised on his mother from the time of his attaining his majority if not before, although he professed his ignorance thereof until shortly before he instituted his suit, his suit was brought five years too late, and is consequently barred by limitation.

Upon the merits of the case I concur in the view taken by the Subordinate Judge.

The plaintiff in his evidence (Ex. 72) admitted that his mother belonged to a rich family, so that she could doubtless have procured competent advice if she wished for it. He said that she was idiotic. Her evidence in the witness-box created a very unfavourable impression on the Subordinate Judge, who states that she began to dissemble at the very commencement of her examination, denying knowledge even of the most familiar circumstances which it is impossible for women to pass unnoticed. There is nothing to show that the plaintiff's mother was so ignorant as to be unable to secure her son's interests by a partition between Dodmallapa and the plaintiff. She was in all **[603]** probability assisted by her brother, who attested the deed of partition, which he is not likely to have done, if he had thought that in the partition the interest of his nephew, the plaintiff, had not been duly cared for and protected. In *Nallappa Reddi* v. *Balammal* (1), it was held that there being no proof of fraud, or that undue advantage was taken of the plaintiff's minority, and in the absence of proof of gross inequality in the distribution of the property, the division was valid and binding upon the plaintiff.

On the 14th October, 1873, when Revansiddapa separated and divided the family property with Dodmallapa (Ex. 116), the whole property was then valued at Rs. 36,225, of which Revansidda took his one-third share of the value of Rs. 12,075. Dodmallapa, by his successful trading and as manager of the remaining undivided family property, made large additions to it, so that when the partition, which the plaintiff now complains of, was made in 1877, its value had increased to Rs. 51,400, of which the plaintiff's mother acting on his behalf and as his natural guardian took one-half, *viz.*, Rs. 25,700, and she and the plaintiff have had the exclusive use thereof ever since. I think that the evidence clearly shows that from the time that the plaintiff completed his eighteenth year in 1881 until he instituted this suit in 1889 he adopted and ratified many transactions entered into by his mother, and that by his conduct and acquiescence during that period he must be taken to have ratified the

(1) 2 M.H.C.R. 182.

partition made on his behalf by his mother in 1877. It is noteworthy, too, that the plaintiff did not bring his suit until two years after the death of Dodmallapa, and until four months after that of Balsingapa, the adopted son of Dodmallapa, although he had for many years known all circumstances on which he now relies in his attempt to get rid of the partition made in 1877. He and his advisers were doubtless aware of the hopeless nature of such a suit had it been brought while those two persons were alive.

For the above reasons, I am of opinion that the plaintiff's claim is an unfounded one, besides being barred by the law of limitation, and that we should, therefore, confirm the decree of the [604] First Class Subordinate Judge at Dharwar, and dismiss the appeal with costs.

FULTON, J.—I concur with the learned Chief Justice in thinking that the decree must be confirmed. The principal argument put forward on behalf of the appellant was that a partition with a minor was not binding unless a fair share were allotted to him, and that in the present case it was impossible to determine that a fair share had been allotted because there were no materials from which to form an opinion. A good deal was said about the burden of proof in a case of this kind, but I think Mr. Inverarity successfully established the proposition that in the first instance it is for the person who alleges a partition with a minor to prove that it was a fair one. Mr. Mayne in dealing with the subject says, para. 435: "It is now quite settled that a partition made during the minority of one of the members will be valid and, if just and legal, will bind him. Of course his interests ought to be represented by his guardian or some one acting on his behalf though I imagine the fact of his not being so represented would be no ground for opening up the partition if a proper one in other respects." Reference may also be made to West and Bühler's Digest, p. 672, and Dr. Jolly's History of the Hindu law, pp. 99, 100, 128 and 129. The test of the validity of the partition appears to be its fairness.

Accepting, however, this criterion it seems to me that "fairness of partition" can be established not only by direct evidence of the amount of the family property and the method of its division, but also by proof of circumstances from which it can properly be inferred. In the present case I think such circumstances exist, in the fact that the partition deed was signed by the plaintiff's mother and attested by her brother; that the families have lived and traded apart just as if they were divided; and that the plaintiff, who must have attained the age of eighteen, about eight years before the institution of this suit, and who was about fourteen at the time of the alleged partition, never complained of its unfairness, until after the death of Baslingapa it became his interest to do so in order to obtain the property of the deceased. Our attention was called to the case of *Kalee Sunkur* v. [605] *Denendro* (1), which is referred to by Mr. Mayne in support of the proposition that a minor, when he arrives at full age, may apply to have a division set aside if it was made in such an informal manner that there are no means of testing its validity. An examination, however, of that case shows that the circumstances were different from those now under consideration, inasmuch as the minor's proper guardian was not a party to the partition, no partition deed was drawn up, and the minor complained as soon as he came of age. On the other hand, reference may be made to the case of *Nallappa Reddi* v. *Ballammal* (2), in

(1) 23 W. R. 68.

(2) 2 M.H.C.R. 182.

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which it seems that the fact of the mother of a minor being a party to the partition was accepted as *prima facie* proof of the fairness of the division. In the case of *Deowanti* v. *Dwarka Nath* (1) no question as to the fairness of the partition appears to have arisen, but the Calcutta High Court held that a partition could undoubtedly be effected between one adult coparcener and a minor duly represented by his guardian. I refer to these decisions, but at the same time it must be remembered that the question of fairness of partition is probably one of fact to be determined by the circumstances of each case in regard to which not much assistance can be got from precedents. In the present case the fact that a partition deed was executed in 1877 between Dodmallapa and the plaintiff's mother is clearly proved. So far as the document goes, it seems a fair division which takes into account a substantial increase in the family property since the partition with Revansiddapa in 1873. It was urged, however, that further proof of the fairness of a transaction between an astute man of business and an illiterate woman under his control who now professes to know nothing whatever about it, is required. This may doubtless be conceded. But to my mind the fairness of the division is proved partly by the fact that the brother of the lady was a witness to the document and more conclusively by the conduct of the plaintiff himself, who, though he apparently has been of age since 1881, does not seem ever to have questioned its propriety till after the death of Baslingapa in 1889. The first of these facts appears to be of considerable importance, for though an attesting witness very often knows [606] nothing of the contents of the document to which he attaches his signature, the circumstance that in a family arrangement of this kind the mother's brothers should be called in to attest, indicates that there was no secrecy about it. Such an attestation under the circumstances would probably have some weight in any country, and is, I think, entitled to special consideration in the Mofussil in India, where, as pointed out in West and Bühler's Digest, p. 233, witnesses are usually intended to attest not merely the signature but also the transaction. Unfortunately this brother is dead, so that it is impossible to ascertain with greater certainty what part he took in the matter, but as he was a man of some education—*vide* witness 74—it seems probable that he would ascertain the contents of the deed which his sister was signing. The strongest circumstance, however, against the plaintiff is his own conduct in doing nothing until 1889. It was contended that there was no proof that he knew of the partition deed, and there is certainly no direct proof, but it is highly improbable that he should have been ignorant of it, considering that even when it was executed he was not a very young child, and that it was signed by his mother, and attested by his uncle and four other witnesses who are not shown to have been in league with Dodmallapa or to have had any object at the time in keeping the matter secret. That the plaintiff is really a great deal older than he alleges, seems clear, having regard to Ex. 71. There is no reason for supposing that in 1887 he misrepresented his age to the Mamlatdar or that the latter did not correctly record what he said. Even supposing it to be possible that he was ignorant of the partition deed, he must have known that he was ostensibly living and trading as a separate member of the family and have also been aware of his uncle's reputed wealth, and on his death he would not have acquiesced in its all being kept by Baslingapa if he thought he

(1) 8 B.L.R. 363.

had not got his proper share. But in Ex. 71 we find him going to the Mamlatdar to signify his assent to Baslinga's name being substituted for Dodmallapa's in the revenue accounts. Of course, if the members of the family were living in union, such an assent might be given ; but the fact seems that they were not, and if the plaintiff supposed that there had been no partition, and that he was merely trading **[607]** with small sums advanced to him by his uncle out of the common stock, I should have expected that on his uncle's death he would at least have ascertained what that common stock was, even if he did not think it necessary to demand his share. But he did nothing at that time in assertion of his rights.

The above circumstances seem to me to afford *prima facie* grounds for the belief that a fair partition was made in 1877. To rebut this presumption the plaintiff has made no serious attempt to show that as a fact he got less than his share. He would, it is true, have a difficulty in showing the real amount of the moveable property, but there was some immoveable property about which evidence might have been given. Mr. Inverarity laid much stress on the non-production of Dodmallapa's accounts, but making due allowance for this circumstance I think it is insufficient to support an inference that the partition was unfair. The plaintiff himself has not produced any books, though as he has had separate transactions it might have been expected that he would have kept some from which to show the capital at his disposal. It is impossible to say what accounts Dodmallapa kept. Exhibit 108 refers to a *bot khata* or ledger which he kept in 1883 containing accounts with individual debtors, but though it is probable that he kept other accounts it is not proved that he did so. Exhibit 104 shows that Baslinga produced no books when his income-tax was being assessed. Mr. Inverarity urged that whereas according to the partition deed Dodmallapa's capital was only Rs. 25,700 in 1877, the widow of Baslinga had in 1889 to pay duty on Rs. 60,000 : but this increase may be due to Dodmallapa's success in business like the increase between 1873 and 1877. He also pointed out that the bonds shown to have been transferred to the plaintiff or his mother were for a very small amount, about Rs. 2,500, but we have no means of knowing how many bonds were really handed over.

Looking to all the circumstances I think, considering the apparent absence of any attempt at secrecy in the partition, the fact that the deed was signed by the mother and attested by her brother and other witnesses, and that for years the plaintiff seems to have acquiesced in the position in which he was placed, **[608]** the only reasonable conclusion to come to is that it was a fair partition and, therefore, binding on the plaintiff.

Under these circumstances there is no necessity to go into the question arising as to the validity of the alleged adoption by Danava.

Decree confirmed.

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Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

ALOO NATHU AND OTHERS (*Original Defendants*), *Applicants v.* GAGUBHA DIPSANGJI, A MINOR, BY THE ADMINISTRATOR OF HIS ESTATE, THE COLLECTOR OF AHMEDABAD (*Original Plaintiff*), *Opponent.** [6th July and 28th August, 1894.]

Judge—Bias—Possessory suit in a Mamlatdar's Court—Mamlatdars acting in the management of the property under the orders of the Talukdari Settlement Officer—Disqualification of the Mamlatdar as a Judge.

No Judge can act in any matter in which he has any pecuniary interest, nor where he has any interest, though not a pecuniary one, sufficient to create a real bias.

A Mamlatdar who under the orders of the Talukdari Settlement Officer had acted in the management of the property in dispute in a possessory suit before him, was held to have such an interest as to disqualify him from trying the case.

Where an officer of Government has in the course of his executive duties formed an opinion upon a matter and has acted upon that opinion, or sought to give effect to it as an agent on behalf of a public body which has become a litigant in a cause, the law will presume an interest creating a bias sufficient to disqualify him as a Judge.

[R., 2 L.B.R. 281.]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb G. G. Desai, Mamlatdar of Dhandhuka in the Ahmedabad District, passed in a possessory suit.

The Collector of Ahmedabad as the administrator of the estate of one Gagubha Dipsangji, a minor, instituted a suit against the defendants in the Court of the Mamlatdar of Dhandhuka to recover possession of certain fields under the Mamlatdars Act (Bombay Act III of 1876). The defendants claimed to be permanent tenants.

[609] The estate of the plaintiff was managed by the Collector of Ahmedabad, and the Mamlatdar had taken part in the management under the orders of the Talukdari Settlement Officer.

During the progress of the suit the defendants applied to the Mamlatdar for the transfer of the case from his Court to some other Court on the ground that he was interested in the subject-matter of the suit, but the application was rejected.

The Mamlatdar awarded the claim.

The defendants then presented an application to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling upon the plaintiff to show cause why the decision of the Mamlatdar should not be set aside on the ground (*inter alia*) that as the Collector carried on the management of the minor's estate through the Talukdari Settlement Officer and the Mamlatdar, the Mamlatdar was wrong in hearing and deciding the suit.

Nagindas Tulsidas Marphatia, for the applicants (defendants).—The Mamlatdar of Dhandhuka was not competent to decide the suit. He

* Application No. 20 of 1894 under the extraordinary jurisdiction.

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manages the estate under the orders of the Collector and Talukdari Settlement Officer. As a Judge he would uphold the action of his superior officers.

Rao Saheb *Vasudeo J. Kirtikar*, Government Pleader, for the opponent (plaintiff).—The Mamlatdar simply acts as an executive and ministerial officer under the orders of the Collector and the Talukdari Settlement Officer in connection with the subject-matter of the suit, and that being so he cannot have any bias as a judicial officer—*Queen* v. *Rand* (1). It has been held that a Magistrate who is a witness in a case is not disqualified from disposing of it—*Queen* v. *Farrant* (2). These authorities show that even supposing that the Mamlatdar may have held a consultation with the Collector and the Talukdari Settlement Officer with respect to the lands in suit, and may have expressed his opinion to those officers, still these circumstances would not disqualify him from disposing of the case. The question to be considered is, whether the Mamlatdar has shown any bias in recording and appreciating the evidence, and we submit that he has not shown any such bias.

[610] The Mamlatdar rejected the application for the transfer of the case because it was made at the last stage.

JUDGMENT.

FULTON, J.—The plaintiff is a minor under the guardianship of the Collector of Ahmedabad, who manages the estate through the Talukdari Settlement Officer, and the question which we have to determine is, whether the Mamlatdar, who acts in the management of the property under the orders of the Talukdari Settlement Officer, has such an interest in the plaintiff's affairs as to disqualify him from trying this case.

The subject is fully discussed in the case of *Loburi Domini* v. *The Assam Railway and Trading Company, Ld.* (3), which shows that where an officer of Government has in the course of his executive duties "formed an opinion upon a matter and has acted upon that opinion, or sought to give effect to it as an agent on behalf of a public body which has become a litigant part in a cause," the law will presume an interest creating a bias sufficient to disqualify him as a Judge. This principle, as remarked by Mr. Justice Field, does not rightly reflect any unworthy suspicion upon an individual Judge, while it secures and upholds one of the great pillars of judicial purity. No Judge can act in any matter in which he has any pecuniary interest—*Dimes* v. *The Proprietors of the Grand Junction Canal* (4), nor where he has an interest, though not a pecuniary one, sufficient to create a real bias. "Whenever there is a real likelihood that the Judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act"—*Queen* v. *Rand* (1).

The circumstances constituting an interest from which a bias may be presumed, vary in each case. In the present case the Collector in his affidavit has stated that the Mamlatdar was simply a ministerial officer carrying out the orders of the Talukdari Settlement Officer who has been managing the minor's estate on behalf of the Collector, and that he was not connected with the management otherwise than as acting under the orders of the Talukdari Settlement Officer. But this affidavit is not sufficiently full to enable us to determine whether or not the

(1) L. R. 1 Q.B. 230.
(2) L.R. 20 Q. B. 58.
(3) 10 C. 915.
(4) 3 H. L. 759.

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[611] Mamlatdar was interested in the management of this estate in such a way as to render it probable that he would have a bias in favour of the plaintiff; and before deciding this question we should like to know whether in his correspondence with the Talukdari Settlement Officer he was in the habit of expressing his opinion and advising generally on the management of the estate, and whether in this particular case he had made any recommendation as to the desirability or otherwise of taking proceedings against the defendants or against other tenants similarly situated. From the affidavit it appears that the suit was suggested by the mother of the minor and the talati of Rojka, but we desire to be informed whether or not the Mamlatdar was consulted on the subject, and must call on the Government Pleader to obtain a further affidavit on this point from the Collector or Talukdari Settlement Officer.

It was urged that this suit must be brought in this Mamlatdar's Court, as there was none other competent to entertain it. But the Subordinate Judge's Court had concurrent jurisdiction, and the mere fact that its procedure may not be so expeditious as the Mamlatdars,' does not justify any argument founded on necessity.

With these remarks we must now adjourn the further hearing of this application for a month, in order to enable the Government Pleader to procure the necessary affidavit.

JUDGMENT CONTINUED.

1894, *August* 28. FULTON, J.—The Government Pleader states that the Collector is unable to make the affidavit called for, as he is not prepared to state that the Mamlatdar was on no occasion consulted about the management of this estate, and that it is quite possible and likely that he was consulted previous to the institution of the proceedings. The rule must, therefore, be made absolute and the decree must be set aside with costs in this Court.

Rule made absolute.

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[612] CRIMINAL APPEAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* RAGHO MAHADU.* [2nd August, 1894.]

Bombay Act VIII of 1867, ss. 10, 11, 12—*Duties of the police patel in cases of unnatural or sudden death—Ancient village system of police not affected by the Code of Criminal Procedure* (*Act X of* 1882).

The ancient village system of police, as regulated by Bombay Act VIII of 1867, remains unaffected by the Code of Criminal Procedure (Act X of 1882) except where the Code contains a specific provision.

Under Bombay Act VIII of 1867, the police patel has to do much more than merely in form the district police. He has himself to investigate the matter of a crime and obtain all procurable evidence. Under s. 11 of the Act, if an unnatural or sudden death occur, or any corpse be found, he must *forthwith* hold an inquest and investigate with the panch the causes of death and all the circumstances of the case, and make a written report of the same. If it appears that the death was unlawfully caused, he must immediately give notice to the police station, and, if the state of the corpse permits, he shall *at once* forward it to the Civil

* Criminal Appeal No. 197 of 1894.

Surgeon or other appointed medical officer. These provisions of the law are likely to be defeated if the police patel refrains from the proper action until the district police officers arrive on the spot.

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[R., Rat. Unr. Cr. Cas. 792 (793); Rat. Unr. Cr. Cas. 854 (855).]

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APPEAL from the conviction and sentence recorded by A. S. Moriarty, Acting Sessions Judge of Ratnagiri.

The accused pleaded guilty to the charge of murder, and was sentenced to death under s. 302 of the Indian Penal Code (Act XLV of 1860).

The sentence was passed subject to confirmation by the High Court.

The accused appealed from the conviction and sentence to the High Court, urging that he was prompted to commit the offence of murder by evil destiny.

Balaji Abaji Bhagvat, for accused.

Rao Saheb *Vasudeo J. Kirtikar*, Government Pleader, for the Crown.

JUDGMENT.

JARDINE, J.—The prisoner, who confessed to the murder both before the committing Magistrate and the Court of Sessions, fully admits his guilt in his appeal to this Court. His petition merely [613] urges that he was predestined to kill the old woman and she to be killed by him. We confirm the conviction and sentence.

In several recent cases we have noticed a laxity on the part of police patels, which the Government Pleader is unable to explain by referring us to any directions of the Government or of the district authorities. The ancient village system of police, regulated formerly by Reg. IV of 1818 and Reg. XII of 1827 and now by Bombay Act VIII of 1867, remains unaffected by the Code of Criminal Procedure, except where the Code contains a specific provision. Under the local law the police patel has to do much more than merely inform the District Police under s. 10 thereof, or under s. 45 of the Code. Under s. 10 he has himself to investigate the matter of a crime and obtain all procurable evidence. Under s. 11, if any unnatural or sudden death occur, or any corpse be found, the police patel shall forthwith assemble an inquest and investigate with the panch the causes of death and all the circumstances of the case, and make written report of the same. If from the inquest it appears that the death was unlawfully caused, he must give immediate notice to the police station and, if the state of the corpse permits, he shall at once forward it to the Civil Surgeon or other appointed medical officer. Under s. 12 the police patel can make arrests, and under s. 13 can take evidence on solemn affirmation, and hold searches.

When he has held an inquest the village headman is required by s. 174 of the Code to report the result to the nearest Magistrate authorized to hold inquests.

In the case before us the patel does not appear to have held the inquest. Neither did he at once send on the body. We have to remark that the command of the law that certain things be done by the police patel, or be done at once or forthwith, is likely to be defeated if this officer refrains from the proper action until such time as the district police officers have come to the village. In cases of crimes it is obvious that the inquiries and searches that often lead to a knowledge of the perpetrators and are followed by arrests should be at least as prompt as the plain words of the law require. The public order is preserved by each [614] public officer

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doing such things as belong to his duty, and there is danger if a practice grows up whereby any officer shifts his peculiar duty on to some other officer. We will send a copy of this judgment to the District Magistrate.

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APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

RAMABAI AND ANOTHER (*Original Defendants*), *Appellants v.* RANGRAV AND OTHERS (*Original Plaintiffs*), *Respondents.**
RANGRAV AND OTHERS (*Original Plaintiffs*), *Appellants v.* RAMABAI AND ANOTHER.† [3rd August, 1894.]

Adoption—Reversioner, suit by, to set aside an adoption by a Hindu widow—Right of suit—Remote reversioners—Watan property—Bombay Act V of 1886, *s.* 2 (1).

The right to sue to set aside an adoption by a Hindu widow is, as a general rule, limited to the nearest reversionary heir, and if he without sufficient cause refuses to institute proceedings, or if he has precluded himself by his own act and conduct from so doing, or has colluded with the widow, or concurred in the alleged wrongful act, the next presumable reversioner will be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversioner claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and should require the nearer reversioner to be made a party to the suit.

Raghunath, a separated Hindu, died possessed of certain property, a portion of which was watan land, and left him surviving a widow Ramabai, a daughter Manubai and the plaintiffs, who were his brother's sons. Subsequently Ramabai adopted Vishvanath as a son. Manubai (the daughter), who lived with Ramabai and Vishvanath, did not take any steps to dispute the alleged adoption. The plaintiffs now sued for a declaration that the adoption, if made in fact, was invalid, and that they were entitled to succeed to the property of Raghunath on the death of his widow Ramabai.

Held, that as the plaintiffs were entitled under s. 2 of Bombay Act V of 1886 to succeed to the watan property in preference to Manubai after the death of Ramabai, [615] and were the presumptive reversionary heirs after Ramabai to the watan property and the only persons interested in disputing the adoption so far as the watan property was concerned, the lower Court exercised a proper discretion in allowing the suit to be maintained by the plaintiffs.

Rani Anund v. *The Court of Wards* (2) and *Kooer Gulab Sing* v. *Rav Kurun Sing* (3), referred to and followed.

THESE were cross-appeals from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona.

One Raghunath Shripat Chandrachud died on the 11th January, 1888, leaving him surviving his widow Ramabai and a daughter Manubai. On the 16th May, 1890, Ramabai adopted a son called Vishvanath.

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* Appeal No, 105 of 1892. † Appeal No. 118 of 1892.

(1) Section 2 of the Watan Act (Bombay Act V of 1886) :—

2. Every female member of a watan family other than the widow of the last male owner, and every person claiming through a female, shall be postponed, in the order of succession to any watan, or part thereof, or interest therein, devolving by inheritance after the date when this Act comes into force, to every male member of the family qualified to inherit such watan, or part thereof, or interest therein.

The interest of a widow in any watan or part thereof shall be for the term of her life or until her marriage only.

(2) 8 I. A. 14 (22). (3) 14 M.I.A. 176 (193).

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In 1892 the plaintiffs Rangrav Krishna Chandrachud and four others, who were the nephews (brother's sons) of the deceased Raghunath, brought the present suit against Ramabai and Vishvanath to set aside the adoption and to establish their right to succeed to Raghunath's property, a portion of which was service watan. The plaintiffs contended that Ramabai had only a life-interest in the property of her deceased husband; that the adoption of Vishvanath had not, as a matter of fact, taken place; but that, even supposing that it had taken place, it was invalid, inasmuch as (1) Vishvanath was not a *sagotra* and had been married before the date of the alleged adoption and (2) the deceased Raghunath had prohibited Ramabai from adopting a son. They claimed to be entitled to succeed to the property on the death of Ramabai.

The defendants denied the alleged prohibition, and contended that Vishvanath had been validly adopted.

The Judge found that the adoption of Vishvanath would not have been invalid on the grounds alleged in the plaint if it had been proved to have taken place, but that the fact of the adoption had not been proved; that the deceased being admittedly a separated Hindu, his daughter was entitled to succeed to his property except the watan property which could not be inherited by a female other than the widow of the deceased; that the plaintiffs being divided members of the family of the deceased were entitled to bring the suit to set aside Vishvanath's adoption only as to the watan property, and that a certain will which the plaintiffs [616] had produced at the trial in support of their allegation that Ramabai was prohibited from adopting, was not proved. He, therefore, held that the adoption of Vishvanath was invalid so far as the watan property was concerned, but rejected the rest of the plaintiffs' claim.

The parties preferred cross-appeals.

Mahadev Chimnaji Apte, for the appellants (original defendants) in appeal No. 105.—The Judge was wrong in allowing the plaintiffs' claim with respect to the watan property. His decree has the effect of partially setting aside Vishvanath's adoption. An adoption cannot be partially held to be good and partially set aside. If the adoption is good with respect to one kind of property, it is good with respect to the other property also. Next, we contend that the plaintiffs are not reversioners, because Manubai, the daughter of the deceased, is alive and she will succeed as the heiress of her father Raghunath after the death of his widow Ramabai. Manubai ought to have been joined as a party to the suit. It is true that she being a female cannot succeed to the watan property. The plaintiffs, as reversioners, are entitled to succeed to that property if the adoption of Vishvanath be held not proved. If, however, the adoption be held proved, then the plaintiffs would neither be presumptive nor contingent reversioners, and the suit must fail (Evidence in support of the adoption was referred to and the case was argued on the facts.)

Balkrishna N. Bhajekar, for the respondents (original plaintiffs) in appeal No. 105.—We are the nearest reversioners after the daughter, and are, therefore, entitled to bring the present suit. The daughter has a right to bring a suit to set aside Vishvanath's adoption, but as she does not choose to do so, we are entitled to sue in order to preserve our interest in the property—*Bhikaji Apaji* v. *Jagannath Vital* (1); *Rani Anund* v. *The Court of Wards* (2): *Kooer Gclab Sing* v. *Rao Kurun Sing* (3).

(1) 10 B H.C.R. 351. (2) 8 I. A. 14. (3) 14 M. I. A. 176.

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JUDGMENT.

FARREN, J.—The first question which presents itself for determination is as to the right of the plaintiffs to maintain this suit, for a declaration that the defendant Vishvanath was not adopted [617] in fact by Ramabai to her husband Raghunath, and that, if adopted in fact, he was not validly adopted.

Raghunath died on the 11th January, 1888, without male issue, but leaving his widow Ramabai and his daughter Manubai. He was a separated Hindu. The plaintiffs, his brother's sons, in the absence of Manubai, would be Raghunath's nearest heirs after Raghunath's widow. The allegation of the defendants is that Vishvanath was adopted by Ramabai on the 16th May, 1890. This adoption the plaintiffs contest in fact and in law.

Manubai, it is admitted, lives with the defendant Ramabai and the alleged adopted son. She has taken no steps to dispute the alleged adoption, and presumably does not intend to take any. Portion of the property left by the deceased is watan land, and under s. 2 of Bombay Act V of 1886 every female member of a watan family other than the widow of the last male owner shall be postponed to the male members of the family.

The law upon this subject is laid down in *Rani Anund* v. *The Court of Wards* (1) in the following terms:—"Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji* v. *Jagannath Vithal* (2) is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature; for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be [618] entitled to sue: see *Kooer Golab Sing* v. *Rao Kurun Sing* (3). In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

Adopting, as we are bound to do, the principles thus pointed out, we think that the lower Court has exercised a proper discretion in allowing the plaintiffs, the presumptive reversionary heirs after the widow to the watan property, and the only persons at present interested, in so far as the watan is concerned, in disputing the adoption, to maintain this suit. We think, however, that that Court would have exercised a still more full discretion if it had directed the plaintiffs to add a paragraph to their plaint as to the facts stated in the proceding paragraph of this judgment and

(1) 8 I. A. 14 (22). (2) 10 B.H.C.R. 351. (3) 14 M. I. A. 176 (193).

caused Manubai to be added as a defendant to the suit. We shall not, however, at this stage direct these amendments.

Reluctant though we are to differ from the Court below on a question of fact, we feel unable to accept the conclusion that the adoption of Vishvanath by Ramabai did not take place. Exhibit 48 (as well as other evidence) proves that she before the date of the alleged adoption was anxious, even eager, to adopt the defendant Vishvanath as her son, and that she went on or about the 15th May, 1890, to Poona in order to adopt him. While there she undoubtedly had an adoption paper drawn out, which in the most careful language recites the fact of the adoption having taken place. She went to the trouble of having this witnessed by some twelve persons, some of them well-known residents of Poona. This deed she subsequently got registered. Under these circumstances it would require very slight evidence to prove that she actually performed the simple act or ceremony of adoption which she had taken such pains to authenticate. Why she should not have performed it, seems inexplicable, if she did not do so. She affirms that she did. She can have no motive for saying that she did adopt the defendant Vishvanath if she did not, for she **[619]** can do so now if so minded. She has called three witnesses to the *factum* of the adoption, *viz.*, the priest, the writer of the adoption paper, and another man who says that he was present on the occasion. No effort is made to shake the testimony of these witnesses by cross-examination. No evidence is called to refute it. The reason why none of the *bhaubands* were present, is explained by the ill-feeling between them and the lady, and their dislike to have a stranger introduced into the family while boys born in it were available for adoption. We cannot disbelieve this probable and apparently true story merely because there is a seeming contradiction between the evidence of Ramabai given in another matter before suit and that of the witnesses now called on her behalf as to the exact place where the ceremony took place. We say *seeming* contradiction, because it is open to many possible explanations, and the lady was not asked to account for it. If asked, she might have shown that it was no real contradiction at all. It was the duty of the plaintiffs' pleader if he intended to rely upon this contradiction to have called the lady's attention to it and given her the opportunity of explanation. We feel confident, in the above state of the evidence, that the adoption in fact took place, and consider that the issue should have been found in that sense. [Upon the evidence their Lordships held (agreeing with the Subordinate Judge) that the will set up by the plaintiffs to prove that the adoption was prohibited, was not proved. In the result the appeal by the defendants (No. 105) was allowed, and the plaintiffs' claim dismissed. The appeal by the plaintiffs (No. 118) was dismissed with costs.]

Claim dismissed.

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[620] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

HARJIVAN (*Original Plaintiff*), *Appellant*, *v.* SHIVRAM AND OTHERS (*Original Defendants*). *Respondents.** [7th August, 1894.]

Limitation Act (*XV of* 1877), *art.* 144—*Adverse possession—Symbolical possession—Effect of symbolical possession against third parties—Auction-purchaser—His right to tack on his own possession to that of judgment-debtor.*

The property in dispute belonged to one Dhondi. He sold it to Arjun on 25th April, 1873, but did not put the vendee into possession. On 18th April, 1883, Arjun sold the property to the plaintiff.

On 4th June, 1883, in execution of a money-decree against Dhondi the property was put up to sale as his, and was purchased by the defendants, who were put into possession by the Court on 26th March, 1885.

On 28th March, 1885, the plaintiff sued Arjun and Dhondi's wife (Dhondi being then in prison) to recover possession of the property. A decree was passed, in execution of which he obtained symbolical possession through the Court on 8th February, 1886. When he sought to take actual possession, he was resisted by the defendants.

Thereupon the plaintiff filed the present suit on 19th December, 1889, to obtain actual possession of the property from the defendants.

Held, that the suit was barred under art. 144 of the Limitation Act (XV of 1877). The defendants had a right to tack on the period of their own adverse possession as against the plaintiff to that of Dhondi's adverse possession as against Arjun. The symbolical possession obtained by the plaintiff did not break up the continuity of the adverse possession of the defendants and the person through whom they derived their title.

[D., 19 A. 499 ; 25 B. 358.]

SECOND APPEAL from the decision of R. S. Tipnis, Acting Judge of Thana, in appeal No. 458 of 1890.

The property in dispute originally belonged to one Dhondi.

On 25th April, 1873, Dhondi conveyed it to one Arjun by a deed of sale of that date. The lower Courts held that this was a colourable transaction intended to defeat Dhondi's creditors. Dhondi remained in possession.

On the 18th April, 1883, Arjun sold the property to the plaintiff.

On the 4th June, 1883, the property was put up to sale in execution of a money decree against Dhondi and purchased by the defendants Nos. 1 and 2.

On the 26th March, 1885, defendants Nos. 1 and 2 obtained possession of the property through the Court.

[621] On the 28th March, 1885, the plaintiff sued his vendor Arjun and Dhondi's wife Girji (Dhondi being then in prison) for possession. He obtained a decree, in execution of which he obtained symbolical possession on 8th February, 1886. When he sought to take actual possession, he was resisted by the defendants.

On the 19th December, 1889, the plaintiff filed the present suit to recover the property from the defendants.

Both the lower Courts rejected the plaintiff's claim as barred by limitation. They held that defendants, who got possession in 1885 under a decree against Dhondi, were entitled to add the period of his possession

* Second Appeal, No. 950 of 1892.

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to their own, and that this possession was adverse to the plaintiff for more than twelve years, and that the plaintiff's suit was, therefore, barred.

Against this decision the plaintiff preferred a second appeal to the High Court.

Shivram V. Bhandarkar, for appellant (plaintiff).—The defendants came into possession on 26th March, 1885, as purchasers at the sale held in execution of the decree against Dhondi. Their adverse possession commenced only from the time when they actually took possession. They have no right to tack on their own possession to Dhondi's. His possession was never adverse to Arjun. Assuming that it was adverse, it did not cover a period of twelve years so as to bar Arjun's title. Moreover, when plaintiff in 1886 obtained symbolical possession in execution of his decree against Arjun and Dhondi's wife, such symbolical possession was effectual against Dhondi and all persons claiming through him as if it was actual possession—*Juggobundhu* v. *Ram Chunder* (1); *Lokessur Koer* v. *Purgun Roy* (2); *Joggobundhu Mitter* v. *Purnanund Gossami* (3). Such symbolical possession gives a fresh starting point. We could sue for possession within twelve years from the date we obtained formal possession —*Umbicka Churn Goopta* v. *Madhub Ghosal* (4). The case of *Ali Saheb* v. *Kaji Ahmad* (5) does not apply.

Mahadev C. Apte, the respondents (defendants).—The receipt given by the plaintiff to the officer of the Court who gave him **[622]** possession states that he obtained *actual* possession of the property in dispute. If that be so, s. 263 of the Code applies, and not s. 264. If s. 263 applies, then the principle contended for, that symbolical possession is equivalent to actual possession as against the judgment-debtor, has no application to the present case—*Lakshuman* v. *Moru* (6). Assuming that the plaintiff obtained symbolical possession under s. 264 of the Code, even then it is of no avail either as against Dhondi or as against the defendants who were in actual possession of the property in dispute, for they were not parties to the plaintiff's suit against Arjun and Girji. They cannot, therefore, be bound by the decree passed in that suit. The formal possession given to the plaintiff in execution of that decree is, therefore, ineffectual as against the defendants and their predecessor in title, Dhondi. Dhondi's possession was adverse to Arjun, and the defendants, who have succeeded to him, are entitled to tack on their own possession to Dhondi's in bar of the plaintiff's claim. The suit is, therefore, barred under art. 144 of the Limitation Act—*Ali Saheb* v. *Kaji Ahmad* (5); *Dinendro Nath* v. *Ramkumar* (7); *Syed Nyamtul* v. *Nana* (8).

JUDGMENT.

RANADE, J.—The cheif point argued before us in this appeal relates to the question of limitation. The property in dispute admittedly belonged to one Dhondi, who executed a deed of sale in favour of Arjun on 25th April, 1873. Both the lower Courts have held that this deed of sale was a collusive transaction, and that Dhondi, and not Arjun, continued to be in possession of the property.

The appellant traces his title through Arjun, who first mortgaged, and then sold, the property on 18th April, 1883, to the appellant. As appellant did not obtain possession of the property, he brought a suit on

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(1) 5 C. 584. (2) 7 C. 418. (3) 16 C. 530.
(4) 4 C. 870. (5) 16 B. 197. (6) 16 B. 722.
(7) 8 I. A. 65 (75). (8) 13 B. 424.

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his deed of sale against Arjun and Dhondi's wife Girji (Dhondi himself being in prison), and obtained a decree, in the execution of which appellant obtained on 8th February, 1886, what he now states was a symbolical possession of the property. In his plaint, appellant stated that he had passed a receipt on that day to the bailiff, admitting that **[623]** he had obtained possession of the property. As a matter of fact, the possession was with Dhondi, and after he went to jail, with his wife Girji.

Respondents Nos. 1—2 claim through Dhondi, having purchased Dhondi's interest at an auction sale in execution of their own decree on 4th June, 1883, and subsequently obtained actual possession through Court on 26th March, 1885. On 28th March, 1885, the appellant brought his suit against Arjun and Dhondi's wife Girji, as stated above, and as he did not obtain actual possession in execution of his decree in that suit, he brought his present suit against the respondents in December, 1889. Both the lower Courts held that appellant's suit was time-barred by reason of Dhondi's adverse possession against Arjun being tacked on to respondents' possession since 1885.

Appellant's contention before us was that the lower Courts were in error in joining Dhondi's possession to that of the respondents Nos. 1—2. He contended (1) that on the day that respondents obtained possession (26th March, 1885), Dhondi's possession, dating from 25th April, 1873, had not become adverse, as it did not cover a period of twelve years; (2) that appellant's symbolical possession of 8th February, 1886, broke up the continuity of the two periods; and (3) that as his claim under the decree and the execution proceedings was good against Arjun and Dhondi, it was equally good as against respondents Nos. 1—2, whose adverse possession only commenced since March, 1885.

On a careful consideration of the authorities cited on behalf of the appellant, we feel satisfied that his contention is not valid, and that it must be disallowed. Mr. Shivram Vithal, the appellant's pleader, chiefly relied on the fact that the purchase from Arjun, which the lower appellate Court has found to be a valid purchase, was dated 18th April, 1883, and preceded the auction purchase dated 4th June, 1883, of Dhondi's rights on which respondents based their claim. The lower appellate Court adjudicated the question of title in appellant's favour. It, however, rejected appellant's claim on the ground of respondents' adverse possession for more than twelve years, and this period was made up by tacking on respondents' own possession against appellant **[624]** to that of Dhondi's against Arjun. It is true Dhondi's possession by itself had not covered the full period of twelve years necessary to constitute adverse possession, but respondents had full right to fall back upon Dhondi's possession, and plead this joint possession in bar of plaintiff's claim. It has no doubt been ruled in *Juggobundhu* v. *Ram Chunder* (1) and *Joggobundhu* v. *Purnanund* (2) that a formal possession, such as the appellant obtained on 8th February, 1886, was, as against the judgment-debtor, equivalent to actual possession, but there is nothing in these rulings to warrant the extension of their scope so as to embrace third parties, who, though they derived their title from the judgment-debtor, had an adverse interest to that of the judgment-debtor's. In *Juggobundhu* v. *Ram Chunder*, it was expressly ruled that such symbolical possession was of no avail as against third parties. In the present case, Dhondi's possession was admittedly adverse to that of Arjun. Appellant no doubt obtained a decree both against Arjun and Girji, who, in the absence of her husband

(1) 5 C. 584.

(2) 16 C. 530.

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Dhondi, was made a party to that suit. But neither Arjun or Girji nor Dhondi were in possession of the property at the time when the appellant brought his suit of 1885. Two days before that suit was commenced, respondents had obtained actual possession of the property, and appellant ought to have joined respondents' names as co-defendants in that suit. Appellant failed to take this precaution, and by the time that he obtained symbolical possession on 8th February, 1886, Dhondi's and respondents' adverse possession covered a period of more than twelve years, and the appellant's claim was very properly held to be time-barred under art. 144 of the Limitation Act. We are led to this conclusion even if we accept appellant's line of argument as correct.

We do not wish, however, to be understood in any way as affirming the correctness of that line of argument. In *Lakshman* v. *Moru* (1) the matter was discussed, and it was held that the doctrine of symbolical possession only held good in cases where execution under s. 264 was alone possible, and that it had no application when the creditor could only execute his decree **[625]** under s. 263 by obtaining actual possession. The execution proceedings, in which the appellant passed the receipt dated 8th February, 1866, do not show that the execution was carried out under s. 264; and it is clear that even if Dhondi had himself continued to be in possession till 8th February, 1886, yet, as he was not a party to appellant's suit, appellant would not have succeeded, under the authority of *Lakshman* v. *Moru*, in ousting him in execution of his decree against Arjun and Girji. The case of *Lakshman Vinayak* v. *Bisansing* (2) was distinguished by Mr. Justice Telang from *Lakshman* v. *Moru* solely on the ground that, in the one case, the period of actual possession of the defendant exceeded, while in the other it fell short of, twelve years. Mr. Justice Telang expressed an opinion in the case decided by him that the defendant in the suit would be entitled to tack on his own possession to that of his father, the judgment-debtor. In the present case, the respondents Nos. 1—2 are auction-purchasers of Dhondi's rights, and they have obviously a better right to fall back upon Dhondi's possession to supplement their own. If a vendor remains in possession of property sold by him, his possession is adverse to that of the purchaser—*Anand Coomari* v. *Ali Jamin* (3). Dhondi's possession was, therefore, adverse to Arjun, and respondents' possession through Dhondi is adverse to that of the appellant through Arjun. In *Gossain Dalmar Puri* v. *Bepin Behary Mitter* (4) it was held that symbolical possession, as against the judgment-debtors, grantors of a lease in that case, would not avail as against a permanent lessee from those grantors, if such lessee was more than twelve years in possession.

On the strength of these authorities, we hold in this case that the appellant's symbolical possession of 8th February, 1886, did not break up the continuity of the adverse possession of the respondents, and the person through whom they derived their title, and that appellant's claim was very properly held to be time-barred by reason of the adverse enjoyment of Dhondi and respondents as against appellant and his vendor Arjun.

We accordingly confirm the decree and reject the appeal with cost.

Decree confirmed.

(1) 16 B. 722. (2) 15 B. 261. (3) 11 C. 229. (4) 18 C. 520.

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19 B. 626.

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[626] APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

RAGHUNATH LALMAN (*Original Defendant*), *Appellant v.* NATHU HIRJI BHATE (*Original Plaintiff*), *Respondent.**

[7th August, 1894.]

Opium Act (*I of* 1878), *s.* 4, † *Rules* 43, 44, 45 *and* 52 ‡ *of the Rules framed under the Opium Act*—*Contract Act* (*IX of* 1872), *s.* 23—*Lease of a farm to retail opium at certain shops in a district*—*Sub-lease of such shops without the Collector's permission*—*Sub-lease void*—*Illegal contract*—*Advances made for an illegal purpose subsequently carried out cannot be recovered.*

[627] The plaintiff who held the farm of the right to retail opium at certain shops in a district, and whose lease contained a clause prohibiting sub-letting without the Collector's permission, entered into an agreement with the defendant to sub-let to him, on certain conditions, the management of certain shops in the district for one year without the Collector's permission. After the expiration of the year the plaintiff brought a suit against the defendant to recover the balance due to him under the agreement and obtained a decree.

Held, reversing the decree, that the agreement not being permitted by the rules framed under the Opium Act (I of 1878) was forbidden by s. 4 of the Act, and was void as having in view an object forbidden by law.

Held, further, that the plaintiff could not recover the price of the opium supplied to the defendant, inasmuch as advances made for an illegal purpose subsequently carried out cannot be recovered.

[**F.**, 3 Bom. L. R. 164; **Appl.**, 33 B. 636=11 Bom. L.R. 748; **R.**, 35 M. 582=10 Ind. Cas. 126=21 M.L.J. 425=9 M.L.T. 459=(1911) 1 M.W.N. 371; **D.**, 14 B. 622; 11 C.P.L.R. 62; 96 P.R. 1902=17 P.L.R. 1903.]

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* Second Appeal No. 759 of 1892.

† Section 4 of the Opium Act (I of 1871):—

4. Except as permitted by this Act, or by any other enactment relating to opium for the time being in force, or by rules framed under this Act or under any such enactment, no one shall—

(*a*) cultivate the poppy; (*b*) manufacture opium; (*c*) possess opium; (*d*) transport opium; (*e*) import or export opium; or (*f*) sell opium.

‡ Rules 43, 44, 45 and 52 of the Rules framed under the Opium Act (I of 1878):—

43. With the general or special sanction of the Commissioner, the Collector may let in farm the right to retail opium, or to manufacture and retail all or any intoxicating drugs prepared from the poppy, in any local area under his control, for a term not exceeding five years. The Commissioner may prescribe rules:

(*a*) for the invitation and acceptance of tenders for such farms;

(*b*) for the requisition of security for the due fulfilment of the engagements entered into by the farmers; and

(*c*) as to the form and conditions of such leases.

Any breach of such engagement shall render the lease liable to annulment by the authority by whom the farm was sanctioned.

44. When any such farm is given, the farmer may make his own arrangements for the appointment of subordinate vendors, and for the manufacture of intoxicating drugs, within the limits of his farm and subject to the conditions of his lease: provided that no opium except that supplied from a Government depot and opium lawfully imported under cl. (*c*), Rule 12, and opium otherwise lawfully obtained, shall be retailed or used in the manufacture of such drugs.

45. Licenses for the retail of opium or of intoxicating drugs prepared from the poppy, by persons appointed by the farmer to retail on his behalf, shall be granted by the Collector in such form and on such conditions, consistent with the conditions of the farm, as the Commissioner from time to time prescribes.

52. Subject to the prohibitions, conditions and regulations imposed and prescribed by the foregoing rules, the manufacture, possession, import, export, transport and sale of opium are permitted.

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SECOND appeal from the decision of G. C. Whitworth, District Judge of Nasik, confirming the decree of Rao Saheb V. G. Kaduskar, Joint Subordinate Judge of Nasik.

The plaintiff farmed from the Collector of Nasik the right to retail opium at certain shops in the Nasik district from the 1st August, 1887, to the 31st July, 1890. On the 5th June, 1889, he agreed to sub-let to the defendant the management of five shops in the Satana Taluka in the said district for one year from the 1st August, 1889.

After the expiration of the year, the plaintiff brought the present suit against the defendant to recover the sum of Rs. 567-5-3, being the balance alleged to be due to him on account of the price of the opium supplied to the defendant under this agreement.

The defendant contended (*inter alia*) that under the terms of the plaintiff's contract with the Collector he was forbidden to sub-let the opium farm without the permission of the Collector; that the sub-letting was, therefore, illegal, and that he was not liable to the claim.

The Subordinate Judge allowed the claim, holding the contract between the parties to be legal.

On appeal by the defendant the Judge confirmed the decree, remarking that the contract between the parties was not illegal even if it were granted that the lease to the plaintiff forbade any sub-letting of the farm without the Collector's sanction.

The defendant preferred a second appeal.

[628] *Daji Abaji Khare*, for the appellant (defendant).—The sub-lease was illegal, being granted without the Collector's permission, and, therefore, it cannot be enforced. The object of the Opium Act (I of 1878) and the rules framed under it is to regulate the sale of opium according to certain prescribed conditions and rules. The license to retail opium is framed in accordance with the rules, and a breach of the license is the breach of the rules. The sub-lease is void, being opposed to public policy —s. 23 of the Contract Act (IX of 1872). The defendant had only a license for one shop: therefore giving and selling opium at other shops was clearly illegal—*Hormasji* v. *Pestonji* (1).

Narayan Ganesh Chandavarkar, for the respondent (plaintiff).—Our agreement with the defendant is not opposed to the terms of the license granted to us, and it is not illegal. The rules do not prohibit sub-letting. We had appointed the defendant as our agent, and he could not act as our agent without a sub-lease. The defendant already held a license for one of the shops under the order of the Collector, and with respect to the other shops he acted under the agreement. Rule 44 of the rules framed under the Opium Act contemplates an arrangement for the appointment of sub-vendors.

Even supposing that the object of the agreement was unlawful, still we are entitled to recover from the defendant the price of opium which we supplied to him and which he sold.

Daji Abaji Khare, in reply.

JUDGMENT.

FULTON, J.—The plaintiff in this case held a farm of the right to retail opium at certain shops in the Nasik district from the 1st August, 1887, to the 31st July, 1890, and on the 5th June, 1889, entered into an agreement with the defendant to sub-let to the latter on certain conditions the management of five shops in the Satana Taluka for one year from the

(1) 12 B. 422.

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1st August, 1889. He now seeks to recover the balance due to him under this agreement, and has obtained a decree in his favour in both the lower Courts. For the defendant it has been argued that the agreement is void under s. 23 of the Contract Act (IX of 1872). We have, [629] therefore, to consider the provisions of the Opium Act and the rules framed thereunder.

Section 4 of the Opium Act forbids the sale of opium except as permitted by the Act or rules. The rules in force when this agreement was made were published on pp. 704—715 of Part I of the *Government Gazette* for 1885. The permission to sell is contained in the 52nd rule, which only permits sales subject to the prohibitions, conditions and regulations imposed and prescribed by the preceding rules. The 43rd rule authorizes the Collector to let in farm the right to retail opium subject to conditions prescribed by the Commissioner. The 44th rule enables the farmer to appoint subordinate vendors within the limits of his farm and subject to the conditions of his lease. The 45th rule provides for the issue of selling licenses to the persons appointed by the farmer to sell on his behalf.

The lease granted to the plaintiff was in form E annexed to the rules, the 10th clause * of which prohibits sub-letting without the permission of the Collector, while the 14th clause * forbids his selling more than ten tolas weight of opium to any person at one time except to a medical practitioner or other person holding a special license from the Collector.

The defendant, it is admitted, was a licensed sub-vendor at one of the five shops; there being other licensed sub-vendors for the other four. The agreement between him and the plaintiff bound him to sell at least 24 lbs. of opium every month or pay compensation to the farmer at the rate of Rs. 5 per lb. on [630] account of any deficiency in the quantity sold, and also required him to purchase from the plaintiff the opium required for sale in the shops.

Now it seems to us that in thus sub-letting part of his farm without the sanction of the Collector, which the District Judge has found was not obtained, the plaintiff was entering into an agreement for the sale of opium contrary to law. The law prohibited his selling it at all except as permitted by the rules. The rules only permitted sales subject to the conditions of the lease. The lease prescribed numerous conditions for the regulation of the shops, and forbade the interposition of a sub-lessee (without the Collector's sanction). The agreement, it is true, bound the sub-lessee to observe all the requirements of the law and rules; but in entering into it, and thereby alienating his immediate control over the shops and sub-vendors, the plaintiff was arranging for the sale of opium in a manner not authorized by his lease and, therefore, not within the permission accorded by rule 52. The mere fact that a breach of the conditions of the lease prescribed by the Commissioner, and not embodied in rules framed by Government with the sanction of the Governor-General in Council, may not be punishable under s. 9 of the Act (as determined in Criminal Ruling 23 of 1887), does not seem to affect the question. The method of selling

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* Clauses 10 and 14 of form E of the rules framed under the Opium Act :—

10 That he will not sub-let any of his opium shops without permission of the Collector or employ for the retail sale of opium any person for whose employment in that behalf he may not have previously received written sanction and a separate license signed by the Collector authorizing such person to sell opium on bahalf of the licensee.

14. That except to a medical practitioner or other person holding a special license from the Collector, he will not sell more than ten tolas weight of opium to any person at one time.

opium arranged for in the agreement was not permitted by the rules, and was, therefore, forbidden by s. 4 of the Act. Consequently the agreement must, we think, be considered void as having in view an object forbidden by law. This view may press hard on the plaintiff; but when he made the agreement he must have been aware that it was contrary to the provisions of his lease, and, therefore, he cannot enforce it, as held in the cases of *Debi Prasad* v. *Rup Ram* (1) and *Hormasji* v. *Pestanji* (2). As pointed out in the Allahabad case, it would be defeating the policy of the law (which evidently intends to give the executive authorities the most complete control over the sale of opium as well as liquor) if such contracts were to be allowed.

[631] Mr. Chandavarkar urged that, even if the agreement were void, the plaintiff could at least recover the price of the opium supplied to the defendant, but since the case of *Collins* v. *Blantern* (3) it seems to have been settled law that advances made for in illegal purpose subsequently carried out cannot be recovered (*vide Begbie* v. *The Phosphate Sewage Co., Limited* (4); *Herman* v. *Jeuchner* (5); *Scott* v. *Brown, Doering, McNab and Co.* (6)). In the present case the plaintiff admits that the object of the agreement was carried out, and his claim is based on that assumption.

Under these circumstances, much as it is to be regretted that a dishonest defence of this sort should succeed, we must reverse the decrees of the Courts below and reject the claim, but at the same time direct that the parties do bear their own costs throughout.

Decree reversed.

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19 B. 631.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

PAROT BAPALAL SEVAKRAM (*Original Defendant*), *Appellant v.* MEHTA HARILAL SURAJRAM (*Original Plaintiff*), *Respondent.**

[14th August, 1894.]

***Hindu law—Inheritance—Succession—Father's sister's daughter's son*—Bandhu—Bhinna gotra sapinda.**

Harisukhrai, a Hindu, died leaving a widow and a son of a first cousin, *viz.*, the son of his father's sister's daughter.

Held, that on the death of the widow the latter, *viz.*, the son of his father's sister's daughter being a *bandhu* or *bhinna gotra sapinda* of Harisukhrai, was entitled to succeed to his property.

In regard to the succession of cognates, there seems to be no difference in the rules laid down in the Mayukha and the Mitakshara, and under the Mitakshara law succession depends upon propinquity and not upon religious efficacy.

[R., 23 M. 123; 2 Bom. L.R. 842; 14 C.P.L.R. 185.]

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad, confirming the decree of Rao Saheb Maneklal Narottamdas, Joint Subordinate Judge.

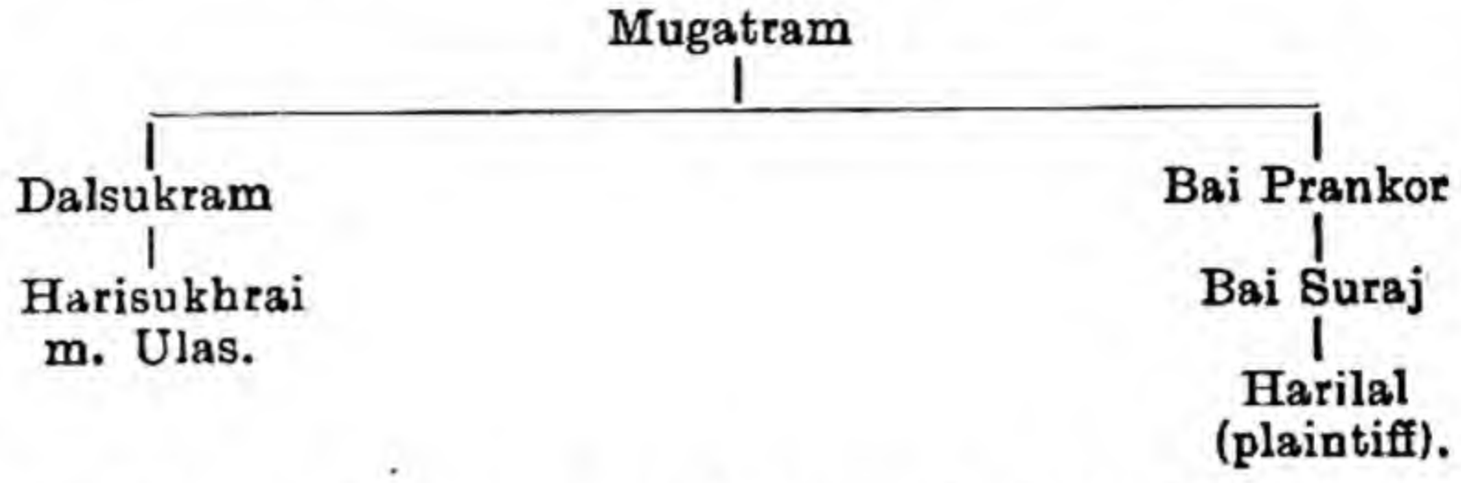
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* Second Appeal No. 523 of 1892.

(1) 10 A. 577.
(2) 12 B. 422.
(3) Smith's Leading Cases I, p. 399.
(4) L.R. 10 Q.B. 491.
(5) 15 Q. B. D. 561.
(6) L.R. (1892), 2 Q.B. 724.

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This action was instituted by plaintiff Mehta Harilal Surjaram to recover possession of certain houses as the reversioner of one [632] Harisukhrai Dalsukhram who died leaving him surviving a childless widow named Bai Ulas. The following table shows the relationship of the parties :—



The plaintiff was the great-grandson,—that is, the son of a daughter's daughter—of Mugatram, the grandfather of Harisukhrai, and as such asserted his right to the houses, there being no other nearer heir of the deceased. The plaint alleged that after the death of Harisukhrai his widow Bai Ulas alienated the houses to the defendant and that the alienation was not warranted by law.

Defendant admitted that he had bought from Bai Ulas, and resisted the claim on the ground that the plaintiff was not the heir of either Harisukhrai or Bai Ulas, and that necessary parties were not joined in the suit.

The Subordinate Judge allowed the claim. In his judgment he observed as follows :—

"The plaintiff is the grandson of the paternal aunt of Ulas' husband Harisukhrai by her daughter Suraj, and as such is a *bandhu* within the sixth degree in the line of descent from Harisukhrai's grandfather Mugatram. He reckons only third in descent from Mugatram, and is entitled to succeed to the property of Harisukhrai on the death of his widow Ulas as a reversioner (West and Bühler, 3rd Ed., pp. 133 and 487, *et seq.*; *Umaid Bahadur* v. *Udoi Chand alias Manman*, I. L. R., 6 Cal., p. 119). There is no nearer relation than plaintiff * * and the plea of non-joinder, therefore, fails."

On appeal by the defendant the Judge confirmed the decree.

The defendant preferred a second appeal.

Branson with *Sitanath G. Ajinkya*, for the appellant (defendant).—The plaintiff's claim has been allowed on the ground that he is a *bandhu* of Harisukhrai We contend that according to the Mitakshara and the rulings commencing with [633] *Vijiarangam's* case (1), the property in dispute would devolve on the heirs of Harisukhrai's widow as if she were a male. The correctness of the decision of the Calcutta Full Bench in *Umaid Bahadur* v. *Udoi Chand* (2), on the strength of which the plaintiff's claim is allowed, is questioned : West and Bühler, p. 498. Two females having intervened between Mugatram and the plaintiff, the latter cannot succeed even as a *bandhu* : West and Bühler, pp. 133, 134. No authority can be found in this Presidency to support the plaintiff's claim. The plaintiff's family is totally different from that of Harisukhrai, and, therefore, he cannot claim Harisukhrai's property as his heir. He may be a relation of Harisukhrai, but he cannot come in as a *bandhu*.

Chimanlal H. Setalvad, for the respondent (plaintiff).—The property belonged to Harisukhrai. His widow had only a life-interest in

(1) 8 B.H.C.R.O.C.J. 244. (2) 6 C. 119.

it, and, therefore, any alienation by her beyond her lifetime is illegal. That being so, the property must devolve on the heir of the last male holder, that is, Harisukhrai. There is no other nearer heir of Harisukhrai than ourselves, and, therefore, we are entitled to claim the property—*Umaid Bahadur* v. *Udoi Chand* (1) ; *Lallubhai* v. *Mankuvarbai* (2). It was contended that because two females had intervened, we cannot succeed. But in *Umaid Bahadur* v. *Udoi Chand* (1) two females had intervened, and yet the contention of the reversioner was allowed. That decision is, therefore, on all fours with the present case. Further, the intervention of two females cannot deprive a man of his *sapind* relationship—West and Bühler, p. 488 ; Mayne's Hindu Law, para. 472. The defendant is a total stranger, and is in no way related either to Harisukhrai or to his family. He cannot, therefore, defeat our claim.

JUDGMENT.

FULTON, J.—The houses in dispute belonged to Harisukhrai, the husband of the deceased Ulas, who succeeded to them on his death. They are now claimed by the plaintiff, who is the nearest relative, being the son of the daughter of Harisukhrai's father's sister.

[634] For the defendant it is contended that the plaintiff is not included in the list of persons entitled to inherit, but we think we must follow the principle laid down in *Umaid Bahadur* v. *Udoi Chand* (1) and hold that the plaintiff is a *bandhu* or *bhinna gotra sapinda* of Harisukhrai, and as such entitled to succeed on the death of Harisukhrai's widow.

The decision above referred to was, it is true, based only on the Mitakshara, but in regard to the succession of cognates there seems no difference in the rules laid down in the Mayukha (*vide* Mayukha, ch. IV, s. 8, pl. 22, and Mitakshara, ch. II, s. 6, pl. 1), which, as pointed out in *Lallubhai* v. *Mankuvarbai* (2), has on most questions of inheritance adopted the doctrines of the Mitakshara. At pp. 425 and 445 of the case just referred to, the learned Judges point out how Nilkantha has accepted Vijnyaneswara's theory of *sapinda* relationship as arising from blood or bodily connection rather than from sharing in common oblations.

The remarks at p. 498 of West and Bühler's Digest of the Hindu Law appear to question the correctness of the decision in *Umaid Bahadur* v. *Udoi Chand* that the intervention of two females in the line of descent is no bar to inheritance, but it seems that this doubt cannot now be entertained ; for, as stated by Mr. Mayne in his note to s. 472 of the 4th edition of his Treatise on Hindu Law and Usage, the principle that succession under the Mitakshara law depends upon propinquity, and not upon religious efficacy, has been settled by distinct rulings—*Lallubhai* v. *Mankuvarbai* (2) ; *Lullubhoy* v. *Cassibai* (3) ; *Nallanna* v. *Ponnal* (4) ; *Ramappa* v. *Arumugath* (5). Accepting this principle we can see no ground for rejecting the claim of the plaintiff who is within four degrees of the common ancestor who was the maternal grandfather of the plaintiff's mother (6).

Mr. Branson for the appellant drew our attention to the case of *Vijiarangam* v. *Lakshman* (7) to show that the property **[635]** inherited

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(1) 6 C. 119. (2) 2 B. 388. (3) 7 I. A. 212.
(4) 14 M. 149. (5) 17 M. 182.
(6) *Vide* Tagore Law Lectures, 1880, Raj Kumar Sarvadhikari, p. 701.
(7) 8 B.H.C.R.O.C.J. 244.

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by Ulas from her husband became her *stridhan* in the larger sense in which the word is used, but assuming this to be the case, it does not appear that she could alienate it without sufficient cause, or that on her death it would descend otherwise than to her husband's heirs. We confirm the decree with costs.

Decree confirmed.

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19 B. 635.

ORIGINAL CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Farran.

BHAWANJI HARBHUM (*Plaintiff*) *v.* DEVJI PUNJA (*Defendant*).*
[28th September, 1894.]

Stamp—Stamp Act I of 1879, *ss.* 11 *and* 16—*Hundi—Execution—Time of execution—Stamp affixed and subsequently cancelled—Evidence—Practice.*

Where a *hundi* was written by the defendant and stamped by him with a one-anna stamp which was left uncancelled and the *hundi* was subsequently taken by him to the plaintiff's son who received it from him and at the time of receiving it cancelled the stamp by writing the date across it.

Held that the *hundi* was duly stamped under ss. 10 and 16 of the Stamp Act (I of 1879) and was admissible in evidence. If at the time of delivery, which completed its legal character, the *hundi* was stamped, and if the cancellation took place at that time as part of the same transaction, it was sufficient.

A deed is duly stamped if the stamp is affixed and cancelled at the time of execution, or if having been at any time previously affixed, it is cancelled at the time of execution.

When applied to a document the term 'execution' means the last act or series of acts which completes it. It might be defined as formal completion. The contract on a negotiable instrument until delivery is complete and revocable. Until delivery a *hundi* is not clothed with the essential characteristics of a negotiable instrument.

[R., 3 O.C. 195 (198); U.B.R. (1907) (4th. Qr. Execution), Signing 5.]

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge:—

"1. This was a suit brought by the plaintiff to recover from the defendant a sum of Rs. 914-2-9, the amount of principal and interest due on a *hundi* passed by the defendant to the plaintiff.

"The suit was filed as a summary suit, but on the defendant's application he was granted leave to defend.

"2. At the hearing the defendant admitted passing the *hundi* to the plaintiff, but pleaded no consideration, and denied liability [636] on other grounds. He also put the plaintiff to the proof of the *hundi*, which he maintained was inadmissible in evidence as being not duly stamped. The *hundi* was made payable on demand, and, therefore, chargeable with duty of one anna.

"3. The *hundi* was wholly written by the defendant. It was admittedly written by him at his place of business on the 23rd April, 1894, and at the time of writing, a one-anna adhesive stamp was affixed, but not cancelled by him. The *hundi* was taken by him the same day (but

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* Small Cause Court Suit No. 16254 of 1894.

how long after the execution does not appear) to the plaintiff's son, who received it. The plaintiff's son subsequently wrote the English date in Gujarati character across the stamp. The plaintiff's son stated in evidence that he did so in the defendant's presence when the *hundi* was brought. I was not, however, satisfied that this was so, and on the evidence should be disposed to hold that the cancellation by the plaintiff's son was made at a subsequent date, probably for the purpose of this case. It was argued for the plaintiff that the time of execution of this *hundi* was not when the defendant wrote it, but when it was handed to the plaintiff's son, but I was of opinion that the *hundi* must be taken as having been executed when defendant wrote it.

"4. Under these circumstances I was of opinion that the provisions of ss. 11 and 16 of the Stamp Act (I of 1879) had not been complied with; that the document, therefore, must be deemed to be unstamped; that under s. 34 the document was inadmissible in evidence; and that the plaintiff's suit must fail.

"5. I accordingly gave judgment, dismissed the suit and certified Rs. 51 as the cost of the defendant's counsel. As the plaintiff's counsel had requested me to state the case for the opinion of their Lordships, I gave judgment contingent on such opinion.

"6. The sole question will be whether, on the facts as stated, the *hundi* is admissible in evidence.

"7. The plaintiff has deposited in Court Rs. 51 certified costs and Rs. 50 to meet the costs of reference."

[637] The following is a translation of the *hundi*, which was in Gujarati :—

"*23rd April, 1894.*

"Peace and prosperity, at the good place the seaport town of Bombay. to Sha the most illustrious Dewji, son of Punjam, written from the seaport town of Bombay by Sha Dewji, son of Punjam, his (salutations of) Johur do you be pleased to read; to wit, from this place from the Rokhia Thakur Bhawanji Harbhum Rs. 900, namely, nine hundred, have been received in full; do you pay the same *immediately on arrival of the hundi*; do you pay the same in the name of (or) to Sha (a respectable person) on seeing his house, place of residence and abode; the mark (is) this that I will write in the letter. Chaitra Vadya 3rd of Samvat 1950, the day of the week Monday, own handwriting."

On the back was written :—

"The half being Rs. 450, do you pay the double thereof; do you pay in all Rs. 900, namely, nine hundred in full.

Rs. 900.

"Sha Shri Dewji, son of Punjam.

Rivett-Carnac, for the plaintiff.—The *hundi* was duly stamped and should have been admitted in evidence. The time of its execution was the time at which it was delivered to the plaintiff by the defendant, and the plaintiff at that time cancelled the stamp which no doubt had been previously affixed. The plaintiff was the payee. It has never been decided whether a payee is entitled to affix and cancel a stamp, or to cancel a stamp already affixed if it has been left uncancelled. Further, I contend that the *hundi* is payable after sight and not on demand, and was, therefore,

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admissible on payment of a penalty. Counsel referred to the Stamp Act (I of 1879), ss. 10, 11, 16, 18, 44, 62.

Inverarity, for the defendant.—"Executed" means "signed." Counsel referred to the English Stamp Act, 33 and 34 Vict., c. 97, s. 54, cl. 2; s. 53, cl. 2; Indian Stamp Act I of 1879, ss. 30, 31, 44 and 61; *Ralli* v. *Caramalli* (1).

OPINION.

FARRAN, J.—The facts in this case are not found with sufficient precision to enable us to give a categorical answer to the question submitted to us. Although paragraph I of s. 11 of the Stamp Act provides that "whoever affixes any adhesive stamp to any instrument chargeable with duty and which has been executed **[638]** shall when affixing such stamp, cancel the same;" we think that reading that paragraph in connection with paragraph 2 of the same section and with s. 16, it is a fulfilment of the requirements of the law if the stamp is affixed and cancelled at the time of execution, or if having been at any time previously affixed it is cancelled at the time of execution.

The terms "executed" and "execution" are defined in the English Stamp Act (33 and 34 Vict., c. 97, s. 2) to mean, with reference to instruments not under seal, "signed" and "signature." In the case of instruments under seal the terms are left to their ordinary signification.

The Indian Stamp Act does not define them, probably because the practice of authenticating a document by signature is not so common in India as in England, and instruments are often (as in this case) completed without a formal signature at the end. The somewhat elastic term "execution" without definition is, therefore, employed. Now "executed" means completed (Wharton's Law Lexicon, Title "Executed"). "Execution" is when applied to a document the last act or series of acts which completes it. It might be defined as formal completion. Thus execution of deeds is the signing, sealing and delivery of them in the presence of witnesses. Execution of a will includes attestation. In each class of instruments we have to consider when the instrument is formally complete.

Now the contract on a negotiable instrument is until delivery incomplete and revocable—*Chapman* v. *Cottrell* (2); Negotiable Instruments Act (XXVI of 1881), s. 46; Bills of Exchange Act, 1882, s. 21 (45 and 46 Vict., c. 61). Until delivery a *hundi* is not clothed with the essential characteristics of a negotiable instrument. Accordingly we think that, if the instrument in question at the time of delivery (which formally completed its legal character) was stamped, and if the cancellation of the stamp took place at that time as part of the same transaction, it will be sufficient. The cancellation of the stamp apparently should be done by the person affixing it; but as it is a mere mechanical operation to prevent the stamp being used again, we think that it will be sufficient **[639]** if done by his directions, express or implied. Accordingly we do not consider that the cancellation of the stamp would be invalidated if done at the time of execution by the *payee* of the *hundi* with the authority of the *drawer*. The circumstances stated by the learned Judge do not bring the case within the provisions of s. 44, to which we have been referred. That section simply provides that the person to whom a bill of exchange or

(1) 14 B. 102.

(2) 34 L. J. Ex. 186.

promissory note chargeable with one-anna duty is presented unstamped for payment, need not refuse payment on that account, but may affix a one-anna stamp thereto and cancel it and then make payment. The word "payee" in the marginal note is manifestly a clerical error for "payer." It is a curious anomaly (if it be so) that the promisor in the case of an unstamped promissory note, who is the person who ought originally to have stamped it, should be at liberty to deduct the value of the stamp from the amount which he pays in discharge of his note.

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We answer the question of the learned Judge by sending him a copy of this judgment, which will enable him to dispose of the case before him.

Plaintiff's attorneys: Messrs. *Edgelow and Gulabchand.*

Defendant's attorneys: Messrs. *Little & Co.*

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19 B. 639.

ORIGINAL CIVIL.

Before Mr. Justice Candy.

VITHULDAS GOBER AND OTHERS (*Plaintiffs*) *v.* THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY (*Defendants*).*

[9th March, 1895.]

Shipping—Seaworthiness—Damage to goods by leakage while ship in dock—Bill of lading—Exception.

The plaintiff's goods were loaded in the defendants' steamer then lying in dock to be carried from Bombay to certain ports in East Africa. At the time of loading, the ship was apparently in a sound and seaworthy condition. Two days after the goods had been put on board, and when the ship was still in dock, it sprung a leak, and the water came into the hold and damaged the plaintiffs' goods. The ship was taken to the dry dock, the cargo was shifted, and the leak repaired. It appeared that the leak had arisen from the fact that one of the plates of the ship had been worn thin in one particular spot, so that when the cargo was put on board and the **[640]** ship lay deeper in the water, the pressure became so great that a hole was made and the water rushed in. The plaintiffs sued the defendants for damages. The defendants pleaded (1) that the ship was in a seaworthy condition when the goods were put on board; (2) that they were protected by the bill of lading which contained the following exception, *viz.*, "Accident, loss and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam and all the perils, dangers and accidents of the sea, rivers, land carriage and steam navigation of whatever nature and kind and accident, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company or from any deviation excepted."

Held, that the defendants were liable. While the ship was in dock it was not seaworthy, and the exception in the bill of lading did not limit the implied warranty of seaworthiness.

SUIT for damages. The plaint stated that the defendants in March, 1893, contracted with the plaintiffs to convey on board their steamship *Mobile* 632 packages of goods from Bombay to Inbambane, Quilimane, and Delagoa Bay; that the plaintiffs accordingly shipped the said goods and obtained bills of lading for some and mate's receipts for others.

The plaint continued as follows:—

"3. The said goods were loaded on board the S. S. *Mobile* at the Prince's Dock, and on the 18th day of March, 1893, it was found that the said vessel was so unfit for the voyage and so unseaworthy as to have

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* Suit No. 540 of 1894.

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sprung a leak and to have five feet of water in her hold, and it was discovered there was a large hole in the bottom of the said steamer. She was surveyed by the surveyors to the Port Trust, and the plaintiffs will rely on the report of the surveyors, copy whereof is annexed and marked C.

"4. The plaintiffs say that the defendants did not supply a seaworthy vessel or a vessel reasonably fit for the voyage, and by reason thereof the plaintiffs' goods were landed in a very damaged condition, and the defendants committed a breach of the contract they had made with the plaintiffs in respect of the said six hundred and thirty-two packages of goods.

"5. The defendants thereafter declined to give the plaintiffs bills of lading for the goods. for which the plaintiffs held mate's receipt, without prepayment of frieght, although the defendants admitted that some of the plaintiffs' goods had been destroyed and the rest had been so damaged as to necessitate their sale by public auction by or at the instance of the defendants."

The plaintiffs alleged that they had sustained damages to the amount of Rs. 2,684-1-6 and loss of interest on that amount to the extent of Rs. 1,000 which they claimed to recover from the defendants as well as the profits which they would have made if the goods had been safely carried to their destination.

[641] The defendants denied their liability. They denied that they had broken the contract or that they had not supplied a reasonably seaworthy vessel. Their written statement contained the following paragraphs :—

"3. The defendants say that at the time the plaintiffs loaded their goods upon the said vessel she had no leak and was quite seaworthy. The defendants will rely upon the certificate of survey granted under Act VII of 1884 on the 29th October, 1892, in respect of the said vessel and upon the reports of the survey held upon the said vessel after the leak therein was discovered.

"4. The defendants say that under the condition contained in the bills of lading, subject to which the plaintiffs' goods were received on board the said vessel, the defendants are in no way responsible for the damage caused to the goods of the plaintiffs."

At the hearing the following issues were raised :—

1. Whether the S. S. *Mobile* was unseaworthy as in the plaint alleged?

2. Whether, having regard to the conditions on which the plaintiffs' goods were received on board the said steamship, the defendants are responsible for the damage to the said goods?

3. Whether the plaintiffs have suffered damages as in the plaint alleged, and if so to what amount?

Cleary, Q.C., and *Inverarity*, for the plaintiffs.—They cited Carvers's Carriage by Sea, pp. 19, 22, 89; Kay on Shipping, p. 79; *Hassanbhoy* v. *The British India Steam Navigation Company* (1); *Steel* v. *State Line Steamship Company* (2); *Gilroy, Sons, and Co.* v. *Price and Co.* (3); *Christie* v. *Trott* (4).

Lang (Advocate-General) and *Macpherson*, for the defendants. They cited *The Southgate* (5); *The Carron Park* (6).

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(1) 13 B. 571. (2) 3 Ap. Ca. 72. (3) L.R. (1893) Ap. Ca. 56.
(4) 22 Law Times Rep. 101. (5) L.R. (1893) P. 329. (6) 15 P.D. 203.

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JUDGMENT.

CANDY, J.—The main facts are admitted. About 16th March, 1893, plaintiff shipped certain goods on board the defendant company's S. S. *Mobile* then lying in Prince's Dock. At that time the *Mobile* was apparently in a sound, seaworthy condition. On the 18th March, 1893, after plaintiff's packages had been loaded, the ship sprung a leak and a considerable amount of **[642]** water came into the hold. 108 of the plaintiff's packages were damaged by the water. The ship was at once taken into the Merewhether Dry Dock, the cargo was shifted, and the spot where the leak had occurred localised, and repaired. On 20th March, 1893, the ship was taken back to Prince's Dock, and the damaged cargo taken out of her. Plaintiff refused to have anything to do with his damaged packages, which, he says, the defendant company had contracted to safely convey to the ports to which they had been consigned. Eventually the saleable packages were sold by Ledbetter & Co., who paid plaintiff the sale proceeds, and now plaintiff seeks to recover the balance of the cost price of the packages, with Rs. 1,000 as loss of profits. The figures in the particulars of the claim attached to the plaint are not disputed; and if the defendant company are liable at all, then the amount claimed can fairly be awarded. The item of Rs. 1,000 would represent about 20 per cent. profit on the cost price of the goods,—not an excessive amount, all things being considered.

The defendant company deny their liability on two grounds. First, they say that the ship was in a seaworthy condition when the goods were put on board. Secondly, they say that they are protected by the conditions in the bills of lading, the mate's receipt also being subject to all conditions of company's bill of lading.

As to the cause of the accident, both sides rely on the evidence of Captain Clark, the Marine Surveyor. He examined the ship directly after she sprung the leak on 18th March, 1893, and found "a small hole, 4"×2".....on examination. I found the leak to have been caused by the wearing away of the plate by some hard substance, probably a small metal bolt. The cause appears to be from chemical action. The wearing of the plate was quite local. After the whole of the cement had been cut out from between three floors, and the plates well tested, they were found to be perfectly sound." I express no opinion myself as to the soundness of this theory. I am not competent to do so. As it is the only theory put forward in the case, and is apparently accepted by both sides, it must be accepted by the Court. It comes to this that, when the ship was built in 1879, some bolt or other **[643]** hard substance must have been left loose between the cement and plates of the ship, and that in the course of years, from this substance rolling and shifting backwards and forwards by every movement of the ship in a seaway, the plate of the ship had been gradually worn thin in one particular spot, so that when on 16th to 18th March, 1893, cargo was loaded, and the ship became deeper in the water, the pressure became so strong that a hole was made and the water rushed in. The defendant company point to the fact that in August, 1892, the ship was examined by the plaintiff's surveyors and the usual certificate granted to last for twelve months, and that just before the cargo was put on board the ship was overhauled by the superintending engineer of the company in the P. and O. Company's dry dock, and everything was then all right. But in reality the ship was not sound. For there was one small spot in which the plate had become so thin, that when the pressure of the water

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increased, a hole was made in the side of the ship and the water rushed in. Even if the defect be termed latent, none the less there was such a defect as to make the ship unseaworthy. It would be absurd to call a ship seaworthy, when, though she appears seaworthy, one of her plates is at a particular spot so worn that the mere loading of cargo on board while in dock, thus sinking the ship deeper in the water, causes the water to force a hole and rush into the hold.

It only remains then to consider whether the defendant company are protected by the conditions in their bill of lading. In my opinion they are not. The conditions are thus expressed :—

"Accident, loss and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam and all the perils, dangers and accidents of the sea, rivers, land carriage and steam navigation of whatever nature and kind and accident, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners, or other servants of the company, or from any diviation, excepted."

I cannot in these words find anything which excepts loss caused by an initial unseaworthiness of the ship. The words "all the perils, dangers and accident of the sea . . . . of whatsoever nature and kind" will not suffice for that purpose. In *Steel* **[644]** v. *State Line Steamship Company* (1) the words were " peril of the seas.....of whatever nature or kind soever, and however caused, excepted," and it was held that there was nothing in these words qualifying the engagement in the bill of lading that the ship should be reasonably fit to perform the service for which she undertakes. Of course, as Lord Blackburn pointed out (p. 89), "the shipowners might have stipulated, if they had so pleased (I known no law that would hinder them), we will take the goods on board, but we shall not be responsible at all, though our ship is ever so unseaworthy; look out for yourselves ; if we put them on board a rotten ship, that is your look out; you shall not have any remedy against us if we do. I say they might have so contracted, and perhaps in some cases they may actually so contract. I do not know." And then Lord Blackburn went on to show that by the words in the bill of lading before him the shipowners had not so contracted. As was naturally to be expected, shipowners naturally took advantage of the hint thrown out by Lord Blackburn. The case of *The Cargo ex Laertes* (2) was a case in which special words were used in the bill of lading limiting liability on account of unseaworthiness. Butt, J., said (p. 190): " No doubt the ordinary rule is, that at the commencement of the voyage, there is an implied warranty that the ship is seaworthy, not that the owner will use his best endeavours to make her so, but that she is in fact seaworthy. The *Laertes* broke down from a latent defect, which I find as a fact could not have been discovered by the exercise of any reasonable care on the part of the owners ; but the flaw in the shafting, which led to the breakdown, existed when the ship started, and, therefore, she was not seaworthy for the voyage. If the implied warranty existed, or was not limited by the contract in the bills of lading, then the owners of the '*Laertes*' would be liable." Then the learned Judge went on to show that the words in the bills of lading applied, and were intended to apply, as a limitation of the original implied warranty, and that they did in fact abrogate the warranty which would otherwise be implied. Had it not been for the express stipulation in the bills of

(1) 3 Ap. Ca. 72.

(2) 12 P. D. 187.

lading, the ruling in *Steel* v. *State Line Steam Ship Company* (1) would have applied.

[645] In the case of the *Glenfruin* (2) there were express conditions intended as a limitation of the original implied warranty. Evidence was given which proved that the shaft of the *Glenfruin* broke in consequence of a latent flaw, and which also explained the character of the manner of welding crank shafts, and showed that it was impossible to discover a latent flaw in a shaft such as was the cause of the accident in this case. The Judge Butt, J., laid down three questions for decision :—(1) Was the break-down of the *Glenfruin's* shaft caused by unseaworthiness ? (1) Does the implied warranty of seaworthiness in the bill of lading amount to a contract by the shipowner that the ship (including her machinery) shall be, in fact, reasonably fit for the voyage, or only that due care shall be taken to make her so fit? (3) Was the warranty qualified, or were the shipowners otherwise exempted from liability, for the breaking of the shaft by the exceptions in the bill of lading? (which were almost identical with the exceptions in the present case). The learned Judge found that (1) the shaft in question had been made by one of the best firms, and after its completion it was impossible for that firm, or for the owners of the ship, to discover the flaw until it was laid bare by the breaking of the shaft. As a fact when the *Glenfruin* started, the shaft was not reasonably fit for the voyage; in other words, the ship was unseaworthy. The Judge said (2) "On the second question.....I am, I think, concluded by authority. I have always understood the result of the cases from *Lyon* v. *Mells* (3) to *Kopitoff* v. *Wilson* (4) to be that under his implied warranty of seaworthiness the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel* v. *State Line Steamship Company* (1)." The learned Judge was doubtless referring more particularly to the remarks of Lord Blackburn at pages 86 and 87 of the report. (3) On the third point the learned Judge held that the exception has no application to the case of **[646]** a ship which was unseaworthy at the time of sailing and the unseaworthiness of which was the efficient cause of the loss or damage.

In the face of the above rulings, which clearly indicate the law on the subject, it is unnecessary to quote other cases. The learned Advocate-General for the defendant company referred to *The Carron Park* (5) as showing that the term "voyage" (which, by the way, does not occur in the bill of lading in the present case) included the period of time during which the vessel was being loaded; and he quoted *The Southgate* (6) as showing that damages resulting from the incursion of water into the ship whilst she had cargo in her, though she was still at her moorings and not in motion, was an "accident of navigation." The equitableness of those decisions may well be admitted; and if the goods are covered by the bill of lading from the time they are put on board, and the reasonable mode of construing the contract evidenced by a bill of lading is to hold the exceptions to be co-extensive with the liability (*Hassanbhoy Visram* v. *The British India Steam Navigation Company* (7) following *Hongkong and Shanghai Banking Corporation* v. *T. Baker* (8)), then it is clear that in the present case the

(1) 3 Ap. Ca. 72.
(2) 10 P. D. 103.
(3) 5 East 428.
(4) 1 Q. B. D. 377.
(5) 15 P. D. 203.
(6) L. R. (1893) P. 329.
(7) 18 B. 571.
(8) 7 B.H.C.R. O.C.J. 186.

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defendant company by inviting plaintiff to ship his goods on board their ship, and by giving him bills of lading, on the exceptions in which they rely, cannot plead that the implied warranty of seaworthiness which they gave does not extend to the period during which the ship was being loaded in the Prince's Dock after the plaintiff's goods had been put on board. But I find as a fact that while the ship was in the Prince's Dock it was not seaworthy, and that the exceptions in the bills of lading do not limit the implied warranty of seaworthiness. Therefore, the findings on the issue must be in the affirmative for the plaintiff. A judgment will be entered for the plaintiff for the amount claimed, with all costs.

Judgment for the plaintiff.

Attorneys for plaintiff : Messrs. *Chalk, Walker and Smetham.*
Attorneys for defendant : Messrs. *Crawford, Burder & Co.*

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19 B. 647.

[647] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

BAI MOTIVAHU (*Original Defendant*), *Appellant v.* BAI MAMUBAI (*Original Plaintiff*) AND KHIMJI LAKHMIDAS (*Original Defendant*), *Respondents.** [15th March, 1895.]

Will—Construction—Gift of residue of income of property "to be used for the purposes of A and B as trustees think proper"—Gift to future children of testator's daughter—Appointment—Power of appointment by will given to daughter in case no children born—Donee's power to appoint limited to persons in existence at death of testator.

One Jetha Ludhani, a Hindu inhabitant of Bombay, by his will directed that his immoveable property in Bombay should be formed into a trust of which he appointed certain trustees. Out of the net income of the trust, the trustees were to pay Rs. 50 to his wife Moti and his daughter Mamu for their personal expenses, and the residue was "to be used for the purposes of my wife Moti and my daughter Mamu and her children in such manner as my trustees think proper." Mamu was thirty years of age at the hearing of the suit and had no children.

Held, that this was a gift of the residue of the net rents in equal shares to Moti and Mamu, and that the survivor of them would be entitled during her life to the entirety of the said rents.

The testator further directed that after Mamu's death the trust was to stand valid during the lifetime of her children (if any), and that afterwards the heirs of such children should divide and receive the property. But if Mamu had no children, then after the death of Mamu and Moti the trust should become void, and the property was to be delivered to such person as Mamu might by will appoint.

Held (1) that the provision for the future children (if any) of Mamu failed under the ruling in the *Tagore* case. If any children should be born, the question would arise as to what would become of the property;

(2) that the direction that the property should be delivered to such person as Mamu should by will appoint, was a valid direction, subject, however, to the limitation that the person to whom Mamu appointed should be a person in existence at the death of the testator.

SUIT for administration and construction of a will. The plaintiff (Mamubai) was the daughter of one Jetha Ludhani, a Hindu merchant of Bombay, who died in November, 1869, leaving a large amount of

*Suit No. 57 of 1878.

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moveable and immoveable property. He left a widow (the defendant Motivahu) and the plaintiff Mamubai who was his only child, being the daughter of a predeceased wife. At the time of Jetha Ludhani's death, the plaintiff was fourteen years [648] of age and had been married for two years to one Bhimji Bhanji. Up to the date of the hearing of this suit she had had no children, and she was then about thirty years of age. She brought this suit for the construction of the will and for the administration of her father's estate.

By his will dated 18th October, 1869, Jetha Ludhani appointed the defendants (Dossa Morarji and Khimji Lakhmidas and his widow Motivahu) his vakils and vakilatan (*i.e.*, his executors and executrix), and (*inter alia*) he directed that his immoveable properties should be formed into a trust, of which he appointed certain trustees who were to collect the income, and after defraying expenses were out of the net income to pay a certain sum for the personal expenses of his wife Moti and his daughter Mamu. In case Mamu should have children, the trust should stand valid during their lifetime and "afterwards" the property was to be distributed among their heirs. If, however, Mamu should have no children, then the trust was to become void, and the property was to go as Mamu should by her will appoint.

A later clause (the 18th) of the will specified the manner in which the property should be divided among Mamu's children, and provided that, if she had no children, the property should be expended in the *dharam* in the testator's name, or if the law would permit, that the property should go as Mamu should by her will appoint.

The following are the material clauses of the will:—

"The vakils and vakilatan therein appointed by me and mentioned below are unanimously to carry on, in the event of my death which may God forbid, the management of the whole of my ready cash (landed) 'estate' and property agreeably to the particulars mentioned below. The particulars thereof are (as follows):—

"1. Should my death may take place, which may God forbid, I have appointed Thakar Khimji Lakhmidas and Thakar Dossa Morarji my vakils and my wife Vow Motivahu vakilatan, three persons jointly. They are to carry on the whole management as 'executors' and 'executrix' agreeably to what I have written."

"7. Agreeably to what is written above the whole of the money which I have resolved to be paid or expended on account of the 'legacies' and for the expenses of my funeral ceremonies for twelve months and on account of the *sadavarat* and for other *dharam* (religious or charitable purposes) according tc the above particulars is to be paid out of my funds in ready cash, but whatever my (landed) 'estate,' that is, immoveable property, there is not to be touched by my vakils or vakilatan for these purposes, but after my death shall have taken place a 'trust deed' is to be made as [649] soon as practicable of my garden dwelling-house, rope-walk warehouses (or gardens), houses, stables, lands and whatever other immoveable property that is (landed) 'estate' there is belonging to me in the island of Bombay, and the whole is to be invested in a 'trust.' As to the trustees thereof, my two vakils and vakilatan and in conjunction with them my friend Seth Thakar Khatao Makanji, (4) four persons, jointly are duly to become 'trustees' four in number, are to collect the income of the whole property, and, after deducting therefrom the expenses connected therewith, money is to be paid out of the net income, whatever it may amount to, for the personal expenses of my wife Motivahu and my daughter Mamu and

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for the children of my daughter Mamu after her death agreeably to the fourteenth and fifteenth clauses of this 'will,' and after paying the same whatever income may remain is to be used for the purposes of my wife Motivahu and my daughter Mamu and her children in such manner as my 'trustees' think proper.

"8. In the 7th clause mentioned above it is resolved to invest the whole of my immoveable property in 'trust' and to collect the income thereof; but the trustees are not to demand any rent for the place out of my property which may be used as a residence for my family, and should any of the 'trustees' depart this life, the surviving 'trustees' are to appoint another 'trustee,' and after the death of my daughter Mamu should there be any children born of the womb of my daughter this 'trust' is to stand valid during the lifetime of such children. Afterwards the heirs of the said children are duly to apportion and receive this property. But should there be no children born of the womb of my daughter Mamu, then after the death of Mamu and my wife Motivahu this 'trust' is to become void, and this property is to be delivered to such persons as my daughter Mamu may direct it to be delivered to by making her will.

"13. For the purpose of defraying the expenses of my house and of the worship of the Thakur (God) in my house, Rs. 750, namely seven hundred and fifty, are to be paid every month to my wife Motivahu out of my fund in ready cash, and they are to be caused to be defrayed (by her), and should Motivahu be not fit to defray the expenses in a decent and respectable manner and with economy, then my abovenamed other vakils are to defray them with their own hands.

"14. To my wife Vow Motivahu Rs. 50, namely fifty, are to be paid every month for (her) personal expenses out of my trust fund mentioned in the 7th clause written above, and should my wife not conduct herself in conformity with my credit and respectability and according to the directions of my above-mentioned other vakils, not even a single cent is to be paid (to her) for her personal expenses.

"15. To my daughter Bai Mamu Rs. 50, namely fifty, are to be paid every month for (her) personal expenses out of my 'trust' fund mentioned in the 7th clause written above, and besides that should any expenses have to be defrayed on account of my daughter Mamu or her children, or should any expense be required to be defrayed on any special occasion, my vakils and vakilatan are duly to pay for the same according to my respectability at the request of my daughter Mamu out of the income of my fund in ready cash.

"16. After receiving (and) paying my claims and debts and 'legacies' nothing is to be expended and paid out of my principal amount that may remain in ready cash. **[650]** Out of the amount that may remain in ready cash out of the interest (and) out of the profits of the trade and makadam's business after deducting the loss as therefrom (*i.e.*) out of the net surplus that may remain every year the abovementioned house expense and the expenses connected with my daughter Mamu and her children and the expenses of the worship of the Thakur (God) in my house are to be defrayed. After defraying these expenses, as to the surplus that may remain in addition to the principal, my vakils and vakilatan are authorised to make such religious charities out of the same in my name as they may deem proper.

"17. No person connected with the parents of my wife Motivahu or with their party is to be employed in my house for service or trade, and

should any be employed, the amount of the personal expenses of my wife Motivahu and the house expense and the payment of a single cent out of my income whatever are to be stopped. The authority respecting the same appertains to my abovementioned remaining vakils.

"18. After receiving my claims and paying (my) debts and after paying the 'legacies' and making the expenses whatever funds in ready cash belonging to me may remain are to be apportioned and distributed in the manner stated below among the children born of the womb of my daughter Bai Mamubai after the lifetime of my daughter Mamu and my wife Motivahu. The particulars thereof are as follows :—

"(1) Should any son or daughter be born of the womb of Mamu, Rs. 2,000, namely two thousand, are to be paid to each of the daughters on their attaining the age of (18) eighteen.

"(2) To as many sons as there may be, my remaining property is to be apportioned and distributed in equal shares after their attaining the age of twenty-one years.

"(3) Should there be no son or sons or should there be no childern born of the loins of the son, the daughter or daughters or their children are to apportion and receive the same in equal shares. According to these particulars and agreeably to what is written above my property is to be apportioned and distributed, and should no child be born of the womb of my daughter Mamu, which may God forbid, in that event on the death of my wife Motivahu and of my daughter Bai Mamu taking place my immoveable property is to be expended on such good *dharam* (religious or charitable works) in my name as may continue as long as the moon last, and should it appear that any one would prevent this property from being given away for *dharam* (religious or charitable purposes) by reason of the rules of the Sirkar, the same is to be given to such person as my daughter Mamu may direct it to be given to by making her will.

"19. There are my own and my wife Vow Motivahu's ornaments, jewels set with stones and of pearls, gold and silver. Nothing is to be given out of them to any one, and these ornaments also are to be apportioned and distributed in equal shares to the sons of my daughter Bai Mamu, if any be born of her womb, agreeably to what is stated in the 18th clause on (their) attaining the age of twenty-one years, and should no child be born of the womb of my daughter Bai Mamubai, which may God forbid, in that event after the decease of my wife Motivahu and of my daughter Bai Mamu shall have taken place, these ornaments and jewels or the money realized therefrom are to be expended in the same manner as my ready cash or moveable property for some good *dharam* (religious or charitable purpose) in my name that may continue as long as the moon lasts, or should (any one) prevent the money from being given away in this [651] manner for *dharam* (religious or charitable purposes) by reason of any rule of the Sirkar, the same is to be given to such persons as my daughter Mamu may direct it to be given to by making her will.

"20. My above-mentioned vakils and vakilatan are to consult and take advice on every occasion of my friend Seth Thakar Khatao Makanji and Seth Muncherji Framji Camaji and Seth Sorabji Shapurji Bengali, making (3) three persons, respecting the management of my will, and my vakils and vakilatan are to act agreeably to the advice which they may obtain; and should my vakils and vakilatan not act agreeably to the terms of my will, my three friends can compel my vakils and vakilatan to act agreeably thereto.

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"According to these particulars I have of my free will (and) pleasure and in my sound sense (and) understanding made this day this my last 'will' or testamentary writing which is to be agreed to by me and my heirs and representatives. All the 'will' and testamentary writing which I have or may have made previous to this are null (and) void.—Bombay, Samvat 1925, Aso sood the 13th, the day of the week Monday the 18th day of October in the English year 1869."

The case was referred to the Commissioner to take accounts. He made his report on 7th October, 1890. No objection was taken to it, and by consent it was confirmed. The testator's property amounted in all to about seven lakhs of rupees.

The case now came before the Court for further directions and for the construction of the will.

Latham (Advocate-General) and *B. Tyabji*, for the plaintiff (Mamubai).—As to cls. 7 and 8, they cited Theobald on Wills (3rd Ed.)., p. 352. A gift to be at the disposal of A by will or otherwise is a gift to A—*Robinson* v. *Dusgate* (1); *Hixon* v. *Oliver* (2). There is no gift over—*Bradly* v. *Westcott*(3). The plaintiff takes even if she does not exercise the power of appointment. If the plaintiff has a child, the alternative gift would be bad—Theobald, p. 406; *Miles* v. *Harford* (4); *Moneypenny* v. *Dering*(5); *Evers* v. *Challis* (6); *Crompe* v. *Barrow*(7); *Re Thatcher's Trusts*(8); *Kumar Tarakeswar* v. *Kumar Shoshi Shikhareswar* (9).

A general power is really a gift to the donee. The subject of the power becomes the property of the donee if he exercises the **[652]** power—Theobald, p. 410; *Raus* v. *Jackson* (10); Williams' Personal Property, p. 443.

Macpherson and *Lang*, for the defendant Motivahu.—English law does not apply. We can only have regard to the words of the will and the power of the testator as limited by authority and by the general Hindu law. The last provision in paragraph 7 is bad—*Manjamma* v. *Padmanabhayya* (11); Mayne's Hindu Law, s. 354. As to cl. 8, the power given to plaintiff Mamu is bad by Hindu law. If not it is void as depending on a void gift. English rulings do not apply. The law of Hindu wills is the Hindu law of gifts. Mamu had no such control over the property as to enable her to give it: Mayne's Hindu Law, s. 380. The testator meant to give Mamu a power to give it by her will. A Hindu cannot give that in which in his lifetime he had no interest. There is an absence of authority on the point, and that fact is in our favour. Such a power has never been known to Hindu Law. The testator certainly never contemplated doing that which he can only be allowed to do by applying technical English rulings to the case. The rules on the Succession Act (X of 1865) do not apply to Hindus. Next, if the power was given, it is void—*Kumar Tarakeswar* v. *Kumar Shoshi Shikhareswar* (9).

JUDGMENT.

FARRAN, J.—This was an administration suit to administer the estate left by the testator Thacker Jetha Ludhani and for the construction of his will. A decretal order was made, referring it to the Commissioner to take certain administration accounts. The Commissioner made his report on the 4th October, 1890. No objections were taken to it and it was

(1) 2 Vern. 181. (2) 13 Ves. 108. (3) 13 Ves. 445.
(4) 12 Ch. D. 691 (703). (5) 2 DeG. M. and G. 145-180.
(6) 7 H.L. Ca. 531. (7) 4 Ves. 681. (8) 26 Beav. 365.
(9) 10 I.A. 51 (60). (10) 29 Ch. D. 521. (11) 12 M. 393.

confirmed by consent on the 25th November, 1890. It only remained to construe the will and to give directions to the executors as to the future mode of dealing with the residue of the estate. This matter was argued before me on the same day, and I took time to consider my decision.

By the 7th clause of his will the testator directed that all his immoveable property in Bombay should be formed into a trust, of which the defendant and one Thacker Khatao Makanji were to [653] be the trustees. "And these trustees are to collect the income of the whole property, and after deducting therefrom the expenses connected therewith, money is to be paid out of the net income, whatever it may amount to, for the personal expenses of my wife Motivahu and my daughter Mamu after her death agreeably to the 14th and 15th clauses of this will, and after paying the same whatever income may remain is to be used for the purposes of my wife Motivahu and my daughter Mamu and her children in such manner as my trustees think proper."

The 8th clause directed that, if Mamu should have children, the trust should stand valid during their lifetime, and the trust property should then be apportioned amongst their heirs. It then proceeded: "But should there be no children born of the womb of my daughter Mamu, then after the death of Mamu and my wife Motivahu this trust is to become void, and the property is to be delivered to such persons as my daughter Mamu may direct it to be delivered to by making her will."

I first deal with the income in the lifetime of the ladies. The net income of the "trust" to be created during the joint lives of Motivahu and Mamu is to be applied first in paying Rs. 50, referred to in cls. 14 and 15, to Motivahu and Mamu each for their personal expenses, and then the residue thereof is to be used for the purposes of Motivahu and Mamu and her children in such manner as the trustees think proper. This seems to me to amount in effect to a gift of the residue for the use of Motivahu and Mamu, and I think that they are entitled to it in equal proportions. The testator no doubt contemplated that the trustees should control the manner of the expenditure, but that is one of those directions which cannot be given effect to, when the income of the fund is absolutely given: Succession Act (X of 1865), s. 125. There is, therefore, no practical distinction between the Rs. 50 and the rest of the income of this fund. Motivahu and Mamu will be entitled to the income of the fund in equal shares during their joint lives, and the survivor will take the whole for her lifetime.

The plaintiff has no children and she is said to be about thirty. It is admitted that the provision for the future children of [654] Mamu (if any) must fail under the ruling in the *Tagore* case. If any should be born, this admission would not be binding on them. I cannot decide what would become of the property in that event.

In the event of no children being born of Mamu, the testator has directed that the property is to be delivered to such persons as his daughter may direct it to be delivered to, by making her will. The question arises, whether that is a valid direction having regard to the ruling in the *Tagore* case.

I endeavour to put myself in the position of the testator, a Hindu, to ascertain what he meant. He manifestly desired to make adequate provision for his wife Motivahu for her life while keeping a watchful control over her. See cls. 13, 14, 17, and 7. He manifestly desired that she

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should not be his heiress. Mamu, subject to the provision for Motivahu and Mamu's children, he wished to inherit after him. He contemplates Mamu surviving Motivahu, and then the trust being kept up for her and her children. Failing children of Mamu he wished that Mamu should do what she pleased with the property, and it is to emphasise that intention I think that he says she is to direct to whom it is to be given by making her will. Subject to Motivahu's interest she is to enjoy it in her lifetime and after her death she is to will it away. This is to all intents and purposes an absolute gift to her. The intention of the testator is, I think, sufficiently plain, though it may fail if Mamu should not give the requisite directions by her will. He has not contemplated her not doing so.

If I am correct in this view, the gift does not offend against the rule in the *Tagore* case. The persons to whom the property is given take it from Mamu and not from the testator. Mamu became the owner. Courts in England have viewed similar wills in this light. The cases are collected in Theobald on Wills (3rd Ed.), p. 352. *Robinson* v. *Dusgate* (1); *Hixon* v. *Oliver* (2) are cases very like the present. If I am in error in ascertaining the wishes of the testator from the words which he has used, I err in good company. When there is, as here, no gift over on failure to **[655]** exercise the power, it is difficult to interpret the will in any other sense than this,—that the testator when penning his intention expressed the incidents of an absolute gift instead of making an absolute gift in the more simple form and omitted to specify some of them.

The next clause to be considered is the 13th. The meaning of this clause is that Motivahu is to receive Rs. 750 per month to keep the house and to defray the worship of the Thakur. Mamu, no doubt the testator expected, would live with her, but, if she withdraws herself, the testator has made no provision for that I should be making a new will for the testator and altering his expressed intention if I were to allocate any part of this sum to Mamu. If Mamu returns to the house, and Motivahu does not properly expend the money on the household expenses, the executors have the power themselves to expend them with their own hands.

As to cl. 15, it is sufficient to say that only Rs. 50 per mensem are payable out of the income of the trust created by cls. 7 and 8. The other expenditure there directed is to be made out of the general fund. This general fund is that specified in cl. 16. The capital is not to be trenched upon. Out of the balance of the income the executor can make payments for religious charity. The bequest is allowable as the translation runs, and even if the word *dharam* only is used in the original, the parties will hardly dispute it, as it is only the surplus income out of which the expenditure can be made.

For the reason already given I cannot positively decide on the invalidity of the provisions in cl. 18. If children should be born, my decision would not bind them.

The 18th clause contains an alternative gift of the property there described to *dharam* or failing that to such person as Mamu may direct by making her will. The whole gift, however, would fail on both branches if Mamu should have a child. Failing such child the alternative gift comes into play. The alternative gift to *dharam* fails for vagueness, but effect will be given to the valid one. See the cases collected in Theobald, p. 406 (3rd Ed.). **[656]** My decision on cl. 8 governs the gift to Mamu expressed in the same words in cl. 18.

(1) 2 Vern. 181.

(2) 13 Ves. 108.

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I do not think that cl. 19 raises a question of election. Motivahu's *stridhan* ornament would not, I think, be properly treated as falling within the clause if there were other ornaments which she wore and of which the testator had power to dispose. If the point is insisted on by the plaintiff, I must have some evidence before me.

I may probably have overlooked some minor points. If so, the case had better be set down again, or they can be dealt with when the minutes of the decree, which will have to be spoken to, are being settled. Costs of all parties will come out of the estate.

The defendant Motivahu appealed.

Lang (Advocate General) and *Macpherson* appeared for the appellant.

Inverarity and *Macleod* for the respondent.

The authorities cited in the lower Court were relied on, and reference was made to ss. 103, 125 of the Succession Act (X of 1865); Mayne's Hindu Law, ss. 364, 354; *Javerbai* v. *Kablibai*(1); *Krishnanath* v. *Atmaram*(2).

The appeal Court (Sargent, C. J., and Bayley, J.) confirmed the decree of Farran, J., with a slight variation. The following was the material part of the decree. The words in italics were added by the appeal Court, thus limiting the class to which Mamu might appoint the property to persons in existence at the death of the testator:—

"And this Court doth further declare that according to the true construction of the said will subject to the payment of the sum of Rs. 50 per month to the defendant Motivahu directed by the 14th para. of the said will and of the sum of Rs. 50 per month to the plaintiff Mamubai directed by the 15th para. of the said will to be paid respectively, the plaintiff Mamubai and the defendant Motivahu are during their joint lives entitled in equal shares to the net rents of the said immoveable properties, and that the survivor of them will be entitled during her life to the entirety of the said net rents. And this Court doth further order that the said trustees do divide and pay the said net rents accordingly, and in case of dispute this Court doth order that it be referred to Charles Edward Fox, Esquire, the Commissioner of the Honourable Court [657] for taking accounts, to ascertain what amount is now payable to the plaintiff Mamubai and to the defendant Motivahu respectively in respect of such net rents having regard to the sums (if any) already paid to them respectively on account of such net rents. And this Court doth further declare that the gift contained in para. 8 of the said will to such person in *existence at death of testator* as the plaintiff Mamubai may direct by her will is valid, but this Court cannot and doth not determine upon whom the property referred to in the said 8th clause will devolve in case the plaintiff Mamubai shall die without making or leaving a will. And this Court doth further declare that this order shall not prejudice the issue, if any, of the plaintiff Mamubai who may be born hereafter. And this Court doth further declare that according to the true construction of the said will the plaintiff Mamubai is entitled to reside with the defendant Motivahu and to have her household expenses conjointly with those of the defendant Motivahu paid out of the Rs. 750 per month by the 13th para. of the said will directed to be paid, but this Court doth further declare that the testator has made no provision in his will, so far as the said payment of Rs. 750 is concerned, for the plaintiff in the event of her withdrawing herself from the testator's family

(1) 16 B. 492.

(2) 15 B. 543.

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house. And this Court doth further declare that according to the true construction of para. 15 of the said will the sums by that para. directed to be paid other than Rs. 50 per month to the plaintiff Mamubai are properly payable out of the income of the said testator's general estate after payment thereout of the said sum of Rs. 750 per month to the defendant Motivabu as directed by the 13th para. of the said will. And this Court doth further declare that Government promissory loan notes of the nominal value of Rs. 36,300 and the house mentioned in the 2nd schedule hereto have been set apart by the executors and executrix of the testator out of his estate for maintaining the *sadavarats* mentioned in paras.3, 4 and 5 of the said will. And this Court doth further declare that the alternative gift to charity in the 18th para. of the said will purported to be made is void for uncertainty, but that the gift in the same para. to such person in *existence at death of testator* as the plaintiff Mamubai may direct by her will is valid. And this Court doth further declare that para. 19 of the said will raises no question of election on the part of the defendant Motivahu. And this Court doth further order that the costs of all parties to the suit when taxed as between attorney and client and noted in the margin hereof be paid out of the testator's estate. And this Court doth reserve further consideration and liberty to parties to apply as there may be occasion."

Attorneys for the plaintiffs :—Messrs. *Brown and Moir.*

Attorneys for the defendant (Motivahu).— Messrs. *Thakurdas, Dharamsi and Cama.*

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[658] APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

RAJI JADAV (*Original Defendant*), *Appellant v.* BAI MATHURA AND OTHERS (*Original Plaintiffs*), *Respondents.**

[21st August, 1894.]

Hindu law—Adoption—Only son.

The adoption of a person who at the time of his adoption is an only son, is invalid. The fact the other sons are afterwards born to his parents, does not validate his adoption.

FIRST appeal from the decision of Rao Bahadur Lalshankar Umiah Shankar, First Class Subordinate Judge of Ahmedabad.

The plaintiff Bai Mathura was the mother of one Jadav Sobharam, who died on the 16th June, 1879. He left a widow Lalita, who was then pregnant. She subsequently gave birth to a son, who died the day after his birth.

On the 7th April, 1890, Lalita adopted the first defendant Raiji, a minor, who was then the only son of one Nahalchand Mohanlal and whose mother was then pregnant.

Lalita died on the 8th April, 1890, and on her death Bai Mathura brought the present suit to establish her right to, and recover possession of, the property left by her deceased son Jadav Sobharam and for a declaration that the adoption of Raiji and a will alleged to have been made by Lalita were invalid.

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The defendant Raiji pleaded that the adoption was legal; that his mother, who was pregnant at the time of adoption, had afterwards given birth to a son who was still alive, and that the will and a deed of adoption executed by Lalita were valid, &c.

The Subordinate Judge found that the adoption of Raiji, who was the only son at the time of adoption, was invalid; that the will relied on by the defendants was genuine, but that it gave no property to the minor defendant, and that the plaintiff was entitled to the property.

The defendants appealed. Pending appeal, the plaintiff Bai Mathura having died, her daughters were joined as respondents.

[659] *Branson* with *Nagindas T. Marphatia*, for the appellants (defendants).—The Judge was wrong in holding that the adoption of Raiji was the adoption of an only son. Raiji's mother was pregnant at the time of the adoption and she gave birth to a son who is living. Therefore, Raiji was not the only son of his parents, and his adoption cannot be impeached on that ground. Various adoptions of this kind have taken place, and they have not been set aside. The adoption of an only son has been upheld by the Allahabad High Court—*Beni Prasad* v. *Hardai Bibi* (1).

Inverarity with *Gokuldas K. Parekh*, for the respondent (plaintiff).—Raiji had no brother in existence at the time of his adoption. The fact that his mother subsequently gave birth to a son cannot make the adoption valid, which was invalid when it was made. It was an accident that Raiji's mother subsequently gave birth to a son and not to a daughter. Though Raiji's mother was pregnant at the time of the adoption, and afterwards gave birth to a son, still Raiji was none the less an only son at the time of the adoption. The adoption of an only son is invalid—*Waman Raghupati* v. *Krishnaji* (2); *Lakshmappa* v. *Ramava* (3); *Hanmanta* v. *Bhimacharya* (4); *Nagabhushanam* v. *Sheshammaguru* (5).

JUDGMENT.

FARRAN, J.—Although we may be permitted to doubt whether the judgment in *Lakshmappa* v. *Ramava* (3), which most probably formed the basis of the Full Bench decision in Appeal No. 1 of 1879, followed by the Full Bench in *Waman Ragupati* v. *Krishnaji* (2), took sufficiently into account the altered sense of the Hindu community evinced by the frequency of the adoption of only sons, we are bound to follow the Full Bench decision (unless the Privy Council has other wise decided) to its logical conclusion. It decides that the adoption of an only son is invalid, inasmuch as such an adoption contravenes the directions in the ancient text against the giving or accepting an only son in adoption. Having regard to the decisions in *Nagabhushanam* v. *Seshammaguru* (5) and *Hanmanta Ramchandra* v. *Bhimacharya* (4), we must hold that the defendant Raiji was an **[660]** only son at the time of his adoption, which adoption was, therefore, (if it took place, as to which the Subordinate Court has recorded no finding) invalid. To hold otherwise would be without warrant derived from the texts to graft an anomalous exception upon an established general rule. We must, therefore, confirm the finding of the Subordinate Judge on the first issue. (The rest of the judgment is not material to this report).

Decree substituted.

(1) 14 A. 67. (2) 14 B. 249. (3) 12 B. H. C. R. 364.
(4) 12 B. 105. (5) 8 M. 180.

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APPEL-LATE CIVIL.

19 B. 660.

19 B. 660.

APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

BALAJI NARAYAN PATVARDHAN (*Original Defendant*), *Appellant v.* RAMCHANDRA GOVIND KANADE (*Original Plaintiff*), *Respondent.** [22nd August, 1894.]

Receiver—Duties and liability of—Civil Procedure Code (*Act XIV of* 1882), *s.* 503.

A receiver appointed under s. 503 of the Civil Procedure Code (Act XIV of 1882) to collect the rents of an estate, is bound to make good a loss caused to it by a breach of his duties.

A receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court. He should in all important matters apply for and obtain the direction of the Judge who appoints him.

A receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties.

[R., 5 C.W.N. 223 ; 19 Ind. Cas. 920=6 S.L.R. 286 ; 61 P.L.R. 1902.]

APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in suit No. 442 of 1891.

The defendant, a karkun in the First Class Subordinate Judge's Court at Poona, was appointed a receiver under s. 503 of the Code of Civil Procedure (Act XIV of 1882) in suit No. 315 of 1887, to collect the rents of an estate consisting of moveable and immoveable property. He employed three successive karkuns and left to each of them the absolute and uncontrolled management of the estate and the custody of its funds without obtaining any security from them. One of the karkuns made use of the whole [661] of the collected funds for his own purposes and destroyed or manipulated the accounts, and after nearly four years' management the receiver handed over the immoveable property and four pies to the plaintiff, who had been appointed administrator, on the termination of the suit, under s. 9 of Reg. VIII of 1827. He produced no accounts.

The District Judge, on the report of the administrator, sanctioned the institution of the present suit. Plaintiff thereupon sued for an account from 8th September, 1887, to 30th September, 1891, and to recover what might be found due to the estate upon taking such account, with interest at 9 per cent. from date of suit, alleging that he found that owing to mismanagement a great deal of damage had been done to the estate. There was no dispute as to the immoveable property, the whole of it having been safely delivered over to the plaintiff.

The defendant pleaded (*inter alia*) that full powers had been conferred on him by his appointment as receiver; that he acted *bona fide* in the selection of his karkuns; that it was impossible to manage the estate, which was situate in three districts, without the assistance of karkuns, and that he was not responsible for the karkuns' negligence or fraud.

The Subordinate Judge found that the defendant had no power to delegate his authority as a receiver, and that he was liable for the property misappropriated by his clerks. He, therefore, appointed a commissioner for taking accounts and ordered local investigation according to certain

* First Appeal No. 165 of 1892.

directions. The defendant failed to render an account to the commissioner. The Judge, therefore, accepted the accounts produced by the plaintiff as correct, and passed a decree according to those accounts, awarding to the plaintiff Rs. 5,894-8-9 with costs.

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The defendant preferred an appeal.

Ganesh K. Deshmukh, for the appellant (defendant).

Mahadeo C. Apte, for the respondent (plaintiff).

JUDGMENT.

FARRAN, J.—The defendant in this case, who is a receiver appointed under s. 503 of the Code to collect the rents of an estate consisting of house property and land, has entirely **[662]** misapprehended his position and duties, and the estate entrusted to his care has thereby suffered considerable loss. His duty, whether he employed a karkun or not, was himself to receive the rents as they were from time to time collected on his behalf, if he did not himself recover them, and keep them under his own control in a bank to a separate account or in some other secure place of deposit, and to pay out such sums as from time to time might be required for current expenses and repairs, and personally or by a karkun to keep correct and accurate accounts of the receipts from and expenditure upon the estate, obtaining vouchers for all, other than petty, sums paid. That duty entrusted to him by the Court as its selected and trusted officer, he was not justified in delegating or entrusting to another. Having done so, and thereby caused loss to the estate, he is bound to make it good.

In all important matters, the receiver should apply for and obtain the direction of the Judge who appoints him. On the other hand, a receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties. The question whether these include the assistance of a karkun depends (if the terms of the order appointing him are silent upon the subject) upon the nature of the estate, and must be determined in each case with reference to its own circumstances. No general rule can be laid down; but whether he be allowed a karkun or not, the receiver must himself perform the proper duties appertaining to his office. These, we repeat, he cannot delegate.

In the case before us the receiver, it appears, employed three successive karkuns, and left to each of them the absolute and uncontrolled management of the estate and the custody of its funds. He did not even for his own protection or that of the estate obtain any security from them. The consequence is that one of them, Marathe, made use of the whole of the collected funds for his own purposes, and destroyed or manipulated the accounts, and after nearly four years' management, the receiver has handed over only 4 pies to the administrator. His liability to account for the balance is undoubted.

[663] As, however, the accounts have not been investigated by the local commissioner, as directed by the Judge, we must now direct the accounts to be taken, and as the pleaders for the parties are agreed that in this case the services of a karkun at Rs. 12 per mensem were necessary owing to the nature of the estate, we will direct the commissioner in taking the accounts to allow that item.

We accordingly refer it to Mr. Bhicaji Gopal Robade to take the accounts of the defendant's receivership, charging him with all sums actually received by him, or which, but for his wilful default, he ought to have received, on the best basis which under the circumstances he can

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adopt. In taking such accounts, let him allow the defendant Rs. 12 per month for the services of a karkun. The terms of this order of reference will supersede the directions given by the Subordinate Judge. The report to be made within six weeks. Costs to be dealt with on receipt of the report as well as the question whether the defendant is to be charged with any and what interest.

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19 B. 663.

APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

VENKAJI BABAJI NAIK (*Original Plaintiff*), *Appellant v.* SHIDRAMAPA BALAPA DESAI AND ANOTHER (*Original Defendants*), *Respondents.** [22nd August, 1894.]

Limitation—Limitation Act (XV of 1877), s. 20—*Interest—Payment of interest as such—Mortgage—Payment of rents to mortgagee, in lieu of interest on debt—Mortgage-deed not registered—Deed not admissible to prove rents paid as interest—Evidence—Practice—Registration Act (III of* 1877), *ss.* 3 *and* 17.

By a bond dated 15th July, 1872, A assigned to B the "*vahivat* of assessment" of certain lands belonging to him as security for a loan of Rs. 10,000. The bond provided that B should receive the assessment, and after making certain payments should retain the balance in lieu of interest until the principal debt should be repaid. The bond was not registered. The assessment was duly received by B until April, 1887. In February, 1890, B filed this suit to recover the principal sum from A personally, relinquishing his claim against the land, as the bond was not [664] registered. A pleaded limitation. B contended that the receipt of the assessment in lieu of interest was a payment of "interest as such" within the meaning of s. 20 of the Limitation Act (XV of 1877) and that the last of such payments having been made within three years before suit his claim was not barred.

Held, that the suit was barred by limitation. The assignment of the "*vahivat* of assessment" contained in the bond was an assignment of a benefit arising out of immoveable property within the meaning of ss. 17 and 3 of the Registration Act (III of 1877) or else a mortgage; and in either case the bond could not be admitted in evidence, as it was not registered. But it was only by reading the terms of the bond that the Court could gather that the assessment was to be received in lieu of interest. This would be to admit indirectly the provisions of the bond in evidence. Apart from the bond there was no evidence that the plaintiff (B) had been paid "interest as such" within three years of the filing of the suit by the duly authorised agents of the defendants, and the claim was, therefore, barred.

[R., 24 B. 615; 34 B. 287=12 Bom. L.R. 9=5 Ind. Cas. 599; 34 M. 64=6 Ind. Cas. 504=20 M.L.J. 968=8 M.L.T. 91; 21 Ind. Cas. 281=9 N.L.R. 140; U.B.R. 1904 (4th Qr.), Registration 1.]

FIRST appeal from the decision of Rao Bahadur G. V. Bhanap, First Class Subordinate Judge of Belgaum. Plaintiff sued to recover Rs. 7,000 alleged to be due on a mortgage-bond dated 15th July, 1872.

The bond had been executed by the defendant's father, who died in 1882, to the plaintiff's father for a sum of Rs. 10,000. Under it the mortgagee was to receive the annual income of the mortgaged land amounting to Rs. 536-12-0, out of which he was to pay Rs. 206-9-0 to Government as *naiki judi* assessment and to retain the balance in lieu of

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* Appeal No. 117 of 1892.

interest until the principal sum was repaid. The following is a translation of the bond :—

"To Rajeshri Baba Naik Valvekar, residing at Gokak.

"This bond is executed in Suru San 1281 Fasli by Shidramapa Balapa Desai Nadgavda of pargana Gokak to the following effect :—

"The sum of Rs. 13,000 is fixed to-day as the sum which we have borrowed from you, including the amount of the decree in original suit No. 560 of 1867, namely, Rs. 2,958. Out of this sum, deducting the amount of Rs. 3,000 of the bond executed in favour of Sheshgir Naik Valvekar, I owe you Rs. 10,000. For the interest due thereon I have given you the *vahivat* (management) of assessment of my *kamat chavrat* (private lands) to the extent of Rs. 536-12-0 out of which Rs. 192-12-0 on account of *naiki judi* and Rs. 13-13-0 on account of assessment for waste lands are to be paid by you to Government, and the balance, namely Rs. 330-3-0, should be enjoyed by you in lieu of interest annually till the principal debt of Rs. 10,000 is paid by me. When the principal is paid off by me I shall take back the (*vahivat* of) collections. I have taken back all the old documents as well as the decree which is satisfied. No dispute exists. There will be no intermediate disturbance. Dated 15th July 1872."

[665] The plaintiff alleged that the income of the land had been duly received in lieu of interest until April, 1887, but that he had been prevented from recovering it since 1888. He now sued to recover the sum of Rs. 7,000, relinquishing Rs. 3,000 of the principal and the interest for 1888, and 1889. He sued to recover the amount from the defendants personally, as the bond was not registered. The suit was filed on the 10th February, 1890.

The defendants denied the bond, and pleaded (*inter alia*) that the plaintiff's claim was barred by limitation.

The Subordinate Judge rejected the claim, holding that execution of the bond was not proved, and that the claim was barred by limitation.

The plaintiff appealed.

Setlur, with *Mahadeo V. Bhat*, appeared for the appellant (plaintiff).—The evidence proves the existence of the bond. The claim is not time-barred. It is shown that the tenants paid the rents to us till April, 1887, and we recovered them for 1888 with the assistance of the Mamlatdar. The present suit was filed on the 10th February, 1890, and is within time. The Judge refused to regard the payment of rent to us as equivalent to the payment of interest within the meaning of s. 20 of the Limitation Act (XV of 1877), because that was provided for by the bond, which he could not look at as it was not registered. We contend that for this purpose the bond does not need registration. We have abandoned our claim to the land. The bond then merely gives us the right to recover certain money annually from the tenants. What is given is "the *vahivat* of assessment" and not the *vahivat* of land. Arrears of money due by a permanent tenant to an inamdar are not immoveable property—*Morbhat* v. *Gangadhar*(1); *Bajirav Waman* v. *Krishnarav Ramrav* (2).

[FARRAN, J.—Does not the bond assign rents and are not rents benefits arising out of land ?]

The bond does not give us any remedy against the lands of the tenants in case they refuse to pay rents. The assignment **[666]** was not an assignment of rents as representing the product of land, but simply of moneys becoming periodically due

(1) 8 B. 234 (238).

(2) P. J. (1885), p. 130.

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Even admitting that rents are transferred to us under the bond, we submit that rents do not come within the definition of immoveable property under the Registration Act. The term 'benefit' must be considered to mean benefit *ejusdem generis*. The right to take juice from date trees is not a benefit arising out of land—*Jalu Namdar* v. *Baicha Namdar*(1). The fact that it is not registered does not prevent the Court from recognizing the existence of the bond, and looking at it for the purpose of connecting the payment of rents with the payment of interest.

Branson with *Vasudeo G. Bhandarkar* appeared for the respondents (defendants).—The execution of the bond is not proved. If, however, it is held to be proved, then we say it should be registered. It assigns rents, and it has been held that rents fall within the definition of immoveable property—*Madhavrao Keshav* v. *Jagannath Mahadeo* (2); ss. 3 and 17 of the Registration Act.

The suit is time-barred, because there is no evidence of payment of interest either by us or by our duly authorized agent within three years before the date of the suit.

JUDGMENT.

FARRAN, J.—We are not inclined to agree with the Subordinate Judge in his finding that execution of the bond sued upon is not proved. It is, in our opinion, clearly established that the plaintiff and his father did pay the *judi* on account of the Desai's *chavrat* lands in Melvanki and did receive the assessment from the tenants. These facts, being in accordance with the provisions of the bond, which, though unregistered, may be read as a whole in order to determine the question of its genuineness as a money-bond, tend strongly to outweigh the considerations which arise owing to the non-registration of the document and the other circumstances to which the Subordinate Judge has called attention.

But whether due execution of the bond is proved or not, we think that the claim to recover the principal is barred by limitation. The suit was filed on the 10th February, 1890. The **[667]** plaintiff received the assessment from the tenants, without the assistance of the Mamlatdar, for Fasli, 1296, the last instalment of which would be payable in April. We, therefore, assume that the plaintiff received assessment from the tenants in April, 1887, as he and his father had done for many years previously.

Now the bond confers upon the obligee the *vahivat* of assessment Rs. 536-12-0 and (subject to the payment of *judi*) the right to retain such assessment in lieu of interest each year until the Desai pays the principal. That is, in our opinion, an assignment of a benefit to arise out of immoveable property within the meaning of ss. 17 and 3 of the Registration Act, or else it is a mortgage. It is not the assignment of the rent to be paid by any particular tenant, or tenants, which might possibly bring the case within the rulings in *Morbhat* v. *Gangadhar* (3) and *Bajirav* v. *Krishnarav* (4), as to which we express no opinion. It is an assignment of the assessment of the land and of its *vahivat* generally, and so (if it is not a mortgage) falls within the ruling in *Madhavrao* v. *Jagannath* (2) and, in our opinion, within the wording and spirit of the definition of immoveable property contained in s. 3 of the Registration Act. The bond being unregistered must, therefore, be treated as a mere money bond, as though the assignment of the

(1) 3 B. L. R. A.C. 394.
(2) P. J. (1889), p. 75.
(3) 8 B. 234.
(4) P. J. (1885), p. 130.

rents of the land in lieu of interest had not been contained in it. This assignment under s. 49 of the Registration Act does not affect the assessment, nor can it be received in evidence of the transaction relating to the assessment. In other words, it cannot for that purpose be read at all. As we cannot read this part of the bond, there is no evidence before us to show why the plaintiff received the rent of the Desai's *chavrat* lands.

It is, however, contended that we ought to infer that the tenants paid these rents to Baba Naik and the plaintiff as interest on the bond with the authority of the Desai. There is some evidence that Baba Naik began to collect the rents contemporaneously with the execution of the bond; he had paid the *judi* even before then, and it is proved that he and the plaintiff have **[668]** been collecting these rents for very many years without objection on the part of the Desai and his representatives. These, and the existence of the bond, are the facts before us. We think that if from them we were to draw the inference which we are asked to draw, we could only do so because we have read the terms of the bond. This would be indirectly admitting the provisions as to assessment in the bond in evidence. The inference, leaving the terms of the bond out of consideration, is not the necessary or only inference to be drawn from the established facts. The difficulty of drawing it is also enhanced by the death of the Desai in 1882 leaving minor sons. We must, therefore, hold that the plaintiff has not established that he has been paid "interest as such" on his bond within three years of the filing of his suit by the duly authorized agents of the defendants, and that his suit is, therefore, time-barred.

The result would be the same if the bond were treated as a mortgage of the *chavrat* lands—*Pichandi* v. *Kandasami* (1). This is probably its true character. The *vahivat* of the assessment is assigned, and the plaintiff always treated himself as being in possession as a mortgagee.

The case is one of hardship, but the hardship has arisen from the neglect of Baba Naik to comply with the provision of a salutary law which we should be straining and not giving effect to if we allowed this appeal. It must, therefore, be dismissed, with costs.

Appeal dismissed.

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19 B. 668.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Appellant v.* VAKHATSANGJI MEGHRAJJI (*Original Plaintiff*) *Respondent.**

[23rd August, 1894.]

Treasure Trove Act (VI of 1878)*—Right of a Talukdar in Gujarat to treasure trove—Rights of Government.*

A bag containing Rs. 248-2-0 and a gold ring was found buried in a field under circumstances which created suspicion of the commission of an offence. The District **[669]** Magistrate called for claimants to come forward under s. 523 of the Code of Criminal Procedure (Act X of 1882). Thereupon the plaintiff put

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* Appeal No. 5 of 1892.

(1) 7 M. 539.

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in his claim alleging that, as Talukdar and owner of the soil in which the property was found, he was entitled to the property. His claim was rejected, and an order was passed under s. 524 of the Code placing the property at the disposal of Government. The Talukdar then sued the Secretary of State for India in Council to recover the property in dispute. The Joint Judge awarded the claim.

Held, reversing the decree of the lower Court, that, in the absence of any evidence to prove the Talukdar's right to treasure trove either by a grant or prescription, the property belonged to Government, the Indian Treasure Trove Act (VI of 1878) being inapplicable, as no notice was given by the finder, nor were any proceedings taken under it.

APPEAL from the decree of T. Hart-Davies, Joint Judge of Ahmedabad, in suit No. 27 of 1890.

This was an action brought against the Secretary of State for India in Council under the following circumstances.

The plaintiff was the Talukdar of the village of Kamlej in the Ahmedabad District. A bag containing Rs. 1,525, which was stolen property, was found buried under ground in that village. After this bag had been unearthed, another bag containing Rs. 248-2-0 and a gold ring was also found in the ground close by on the same occasion. This bag was found by a *pagi* in the plaintiff's service.

The police seized both bags, and produced them before the District Magistrate.

The Magistrate directed the first bag to be restored to the owner after the conviction of the thief.

As regards the second bag, the Magistrate called for claimants to come forward under s. 523 of the Code of Criminal Procedure (Act X of 1882).

Thereupon the plaintiff laid claim to the property contained in the second bag, but his claim was disallowed, and an order was passed under s. 524 of the Criminal Procedure Code, directing the property to be placed at the disposal of Government.

The plaintiff then filed the present suit against the Secretary of State for India in Council, alleging that as owner and Talukdar of the village in which the property was found he was entitled to it.

[670] The defendant disputed the plaintiff's title, and contended that the District Magistrate had properly disposed of the property in question under s. 524 of the Code of Criminal Procedure.

The Joint Judge awarded the plaintiff's claim.

Against this decision the defendant appealed to the High Court.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the appellant.—The lower Court is wrong in holding that the present case is governed by the ruling in *Queen-Empress* v. *Tribhovan* (1). That was a case under s. 523 and not under 524 of the Code of Criminal Procedure (X of 1882). Peile's work on the Talukdars of Gujarat has no bearing on the question at issue. It does not touch the question of treasure trove. The question is one to be decided by common law. In England the Crown is the owner of property found under circumstances like the present. The Hindu law is also to the same effect. Hidden treasure goes to the sovereign—Manu, ch. 8, pl. 37—39; Yajnayavalkya in Mandlik's Vyavahar Mayukh, 204; Stoke's Hindu Law, 131; Sacred Books of the East, Vol. 14, ch. 3, s. 13; Vishnu, s. 3, pl. 55—63, Apastambha, pl. 43—45; *In re Uma Charan Banerji* (2); *Rani Kattama Natchiar* v. *Mahammad Mira* (3). These authorities show that the plaintiff has no right to the property in

(1) 9 B. 131. (2) 7 B. L. R. Appx. 3. (3) 7 M.H.C.R. 150.

dispute merely because he is Talukdar and owner of the soil in which the property was found buried. The Treasure Trove Act (VI of 1878) has no application to the present case, as no proceedings were taken under it, no notice under it was given by the finder, and the finder himself is not a party to this suit. Even if it applied, the Act creates a special tribunal to determine a claim of this kind, and the Civil Court would have no jurisdiction to entertain this suit—*Khando Narayan* v. *Apaji Sadashiv* (1).

Inverarity (with him *G. M. Tripathi*).—The sovereign is no doubt entitled to hidden treasure at common law. It is said that "treasure trove is when any money is found hid in the earth, but not lying upon the ground, and no man knows to whom [671] it belongs; then the property thereof belongs to the king or the lord of the manor by special grant or prescription.....the law of England gives it to the king by his prerogative or some other claiming under him" (2). But the common law rights of the Crown are vested in Talukdars: see Objects and Reasons for Bill No. 6 of 1885. They are proprietors of Crown rights by inheritance. Act VI of 1878 settles the rights of the finder as well as of the owner of the place in which the treasure is found. Both of them are entitled to divide it under s. 10 of the Act. The common law rights of the sovereign no longer exist. Under s. 20 of Act VI of 1878 the finder's share in treasure trove vests in the Crown if the finder does not give notice as required under s. 4. And it is only after such notice is given by the finder that the Collector's jurisdiction to hold an inquiry arises. In the absence of such notice, the Civil Court can entertain a suit like the present. The suit is not barred by s. 524 of the Code of Criminal Procedure. The order placing the property at the disposal of Government is not final. See also Kathiawar Directory, Part II, p. 927.

JUDGMENT.

JARDINE, J.—The facts are that after a person accused of theft had pointed out a place where he had concealed the stolen property, Rs. 1,525, by burying them in the ground, and after these rupees had been unearthed, another bag containing Rs. 248-2-0 and a golden ring was found in the ground close by and in the same pit at a greater depth on the same occasion. The property in this second bag is the subject of the present suit. In the absence of any contention to the contrary, we concur with the Joint Judge in holding that the District Magistrate, who called for claimants to come forward under s 523 of the Code of Criminal Procedure (X of 1882), had jurisdiction so to do, the property having been "found under circumstances which create suspicion of the commission of an offence." The plaintiff, who is Talukdar, of Kamlej, and owner of the field where the property was found, put in a claim, which the District Magistrate disallowed. Under s. 524 the Magistrate placed the property "at the disposal of Government," which he could do where the following words [672] of the section apply: "If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him." The person who found the property is not a party to the present suit; and his interest in it need not be considered.

The Talukhdar sued the Secretary of State for India in Council, alleging that as Talukdar and owner of the soil wherein the property was found, he is entitled. The Joint Judge has awarded the claim.

(1) 2 B. 370.

(2) See Jacob's Law Dictionary (10th Ed., 1782).

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The Joint Judge held that the decision in *Queen-Empress* v. *Tribhovan*(1) is authority for holding that this suit will lie. He omitted to notice that the decision relates to s. 523, and not to an order properly made under s. 524. As s. 524 allowed an appeal, it is doubtful whether the law contemplates a remedy by suit. In the unreported case of *Sheikh Gholam Abid*, cited in Prinsep's Code of Criminal Procedure, 7th Ed., under s. 89, the words in that section "shall be at the disposal of the Government" were held by the High Court at Fort William to confer an absolute right on the Government. In *The Government of Bengal* v. *Meer Surwar Jan*(2), it was held that the property of an absconding criminal placed at the disposal of the Government could only be restored by the Government and not by the High Court. In *Bukhooree Singh* v. *The Government* (3), it was held that no suit would lie for such property against the Government or the purchaser. These cases have not been cited at the hearing, and we refrain from deciding the point, as we can dispose of the plaintiff's claim on its merits.

The Indian Treasure Trove Act (VI of 1878) is irrelevant to the present matter, as no notice was given under it by the finder, nor any proceedings taken. Mr. Inverarity has, however, argued for the plaintiff that it contains legislative recognition of the right of the owner of the soil to share with the finder of the treasure trove. Section 6 contemplates persons having rights as owners of the place where the property is found. But **[673]** there is no declaration of substantive law that the owner of the soil is entitled to treasure trove; although, as stated by the Honourable Sir Edward Bayley at the meeting of the Viceroy's Council on the 13th February, 1878, when the Bill was passed, "as a matter of fact such right was very largely asserted by persons who were owners of the soil, and the assertion of vague and antagonistic rights had given rise to many disputes, and had also frequently led to the concealment of property found." See *Uma Charan's* case (4) and *Rani Kattama* v. *Muhammad Mira* (5) which interpret local regulations unfavourably to the owner of the soil.

It is the common ground of the plaintiff and defendant that at Hindu law, hidden treasure goes, under limitations about Brahmins and others, which need not be here considered, to the sovereign, as protector of the people and lord of the soil, as is said in Manu, ch. 8, pl, 37 to 39. See, too, the Vyavahara Mayukha, ch. 7, ss. 8 to 10, on the king's rights in waifs, strays and treasure trove; also West and Buhler, 833. The learned Government Pleader has also drawn the Court's attention to similar rules in Gautama, Vasishta, Vishnu and Apastamba. The plaintiff claims that, as Talukdar and absolute owner of the soil, he enjoys the franchise of treasure trove as a seignorial appendage to his high territorial lordship. In England, as Coke tells us, treasure trove doth belong to the king or to some lord or other by the king's grant or prescription. The plaintiff claims by right acquired before the village of Kamlej became part of British India. The Joint Judge affirms his right in the following passage of his judgment:—"There is no doubt, looking to the consensus of authorities, and as every revenue officer who has served in Gujarath is aware, that a Talukdar is the absolute *owner* of the land. He is not, like an inamdar, an alienee merely of Government revenue. I may quote Sir J. Peile's report (*passim*) on this subject and the statement of objects and reasons to Act VI of 1888

(1) 9 B. 131. (2) 18 W. R. Cr. R. 33. (3) 8 W. R. 207.
(4) 7 B.L.R. Appx. 3. (5) 7 M. H. C. R. 150.

where this fact is enunciated. So, as actual and absolute owner of the land, the Talukdar is owner of property found in it in the same way as the Kathiawar States (*vide* statement of objects and reasons quoted above)." With respect to the above remarks we have to [674] notice that Sir James Peile does not, in the papers referred to, make any mention of treasure trove or any franchises belonging to the Talukdars of Gujarat. He appears to be engaged in discussing the more familiar question of the right to land revenue. He says the Talukdars are not grantees. "Over their landed estates," he says, "they exercise the proprietary right of the Crown by inheritance, just as the Native Chiefs and their kinsmen do in Kathiawar. The Government revenue paid by Talukdars was originally a tribute, and the rights of Government are limited to that payment. Government is not the owner of any of the land in these estates, waste or other." These statements may well be true, as matter of history. The plaintiff may to some extent be a lord of regalia; but there is no evidence that he owns all the rights of the Crown which in England flow from the prerogative of the sovereign as universal occupant. They do not touch the present claim to treasure trove which we think must be based on documents or instances of the exercise of the right by the plaintiff, or by neighbouring Talukdars, to prove a grant or prescription. Of such evidence there is none on the record; and we have not been moved to remand the suit in order to enable evidence to be given.

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We, therefore, reverse the decree and dismiss the suit, with all costs on the plaintiff.

Decree reversed.

19 B. 675.

[675] APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

RAKHMA VALAD JAVJI, DECEASED, BY HIS HEIRS HIS SONS HANMANTA AND OTHERS (*Original Defendants*), *Applicants* v. TULAJI VALAD RAMJI AND OTHERS (*Original Plaintiffs*), *Opponents.**

[27th August, 1894.]

Mamlatdar—Decree passed by Mamlatdar—Execution—Execution of Mamlatdar's decree by Mamlatdar under directions of Collector—Mamlatdars' Act (Bom. Act III of 1876), s. 17 †.

A Mamlatdar having under the direction of the Collector executed a decree passed by himself directing the removal of a dam,

Held that though it might be improper for the Collector to issue such a direction, which legally could only issue from the High Court, the High Court would

* Application No. 120 of 1893 under the extraordinary jurisdiction.

† Section 17 of the Mamlatdars' Act (Bom. Act III of 1876):—

17. If a Mamlatdar's decision be for awarding possession or restoring a use he shall issue an order to the village officers to give effect thereto.

If it be for granting an injunction, he shall cause the same to be prepared in the form of sch. C, and shall deliver or tender the same then and there to the defendant, if he be present, and if he be not present, shall send it to the village officers to be served upon him.

When the Mamlatdar awards costs, such costs, together with the costs of execution, shall be recovered from the party in person, and in the event of non-payment, by the attachment and sale of his property.

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not set aside the execution if otherwise valid. Section 17 of the Mamlatdars Act (III of 1876) is imperative, and leaves to the Mamlatdar no discretion as to the duty of enforcing the decree. The Act does not purport to provide detailed rules as to applications for execution, and a Mamlatdar's Court is not governed as to execution of decrees by the ordinary rules of procedure; and provided the procedure followed gives effect in the end to the intention of s. 17, the Court will not interfere.

Held also that under s. 17 of the Mamlatdars' Act (III of 1876) a Mamlatdar was not precluded from himself supervising the execution of a decree in a case in which the village officers were from interest or other cause unlikely to give proper effect to it.

[Diss., 25 B. 395=2 Bom. L.R. 1136; R., 23 B. 761.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Rao Saheb N. V. Bhat, Mamlatdar of Sinnar, in the Nasik District, passed in the execution of a decree in a possessory suit.

The applicants built a dam across the river Mahalungi in the Nasik District and obstructed the flow of water, whereupon the [676] opponents sued them in the Court of the Mamlatdar at Sinnar, and on the 24th June, 1885, obtained a decree directing that an opening should be made in the dam so as to give the opponents (plaintiffs) the same amount of water as they had previously enjoyed.

The applicants then filed a suit in the Subordinate Judge's Court of Sinnar to set aside the Mamlatdar's decree, but this suit failed, and the order was confirmed.

On the 15th June, 1891, the opponents applied to the Mamlatdar to execute his decree of 24th June, 1885, and to have the dam opened. The Mamlatdar referred them to the Civil Court for an order to that effect, whereupon they (opponents) applied to the Collector of the District on the 5th April, 1892, requesting him to direct the Mamlatdar to make an opening in the dam and allow the water to flow in accordance with the Mamlatdar's decree. The Collector on the 15th April made the following endorsement on the application, and forwarded it to the Assistant Collector:—

"It appears from the reply received by the applicant from the Court on his application, and placed with the proceedings, that the prohibitory order passed by the Civil Court enjoining the Mamlatdar not to execute the order passed by him came to an end when the suit pending in the Civil Court was disposed of. Therefore there appears to be no objection to the execution of the order of the Mamlatdar's Court from the taluka (office). May this be known."

On the 27th May, 1892, the Mamlatdar instead of issuing orders to the village officers under s. 17 of the Mamlatdars' Act (III of 1876) to execute the decree, went himself to the place and had a portion of the dam removed under his own surpervision.

The applicants now applied to the High Court under its extraordinary jurisdiction, contending that the Collector and the Assistant Collector had no jurisdiction to move in the matter; that the Mamlatdar acted with material irregularity in acting upon orders, and that the execution had been illegal and had caused them serious loss and damage. They obtained a rule *nisi* calling upon the plaintiffs to show cause why the portion of the dam removed by the Mamlatdar should not be restored.

[677] *Branson* with *Mahadev B. Chavbal*, appeared for the applicants (defendants) in support of the rule:—The Collector had no authority to interfere in the matter. When the Mamlatdar refused to execute the

decree, the proper remedy of the plaintiffs was to apply to the High Court and not to the Collector. The Mamlatdar's powers are limited entirely by the Mamlatdars' Act. The Mamlatdar having refused to execute the decree, he was *functus officio* and had no power either to review his order or to do any thing in the matter under the Collector's order. Further, the action of the Mamlatdar was in obedience of the order of his superior officer, the Collector. It was not a judicial act. The Collector had no authority to issue an order to the Mamlatdar in a matter arising under the Mamlatdars' Act—*Ravlojirao* v. *Satu*(1). Moreover, the Collector ought to have issued notice to us and to have heard us before acting. His order was *ex parte* and illegal. Section 17 of the Mamlatdars' Act lays down certain procedure in execution of a decree. It provides that the execution of the Mamlatdar's decree should be entrusted to the village officers. Here the Mamlatdar himself executed his decree. He had no authority to do this under the Act.

Lang (Advocate-General) with *Daji Abaji Khare*, appeared for the opponents (plaintiffs) to show cause.—The Collector appears to have advised the Mamlatdar to execute his decree, the Mamlatdar having been under an erroneous impression that the decree in the civil suit prevented him from doing so. No harm or injustice of any kind has been done. It was not necessary for the Collector to give to the defendants notice of our petition to him. The Collector did not himself take any action in the matter. What the Mamlatdar did was justifiable, and the fact that he did it under the advice of the Collector cannot make any difference. It is urged that the Mamlatdar ought to have ordered the village officers to execute the decree. It appears, however, from our petition to the Collector that the village officers were interested in maintaining the dam and would put obstacles in our way. Owing to this circumstance the Mamlatdar himself supervised the execution of the decree. Even [678] supposing that the Mamlatdar has committed an error in law, still that would not be a sufficient ground for interference under s. 622 of the Civil Procedure Code—*Hari Bhikaji* v. *Naro Vishvanath*(2). If the defendants are aggrieved by the execution of the decree, they can seek redress by an independent proceeding, but not by an application under the extraordinary jurisdiction—*Motilal Kashibhai* v. *Nana*(3).

JUDGMENT.

FULTON, J.—We do not think we should interfere in this case. The Collector doubtless was not legally justified in giving directions in a case under the Mamlatdars' Act, but we agree with the learned Advocate General that as his intervention merely resulted in the Mamlatdar's taking steps to give effect to the decree, it furnishes no ground for action on our part. Section 17 is imperative, and left the Mamlatdar no discretion as to the duty of enforcing the decree. The Collector's memorandum at most merely directed him to obey the law; and though it may have been improper for the Collector to issue such a direction, which legally could only issue from this Court, we cannot on account of the impropriety set aside the execution if otherwise valid. The argument that because the Mamlatdar had, owing to a misapprehension, at first refused to execute the decree he was precluded from enforcing it afterwards when the misapprehension had been removed, will not, we think, hold good. The Act does not purport to provide detailed rules as to applications for execution.

(1) P. J. (1879), p. 5. (2) 9 B. 432 (433). (3) 18 B. 35.

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It does not even prescribe any application at all. It simply requires the Mamlatdar to issue orders to give effect to his decree, and the fact of his failing at first to do so does not seem to render the obligation any less binding. Cases such as *Manjunath* v. *Venkatesh*(1), *Mungul Pershad* v. *Grija Kant*(2), *Ram Kirpal* v. *Mussumat Rup Kuar*(3) and *Bani Ram* v. *Nanhu Mal*(4) do not appear applicable to Courts, like the Mamlatdar's, which are not governed as to execution of decrees by the ordinary rules of procedure; and provided the procedure followed gives effect, in the end, to the intention of s. 17, we ought not, we think, to interfere.

[679] Next it was urged that the Mamlatdar's action was at variance with the provisions of s. 17, inasmuch as instead of issuing orders to the village officers to give effect to the decree he went himself to the spot and got the dam cut under his own supervision. This procedure may perhaps have been unusual, but the allegation contained in the 11th paragraph of the opponents' petition of 5th April, 1892, that the village officers of Thangaon were interested in the proceeding, has not been contradicted by affidavit or in argument, and if true, would probably justify the execution of the decree otherwise than through their agency. Section 17 prescribes the ordinary method to be adopted, but ought not, we think, to be read so literally as to compel the Mamlatdar to employ interested parties to give effect to the decree. In all cases the law must be construed in a reasonable manner, but it would defeat the intention of the Act to hold that a Mamlatdar was precluded from himself supervising the execution of a decree in a case in which he thought the village officers were from interest or other cause unlikely to give proper effect to it. Under the circumstances, then, we do not think that we are in a position to hold that in going to the spot to enforce the decree the Mamlatdar acted erroneously.

Lastly, it was said that in cutting the masonry dam the Mamlatdar had exceeded the limits of the decree, but as the existence of this dam had been adjudged to be incompatible with the customary supply of water to the opponents it is difficult to see how else he could give effect to the decree. Whether the applicants may now restore their old kutcha dams in such a way as not to interfere with the due supply of water to the opponents, is a point on which we can offer no opinion, and in respect of which, so far as we are aware, no orders have been issued by the Mamlatdar. But the applicants must take care that, if they take any such steps, they must not deprive the opponents of the supply of water awarded to them by the decree which the Civil Courts have refused to set aside. Under the circumstances we discharge the rule with costs.

Rule discharged.

(1) 6 B. 54.
(2) 8 I. A. 123=4 C. 249.
(3) 11 I.A. 37=6 A. 269.
(4) 11 I.A. 181=7 A. 102.

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[680] APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

JALBHAI ARDESHIR SHET *(Original Defendant), Appellant v.* LOUIS MANOEL *(Original Plaintiff), Respondent.** [22nd August, 1894.]

Christian—Native Christian—Conversion from Hinduism to Christianity, effect of—Hindu convert—Salsette, law applicable to Christian inhabitants of—Hindu law, how far applicable—Succession—Inheritance—Co-parcenary—Primogeniture—Manager of family—Mortgage by manager when binding on family property—Mortgage—Redemption—Decree against manager alone on the mortgage, how far binding on the property—Parties—Practice—Will—Joint family—Ancestral property—Right of Christian of Salsette to deal by will with his share in ancestral property.

The law of a conquered territory continues in force until altered by the Crown or the Legislature. The island of Salsette was conquered from the Marathas by the British in 1774 and the law of succession for the Christian inhabitants of the island remained unaltered until the passing of the Indian Succession Act (X of 1865). Until that Act was passed, the law of primogeniture was not in force among the Christian inhabitants of Salsette. In the absence of a widow and daughter the sons took the property of their father in equal shares.

Quære whether they did so under the Hindu law or the Portuguese law or by force of usage existing among them.

A mortgage of certain property was made in 1875 by the eldest of three brothers (Pedro, Minguel and Enos), who were Christian inhabitants of the island of Salsette. They had inherited the property from their father, who died in 1840. The family had originally been a Hindu family, but had been converted to Christianity. Enos died in 1876, and Minguel died in 1883, bequeathing his interest in the property to his nephew the plaintiff, who was Pedro's son. In that year (1883) the mortgagee sued Pedro alone upon the mortgage and obtained a decree which he afterwards assigned to the defendant who sold the mortgaged property in execution of the decree, and at the sale purchased the property himself. The plaintiff (son of Pedro the mortgagor) now sued to redeem the property, and the questions arose (1) whether under the law applicable to the Christian inhabitants of Salsette the eldest brother Pedro had succeeded on the father's death to the whole of the family property, and (2) if not, then to what extent the mortgage in question bound the property of the family.

Held, (1) that the law of primogeniture prior to the passing of the Indian Succession Act (X of 1865) did not exist among the Christian inhabitants of Salsette, and that Pedro, although eldest son, had not succeeded to the whole of the family property. He and his brothers took equal shares in the property of their father.

(2) That the mortgage by Pedro had been authorised by the family and was for family purposes and was binding upon the family property. Although Pedro and his brothers could not be regarded as co-parceners under Hindu law, yet having regard to the fact that they were descendants of converts from Hinduism, among whom **[681]** Hindu usages largely prevailed, the question should be treated in much the same way as if the family was still a Hindu family, and the Court would not require the same direct proof of the manager's authority to mortgage as it would in the case of an English manager under similar circumstances.

(3) That the plaintiff was not entitled to redeem. What was intended to be sold at the sale held in execution of the decree upon the mortgage was the whole interest in the mortgaged property. The defendant purchased that interest subject to the right of the plaintiff to show that his share derived from Minguel was not bound by the mortgage, and he had failed to do so. Minguel's share as well as Pedro's had passed by the sale.

(4) A member of the Christian community of the island of Salsette is entitled to deal with his share in ancestral property by will.

[R., 23 B. 539; 31 C. 11 (P.C.); 16 C.P.L.R. 19; (1900) P.L.R. 251 (269); D., 40 C. 407=16 C.L.J. 311=17 C.W.N. 102=17 Ind. Cas. 257.]

* Appeal No. 81 of 1893.

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THIS was a first appeal from the decision of Rao Bahadur G. V. Limaye, First Class Subordinate Judge of Thana.

One Antonio Louis Manoel, a Christian inhabitant of Salsette in theThana District, died in the year 1846 leaving considerable immoveable property and three sons, *viz.*, Pedro, Minguel and Enos. The family had been originally a Hindu family.

On the 9th January, 1875, the eldest son, Pedro, mortgaged the family property in dispute in the present suit to the executors of one Domingos Aga de Penha for Rs. 8,000. The mortgage-deed was attested by Enos, who died in the year 1876.

Disputes subsequently arose between Pedro and Minguel, which were referred to arbitration, and an award was made under which the family property was given to Minguel. The award was presented to the Subordinate Judges's Court at Nasik, and an order that it should be filed was made by consent on 10th February, 1882, and it was duly filed under s. 526 of the Civil Procedure Code (Act XIV of 1882).

Minguel died on the 27th May, 1883, having made a will by which he left the property to Pedro's son, Louis Manoel, the present plaintiff, who subsequently obtained possession of the property including the property in suit.

The mortgage-debt contracted by Pedro not having been paid, the mortgagees in April, 1883, filed a suit on the mortgage against Pedro (to which the present plaintiff was not a party) and obtained a decree on the 11th May, 1885, which he assigned to the present defendant, Jalbhai Ardeshir Shet. In execution of the **[682]** decree the defendant sold the property now in dispute at a Court sale on the 27th September, 1886, and purchased it himself. In 1887 he sought to dispossess the plaintiff.

The plaintiff thereupon brought a suit (No. 308 of 1888) against him in the Court of the First Class Subordinate Judge of Thana to establish his right to the mortgaged property as devisee of his uncle Minguel and for an injunction restraining the defendant from interfering with his possession. In that suit the plaintiff treated the defendant as a trespasser, and did not admit his title as mortgagee. The Court found that the defendant was a mortgagee of plaintiff's father Pedro and dismissed the suit.

On appeal by the plaintiff to the High Court the decree was confirmed on the ground that defendant not having been a party to the consent order of the Nasik Court, it could not affect his right under the mortgage which was prior in date (see Printed Judgments of 1890, p. 215).

While these proceedings were going on, the defendant took possession of the property. The plaintiff now sued to recover it. He contended that the property which had been mortgaged by his father Pedro was ancestral property and that the mortgage not being for the benefit of the family, only affected Pedro's share. He prayed for possession of Minguel's moiety and for a declaration that it was not affected by the mortgage, and as heir of Pedro he prayed for redemption of Pedro's moiety on payment of what might be due. In the alternative, he prayed for redemption of the whole property in case Minguel's share should be held subject to the mortgage.

The defendant contended that English law and not Hindu law applied to the plaintiff and his family, who were Christians, and that, consequently, Pedro, as eldest son had succeeded to the whole property and was competent to mortgage it; that the award of the arbitrators and the consent order

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of the Nasik Court based on it were collusive and fraudulent, and being subsequent to the mortgage did not affect it; that the plaintiff's suit of 1888 having been dismissed, the question now raised was *res judicata*, and that the plaintiff being one of the sons and heirs of Pedro was [683] bound by the mortgage effected by his father, by the decree on the mortgage, and the subsequent execution sale.

The Subordinate Judge was of opinion that up to the date of the passing of the Indian Succession Act (X of 1865) the plaintiff's family had been subject to Hindu law, and that, consequently, Minguel had at that time a half-share in the property which he retained till his death. He held, however, that the mortgage of 1875, had been effected by Pedro with Minguel's consent, and that Minguel's share was included. As to the plaintiff's claim to his father Pedro's share, the Court held that it was *res judicata* by the previous suit, and that his claim to it was now barred. The arbitration proceedings and the consent decree were found to be a sham. But as to the share of Minguel, the Court held that the plaintiff was entitled to redeem, and passed a decree in the following terms:—

"I, therefore, order that the plaintiff do redeem and recover possession after partition of half of the property in dispute from the defendant on payment to him of Rs. 6,181 with interest at 9 per cent. per annum on Rs. 4,000 out of that sum from 2nd April, 1883, to date of payment, *minus* half of the net income, if any, derived by the defendant from the said property, the amount of which will be determined in execution. In default of payment within six months from the date of determination of the income, the plaintiff's right to redemption will for ever be foreclosed. Costs of both the parties to be borne by the plaintiff."

The defendant appealed, and the plaintiff presented cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

Inverarity (with *Manekshah, J. Taleyarkhan*), for the appellant (defendant).—We have bought the property at a sale in execution of a decree upon the mortgage effected by Pedro in 1875. He was the eldest son The family was Christian, and English law applied, and on his father's death in 1840 the whole property devolved on Pedro by right of primogeniture. He, therefore, could mortgage the whole of it.

If it be held that the rule of primogeniture does not apply, then we contend that there is evidence in the case to show that the mortgage was effected for family purposes. Pedro was the manager of the family, and the proceedings instituted by the mortgagee against Pedro bound his brother, though they were [684] against Pedro alone—*Doulat Ram* v. *Mehr Chand*(1); *Hari Vithal* v. *Jayaram Vithal*(2). Some of the property in dispute was the self-acquired property of Pedro, and, therefore, the plaintiff is not entitled to dispute the alienation of that property. He can only lay claim, if at all, to that portion of the property which is ancestral. But we dispute his right even with respect to the ancestral property.

It is not now open to the plaintiff to contend that the award and the consent order were not fraudulent and collusive. See Printed Judgments of 1890, p. 215. The consent order is a nullity.

Either the Hindu law of succession or the English law of primogeniture applies. If the former law applies, then Minguel had no right to make a will, because the property was ancestral. His share survived to Pedro. *Prima facie* the English law applies—*Lopes* v. *Lopes* (3).

(1) 14 I. A., 187. (2) 14 B. 597. (3) 5 B.H.C.R.O.C.J. 172.

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The plaintiff is bound by the execution sale held against his father, and is not entitled to redeem any portion of the property. Whether the Hindu law or the English law of primogniture applies, we are entitled to retain the whole of the property.

Lang (Advocate General with *Dattatraya A. Idgunji*) for the respondent (plaintiff) :—The mortgage affected Pedro's share only. Minguel and Pedro were tenants-in-common. Minguel did not join in the mortgage. There is no evidence in the case to show that he was either consulted or informed by Pedro. The mortgage was not effected for the benefit of the family. The money was borrowed by Pedro to meet losses which he had suffered in his business : therefore, the debt cannot be a charge on the whole property. Neither the English law of primogeniture nor the Hindu law of succession is applicable to the present case. The English law of primogeniture is not applicable, because the family belonged to Salsette and not to Bombay, and the Hindu law of succession is not applicable, because among the Christian inhabitants outside Bombay, prevailing customs are given the binding force of law. See Reg. IV of 1827. **[685]** The evidence in the case distinctly shows that Pedro and Minguel were tenants-in-common. Pedro was not the manager of the family, and, therefore, the mortgage is not binding either on Minguel or his devisee the plaintiff—*Ganesh Sadashiv* v. *Balakrishna Gopal* (1) ; *Vasudeo Baloji* v. *Narayan Krishna* (2) ; *Venkat* v. *Kannan Dhora* (3) ; *Bir Chunder* v. *Mahomed Afsaroodeen* (4) ; *Dullabhdas Devchand* v. *Lakshmandas* (5).

The High Court's judgment in suit No. 308 of 1888 (Printed Judgments of 1890, p. 215) did not decide that the consent order of the Nasik Court was inoperative ; it only decided that the mortgage charge could not be affected by that order. That consent order gave the family property to Minguel. In order that it should be inoperative, it should be in fraud of some one—*Abdool Hoosein* v. *Charles Agnew Turner* (6) ; *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (7). It does not affect the mortgage charge, and, therefore, it is not in fraud of the mortgagee. That order is binding as long as it is not set aside—*Motiram* v. *Bahiru* (8). Its operation was to make Minguel the assignee of Pedro. Minguel, therefore, took the whole property, Pedro's half being mortgaged. Minguel devised the whole to the plaintiff, and he is now, therefore, entitled to redeem the half that was mortgaged by Pedro and recover possession of the other half free of any charge. Even if the consent order be left out of consideration, still he would be entitled to redeem half of the property as his father's heir and to recover the other half free of any charge under his uncle's will. A third party cannot impeach a decree as fraudulent—*Gulibai* v. *Jagannath* (9).

JUDGMENT.

FARRAN, J.—In this case the lower Court has passed a decree entitling the plaintiff to redeem and recover possession from the defendant of one-half of the property in dispute on payment of half the money due under a mortgage of the 9th of January, 1875, executed by Pedro de Penha in favour of the assignor of the defendant. Both sides object to that decree,—the plaintiff, on **[686]** the ground that it gives him too little, the defendant, on the ground that it gives the plaintiff too much.

(1) P. J. (1887) p. 28.
(2) P. J. (1882) p. 21.
(3) 5 M. 184.
(4) 10 C. 299.
(5) 10 B. 88.
(6) 14 I. A. 111.
(7) 15 I. A. 119.
(8) P. J. (1889) p. 68.
(9) 10 B. 659.

The plaintiff had, previously to the present suit, filed a suit (No. 308 of 1888) in the same Court against the defendant in substance to establish his right to the mortgaged property in priority to the mortgagee, basing his title upon a consent order of February 10, 1882, which we shall hereafter refer to. This suit was finally dismissed on the 13th August, 1890, by the High Court, principally on the ground that the order of February, 1882, was not binding on the mortgagee—*Louis Manoel Pedro Antonio de Penha* v. *Jalbhi Ardeshir Shet* (1). The dates there given are inaccurate.

The third ground of appeal, which raises the question whether the law of primogeniture prevailed amongst the Christian inhabitants of Salsette prior to the passing of the Indian Succession Act (X of 1865) cannot, we think, be supported. The defendant Jalbhai rested his case, in his written statement, mainly on the prevalence of that law, relying probably on the decision in *Lopes* v. *Lopes*(2) ; but the judgment in that case was based upon the ground that the Portuguese law was not preserved to the Portuguese inhabitants of the town and island of Bombay, but was by implication abrogated when Bombay was ceded to the English in A. D. 1661. Salsette is in a wholly different position. From the Portuguese it passed by conquest to the Marathas about the year A. D. 1737, and subsequently in A. D. 1774 it was conquered by the British from the Marathas. (See a full account in Bombay Gazetteer, Vol. XIII, p. 203). Under these circumstances the rule as laid down by the Privy Council in *The Mayor of Lyons* v. *The East India Company*(3), and recognised in the judgment in *Lopes* v. *Lopes* (at p. 181), is that the law of the conquered country continues until the Crown or the Legislature change it. So far, however, from changing the Law prevailing at the time of the conquest, the Bombay Legislature by Reg. IV of 1799, when providing a code for the Courts administering the law in Salsette, (*inter alia*) enacted in s. 14 that "in all cases of succession to landed property the Judge is, of whatever religion [687] the parties may be, to endeavour to ascertain also whether they have been regulated by any general usage of the District where the disputed land is situated or any particular usage of the family of the defendant and to consider in his decision the weight due to such evidence." That Regulation was repealed, but it is not suggested that the English law of primogeniture was introduced into Salsette by any later enactment as the *lex loci* of the island. Regulation IV of 1827 provides that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of the Government applicable to the case, and in the absence of such Acts and Regulations the usage of the country in which the suit arose ; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone."

We have, therefore, to ascertain how lands in Salsette in the case of its Christian inhabitants descended on an intestacy prior and subsequent to the year A. D. 1774 and down to the year 1866. A great mass of evidence has been taken in the case, which establishes that when a Christian inhabitant of Salsette died intestate previous to 1866, his property, both moveable and immoveable, devolved, not on his eldest son, but on his sons equally. That evidence is by no means consistent as to what the rights of the widow and daughters are considered to have been. As it was mainly directed to establish the non-existence of the law of primogeniture, and was not directed to the ascertainment of the rights

(1) P. J. (1890), p. 215. (2) 5 B.H.C.R.O.C.J. 172. (3) 1 M.I.A. 175 (271).

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of members of the family other than sons, it would be unsafe to draw any general conclusions from it. It is, however, clearly established that, as a fact, sons, in the absence of a widow and daughters and other persons entitled to share in it, share equally the property of their father.

It is argued for the appellant Jalbhai that the evidence proves that the Christian inhabitants of Salsette, being converts from Hinduism, must be taken to have retained the Hindu law in its entirety, and that the Court ought to administer in this case the Hindu law pure and simple to the parties. Counsel relied on the case of *Abraham* v. *Abraham* (1) in support of his argument. The Subordinate Judge seemingly adopted it. The difficulty in [688] acceding to it is that it is quite different from the case made by his client in the pleadings. In the first paragraph of the written statement the defendant says that "the terms *ancestral property* and *family property* employed by the plaintiff are entirely inappropriate, the plaintiff and his family being Christians. In the year 1846 the succession to property belonging to any member of the plaintiff's family was governed by English law." The evidence undoubtedly establishes that sons take an equal share in their father's estate, as the plaintiff throughout has contended; but whether they do so in consequence of the prevalence of the Hindu law, or of the Portuguese law amongst this class, or of a usage existing amongst them from their having retained or adopted these respective laws in a modified form, it is unnecessary, and under the circumstances would be improper for us to determine.

The defendant, however, also seeks to establish the validity of the mortgage on the ground that "it was executed by Pedro with the assent of his brothers Minguel and Enos, and that the money raised upon it was spent in such a way that the mortgage would still have been good if Pedro had been, as he was not, the manager of a Hindu family at the time he made it." The issue raised on that contention has been decided by the Subordinate Judge in favour of the defendant, and we think that that finding ought to be supported. We cannot, however, find on the record before us that Mr. Kher went into this question, or how the First Class Subordinate Judge, who ultimately decided the case, considered himself precluded from entering upon it.

Although we are not prepared to hold, for the above reasons, that the property of Antonio descended upon his three sons Pedro, Minguel and Enos, as co-parceners under Hindu law, rather than as tenants-in-common as alleged by the plaintiff, yet we think that having regard to the fact that the Chiristian inhabitants of Salsette are for the most part descendants of converts from Hinduism (see Bombay Gazetteer, Vol. XIII, pp. 202, 204) and that Hindu usages as shown by the evidence prevail to a large extent amongst them in the mode of the management of their paternal estate, and as the plaintiff in his plaint, though alleging that the property devolved upon Pedro, Minguel and Enos as tenants-in-common, in para. 11 speaks of the other members [689] of the family being co-parceners with Pedro, and complains that the mortgage was not for the benefit of the family, we should not be justified in requiring the same direct proof of the authority of the manager of the family to mortgage the paternal estate under his management as we should require in the case of an English manager under similar circumstances, but should treat it much in the same way as if the family were still a Hindu family. The decision in *Abraham* v. *Abraham* is, we think, an express

(1) 9 M. I. A. 195 (199).

authority for our doing so. The case is also very similar in its circumstances to *Myna Boyee* v. *Ootaram* (1).

In this case Minguel, who had become a priest in early life, left the management of the paternal estate (at all events after the death of the mother, in 1865 probably) in the hands of Pedro assisted by his lame and delicate brother Enos, he himself returning from time to time to the family house and staying there for short periods only. From 1863 to 1865 Pedro sold several plots of land, and subsequently purchased other plots, the conveyances of the plots sold being executed sometimes by him and his mother and brother Enos, and sometimes by himself alone. Pedro also took a liquor contract from Government, and carried it on for some years, and altogether acted as a general manager invested with the largest powers. That which, however, leads to the conclusion most strongly that the mortgage was executed by the authority of Minguel is that when in 1882 Pedro and the plaintiff agreed to sell part of the property to one Maneckji in order to pay off the debt due on the mortgage, the plaintiff, who then held a power of attorney from Minguel, offered to execute the conveyance in Minguel's name (Ex. 144). Minguel's also lending his name to the sham proceedings in the Nasik Court to protect the property for Pedro and the plaintiff, tends to the same conclusion. The mortgage was also attested by Enos, who was assisting Pedro in the management. It was, therefore, not a clandestine mortgage. The evidence also shows that the money was raised and employed for the most part at all events in connection with the liquor contract and for the rebuilding of the family house. For these reasons we hold that the mortgage was made by the authority of Minguel and Enos and for family purposes, and was **[690]** binding upon the whole family. The absence of Minguel and his priestly office account for his not having himself signed or attested the mortgage. The true theory perhaps is that he abandoned the property wholly to his brothers. Enos died in or about the year 1876, and his interest in the equity of redemption then devolved on his brothers Pedro and Minguel. This is common ground.

We also agree with the Subordinate Judge that the award of the 27th October, 1881, presented to the Nasik Court and the consent order of February 10, 1882, that it should be filed, were collusive between Minguel represented by the plaintiff and Pedro. Two different Judges have arrived at that conclusion. The additional evidence put in in the present case places the question, we think, beyond doubt. The object of the conclusive award and order and the mode in which the object was carried out were these:—The plaintiff and his father Pedro were desirous of inducing the mortgagees to accept a small sum in payment of the mortgage debt. They accordingly caused it to be represented in a document, which was drawn up in the shape of an award, that Pedro had wasted the estate to the extent of Rs. 10,000 and that Minguel had received nothing. The document then awarded that Pedro should give possession of the whole residue of the estate to Minguel. This document Pedro and the plaintiff caused some three persons to sign as though it were an award made by them. It was then presented to the Court at Nasik as an award under s 525 of the Code of Civil Procedure, and eventually on the application of the plaintiff as the attorney of Minguel and with the consent of his father Pedro it was filed as an award under s. 526.

(1) 8 M. I. A. 400 (420).

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This award and the subsequent proceedings thereon must, we consider, be discarded from consideration in this case (1) because the decision of the appellate Court in suit No. 308 of 1888 has decided that the plaintiff cannot base his title on the decree of the Nasik Court *as a decree*, the mortgagee not having been a party to these proceedings. We do not decide that, if that decree had operated as an assignment to Minguel, the decision of the appellate Court would have precluded the plaintiff as executor **[691]** of Minguel from suing upon it *as an assignment* to redeem the mortgage. It is unnecessary to express an opinion upon that point, because (2) the award is not in itself an assignment, but merely gave Minguel the right to an assignment from Pedro, and the order of the Nasik Court gave it no further force beyond this, that it conferred on Minguel the right to have a decree passed according to it under s. 522. No decree, which might have operated as an assignment, was ever passed. (3) The award being a sham award, and the order for its filing being a collusive order, intended to have no effect between the parties to it, but to be used as a blind to deceive the mortgagee, cannot be used against any one except possibly the parties to it and their privies—*Ahmedbhoy* v. *Vulleebhoy* (1); Evidence Act (I of 1872), s. 44.

Minguel died in 1883, leaving a will, dated 5th January, 1881, by which he bequeathed his interest in the property in question to the plaintiff. The plaintiff has duly proved it. It is contended by counsel for the defendant that Minguel had no power to deal with the property by will, as he was an undivided co-parcener governed by Hindu law, but we cannot accede to that contention. It is not the case made by either party upon the pleadings, and the evidence has not been directed to meet it. Even if we assume that the Christians of Salsette retained the Hindu law of inheritance down to 1866, it is clear that, as pointed out in *Abraham* v. *Abraham* (*supra* at p. 241) and *Myna Boyee* v. *Ootaram* (*supra*) the holding of land in co-parcenery incapable of being dealt with by will is not a branch of the law of succession proper, and that the Hindu law of succession or inheritance can well be retained by Christian converts without their at the same time being bound by its rule of strict co-parcenership. The evidence in this case is conflicting as to the power of a Salsette Christian to deal with his share in ancestral property by will, but read as a whole, is, we think, in favour of his being considered entitled to do so. The plaintiff in this view is, therefore, in the same position in regard to the equity of redemption in the mortgaged property as Minguel would have been had he survived.

[692] We have next to consider the effect of the suit on the mortgage which in April, 1883, the mortgagee filed against Pedro alone in the Nasik Court (subsequently transferred to Thana), and to which he did not make the plaintiff as executor of Minguel a party. In that suit a decree was on the 11th May, 1885, passed for the sale of the mortgaged property. The defendant became the assignee of that decree. The property was sold under it, and the defendant purchased on the 27th September, 1886, and in that capacity now claims to be the absolute owner of the property. We have already pointed out that it was unnecessary to make the plaintiff a party to these proceedings as pretended assignee of the equity of redemption under the consent order of the 10th February, 1882. Independently of that decree the plaintiff as executor of Minguel was the owner of half of the equity of redemption. The question whether the proceedings bound him, is

(1) 6 B. 572.

one of difficulty. Section 85 of the Transfer of Property Act (IV of 1882) does not apply to the case, as it was not then in force in Thana. The reason why the plaintiff did not apply to be made a party to these proceedings, must have been that he did not at that time desire to redeem the mortgage, inasmuch as he was then preparing to assert his title to the property free from the mortgage under his fraudulent decree, a claim which he subsequently unsuccessfully asserted in suit No. 308 of 1888 in the Thana Court and in appeal in this Court. The mortgagee did not make him a party, as Pedro was supposed to represent the family in the matter of the mortgage.

The question is, can the plaintiff now redeem on the ground that he was not made a party to those proceedings. Although the parties are not members of a joint Hindu family, yet they appear to a considerable extent to govern their dealings as though they filled that character. If they were such members, the case of *Doulat Ram* v. *Mehr Chand*(1) would be exactly in point, as well as the case of *Vishnu Vithal* v. *Venkatrav Bhavanji*(2). The mortgage purported to mortgage the whole interest in the property and was made by Pedro the manager. The suit was brought against Pedro who had executed the mortgage, and asks that the debt may be satisfied out of the mortgaged property and **[693]** that the property may be sold. What was intended to be sold was the whole interest in the property, and that was what the defendant purchased. The above cases are not, we think, in conflict with *Shaik Abdulla* v. *Haji Abdulla*(3), where one only of the heirs of the mortgagor was made a party to the suit on the mortgage. The Privy Council in deciding *Doulat Ram* v. *Mehr Chand* (*supra*) do not suggest that the plaintiffs in that case were at all events entitled to redeem the property, as they had not been made parties to the suit in which the property was sold at the instance of the mortgagee. What their Lordships appear to us to hold is that the purchaser at the Court's sale obtained a good title to the property purchased by him subject to the right of the co-parceners, who were not made parties to the suit, to dispute the sale on the ground that the original mortgage was not binding upon them. We think that the principle of these decisions governs the case before us, and that the defendant purchased the whole interest in the mortgaged property subject to the right of the plaintiff to show that his interest derived from Minguel was not bound by the mortgage. This he has failed to do. The plaintiff is not, for the reasons we have given, entitled as absolute owner to recover half the mortgaged property from the defendant who has obtained possession of it under his purchase. That portion of his claim has been correctly disallowed by the Subordinate Judge.

The Subordinate Judge has, however, allowed the plaintiff to redeem half the mortgaged property on payment of half the sum due under the mortgage. If, subject to the plaintiff's right to dispute the mortgage being binding upon his share in the mortgaged property, the decree and sale by the Thana Court affect his interest, he cannot now be entitled to redeem at all. We have held, for the reasons which we have stated, that they do. This portion of the plaintiff's claim cannot, therefore, be supported, and the suit ought to have been dismissed *in toto*. We disallow the plaintiff's cross objections and allow the defendant's appeal with costs throughout.

Suit dismissed.

(1) 14 I. A. 187 = 15 C. 70. (2) P.J. (1889), p. 248. (3) 5 B. 8.

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APPEL-LATE CIVIL.

19 B. 694.

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[694] APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

MINGALE ANTONE KANE (*Original Plaintiff*), *Applicant v.* RAM CHANDRA BA'JE (*Original Surety*), *Opponent.**

[28th August, 1894.]

Civil Procedure Code (Act XIV of 1882), s. 349—Surety—Insolvency of a defendant—Surety under s. 349—Default of principal—Liability of surety—Mode of enforcing liability of surety—Practice—Procedure.

The Civil Procedure Code (Act XIV of 1882) provides no means for enforcing in execution a surety bond passed under s. 349. The proper course of the plaintiff is to obtain an assignment of the bond with a view to suing on it.

[Rel., 12 C.L.J. 419=7 Ind. Cas. 917 ; R., 31 C. 162.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order passed by Rao Saheb G. V. Saraiya, Subordinate Judge of Bassein, in an execution proceeding.

The plaintiff obtained a decree against one Baba Trimbak Naik, and in execution applied for his committal to jail. On the 5th June, 1893, Baba Trimbak applied to be declared an insolvent. He was thereupon released on his furnishing security to appear when called upon, and the opponent Ramchandra became his surety (Civil Procedure Code (Act XIV of 1882), s. 349).

Baba failed to appear on the appointed day, namely, the 16th September, 1893, and on the 18th September the plaintiff applied for a warrant for his re-arrest. The warrant was returned unserved, as the bailiff was unable to find him. On the 14th October, 1893, the plaintiff's execution darkhast (application) was dismissed owing to the plaintiff's absence.

On the 28th November, 1893, the plaintiff applied for an order to recover the amount due from the surety Ramchandra (the opponent). The Subordinate Judge rejected the application, holding that he had no power to grant it.

The plaintiff applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling upon Ramchandra to show cause why the order of the Subordinate Judge should not be set aside on the ground that in rejecting the application he committed an error in law and failed to exercise a jurisdiction vested in him.

[695] *Govardhanram M. Tripathi*, appeared for the plaintiff in support of the rule.—The Civil Procedure Code does not provide for proceeding against a surety appointed under s. 349. We, therefore, required authority from the Court to recover the amount of the surety bond from the surety —*Poynor Bibee* v. *Nujjoo Khan* (1); *Moidin* v. *Chandu* (2). The Court should have assigned the surety bond to us, so that we might institute a suit on it.

Mahadeo C. Apte appeared for the opponent (surety) to show cause:—The applicant must show, if he wishes to have the bond given to him,

* Application No. 41 of 1894 under the extraordinary jurisdiction.

(1) 5 C. 437. (2) 7 M. 273.

that the execution proceedings are still pending. But the execution proceedings terminated with the dismissal of the darkhast owing to the applicant's default on the 14th October, 1893. The execution proceedings having terminated, the surety is absolved from liability—*Lalji Sahoy* v. *Odoya Sunderi*(1).

JUDGMENT.

FULTON, J.—The facts of this case are explained in the plaintiff's application of the 28th November, 1893, to the Subordinate Judge as follows:—"The plaintiff presented darkhast No. 657 praying that his judgment-debtor the defendant might be committed to jail. The defendant on 5th June, 1893, applied to be declared an insolvent, and was released on his furnishing security on the same day to appear when called upon. He did not, however, subsequently appear in the course of the execution proceedings, and is said to have absconded. On the 14th October the darkhast was dismissed owing to the plaintiff's absence, and on the 28th November the plaintiff prayed the Court to give him such authority as would enable him to recover the amount due from the surety." The Subordinate Judge thereupon made the following order: "I think that I have no power to grant this application. The applicant's remedy against Ramchandra Baje, if any, will be to proceed in the manner prescribed by the Civil Procedure Code. I refuse the application."

Apparently the Subordinate Judge thought that a plaintiff might apply for execution against a surety under s. 349 of the Code as against one under s. 336. But in this view we [696] are unable to concur. The Civil Procedure Code provides no means for enforcing in execution a surety bond passed under s. 349, and the decisions in *Poynor Bibee* v. *Nujjoo Khan* (2) and *Moidin* v. *Chandu* (3) show that the proper course is for the plaintiff to obtain an assignment of it with a view to suing on it.

Mr. Apte for the opponent contended that with the dismissal of the plaintiff's darkhast the surety's liability terminated, and drew our attention to the decision in *Lalji Sahoy* v. *Odoya Sunderi* (1). But that decision referred to the enforcement of a surety bond under s. 336 and not to one given under s. 349 in insolvency proceedings which might be continued by the petitioner himself, and would not terminate owing to the absence of the judgment-creditor at whose instance the petitioner was originally arrested, and might also affect other creditors equally with such judgment-creditor.

In the present case the defendant failed to appear on the 16th September, and the plaintiff on the 18th applied for a warrant for his re-arrest. The warrant was returned unserved owing to the bailiff's being unable to find the defendant, and on the 14th October the darkhast was dismissed owing to the absence of the plaintiff, who may not unreasonably have thought it useless to prosecute it further against the judgment-debtor. The question whether the liability which the surety incurred on the 16th September, when the defendant first failed to appear, was discharged by the subsequent dismissal of the darkhast is one that must be decided between the parties concerned in any suit which may hereafter be instituted on the bond. *Prima facie*, however, there appears to be sufficient ground for the assignment to the applicant of the bond in question.

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(1) 14 C. 757. (2) 5 C. 437. (3) 7 M. 273.

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We must, therefore, make the rule absolute and direct the Subordinate Judge to assign it to the applicant. If the applicant file a suit on the bond within six months from this date, he may recover from the opponent his costs of this application in both Courts; otherwise he must pay the opponent's costs.

Rule made absolute.

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19 B. 697.

[697] APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

KASHIBA BIN NARSAPA NIKADE (*Original Plaintiff*), *Appellant v.* SHRIPAT NARSHIV, DECEASED, BY HIS SON AND HEIR RAMCHANDRA AND ANOTHER (*Original Defendants*), *Respondents.**

[28th August, 1894.]

Domicil—Widow's domicil—Capacity to contract—Law—Law of domicil regulates capacity to contract—Minor—Contract by a minor - Liability of minor—Contract Act (IX of 1872), ss. 11, 128—Principal and surety—Surety of a minor—Liability.

The domicil of a widow is the same as that of her husband, unless she has changed it after his death.

By the law of England the question of the capacity of a person to enter into a contract is decided by the law of his domicil. This principle of English law is adopted by s. 11 of the Contract Act (IX of 1872).

A minor cannot be sued on a bond executed by him during minority and not ratified by him after his majority.

A surety to a bond passed by a minor for moneys borrowed for purposes of litigation not found to be necessary, is liable to be sued on it whether the contract of the minor is considered to be void or voidable.

[R., 23 B 1; 33 C. 713 (752)=3 C.L.J. 422=10 C.W.N. 673; L.B.R. (1893—1900) 656; U.B.R. (1897—1901), 313.]

SECOND APPEAL from the decision of C. G. W. Macpherson, District Judge of Belgaum, reversing the decree of Rao Saheb R. G. Bhadbhade, Subordinate Judge of Chikodi.

The plaintiff sued to recover Rs. 1,194-12-0 due on a bond, dated 29th November, 1887, executed by the first defendant, who was a minor. The second defendant and his son, the third defendant, were sureties.

Defendant No. 1 (Lakshmibai) did not appear at the hearing of the suit. Defendant No. 2 was dead. The third defendant (Ramchandra) contended that the bond was void, as the first defendant was a minor when it was executed, and that he, therefore, was not liable as surety. He also contended that the suit was not maintainable in the Court at Chikodi, as the first defendant resided at Kolhapur (outside British territory) where the bond was executed.

The Subordinate Judge found that though the first defendant, the executant of the bond, resided at Kolhapur, the suit was maintainable in the Chikodi Court, inasmuch as the third defendant [698] resided within its jurisdiction; that as the parties resided within British territory, and the place of payment being obviously the creditor's residence, the validity of the contract must be tested by the law of British India; that the bond

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* Second Appeal No. 403 of 1892.

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was voidable at the instance of the first defendant, but was not void, and that the deceased second defendant and his son, the third defendant, being sureties on the bond, they were liable to the plaintiff's claim. He, therefore, passed a decree awarding the claim with costs.

The defendants preferred separate appeals. The Judge found that the first defendant was subject to English law, and that by that law she was a minor when she executed the bond, and was, therefore, not liable upon it, as she had not ratified it after attaining majority. He held that as the first defendant was not liable, the third defendant, being a surety, was not liable, and he accordingly reversed the decree.

The plaintiff preferred a second appeal.

Vikaji, with *Gokuldas K. Parekh*, for the appellant (plaintiff).

Lang (Advocate General), with *Mahadeo C. Apte*, for respondent No. 1 (defendant No. 3).

Inverarity with *Dhondu M. Sauzgiri*, for respondent No. 2 (defendant No. 1).

The following authorities were cited in the argument:—Story's Conflict of Laws, arts. 82, 637 (*a*); Westlake on Private International Law, p. 45, art. 353; Tudor's Leading Cases, p. 284; Chitty on Contracts, pp. 209, 586, 687; Addison on Contracts, (8th Ed.), p. 127; Parson's Law of Contracts, Vol. I, p. 329; Indian Contract Act (IX of 1872), ss. 11, 64, 126, 128; Mayne's Hindu Law, arts. 191, 196; *Cooper* v. *Cooper*(1); *Hari Ram* v. *Jitan Ram*(2); *Fatima Bibi* v. *Debnauth Shah*(3); *Mahmed Arif* v. *Saraswati Debya*(4); *Hanmant Lakshman* v. *Jayarao Narsinh*(5).

JUDGMENT.

FARRAN, J.—This was a suit on a bond executed by the defendant Lakshmibai to secure payment to the plaintiff of Rs. 1,000 and interest. The defendant Lakshmibai was the widow of **[699]** Shidojirao N. Nimbalkar, a British subject, who had his domicile in British India. At the time of execution she was staying in Kolhapur. She was then admittedly under the age of eighteen years, but would seem, though there is no express finding upon the point, to have completed her sixteenth year. The money was borrowed in connection with a suit about her *desgat* property. The District Judge states in his judgment that the litigation was not shown to be necessary. The defendant Ramchandra's father, since deceased, joined in the bond. Its terms, so far as they related to him, were as follows:—" Security for the recovery of this amount is myself (namely) Shripat Narsinha Diwanji, inhabitant of Chikodi. The abovenamed Shrimant Matoshri Bai Saheb will pay the amount as agreed above. Should she fail to pay, I will pay the abovementioned amount personally without pleading her excuse and take back this bond. If it is not so paid, you should get it paid off from my income." The defendant Ramchandra also executed the bond to show his consent to it and undertook to pay it if his father did not.

At the original hearing, the defendant Lakshmibai did not appear. Ramchandra appeared and pleaded that Lakshmibai was a minor when the bond was given, and that his father Shripat and he were not, therefore, liable upon it. The Subordinate Judge passed a decree against the defendants. Both appealed, and the District Judge, in appeal, dismissed

(1) 13 App. Ca. 88. (2) 3 B.L.R. 426. (3) 20 C. 508.
(4) 18 C. 259. (5) 13 B. 50.

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the suit against both. The present is an appeal by the plaintiff against the decision of the District Judge.

The first question which arises for consideration is by what law the minority of Lakshmibai and her consequent ability to contract are to be determined. As she was a widow of a domiciled British subject, and is not shown to have changed her domicil since his death, it must be taken that her domicil, when she executed the bond, was in British India. Now it has been long a fertile source of controversy whether, according to English law, the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicil or by the *lex loci contractus*. It is so stated by Lords Watson and Macnaghten in *Cooper* v. *Cooper* (1) in the House of Lords. In the same **[700]** case Lord Halsbury after saying that there is a singular concurrence of opinion amongst jurists upon the question, says that the capacity to contract is regulated by the law of domicil, citing Story's Conflict of Laws, pl. 64. It was not necessary to decide the point in that case, as the domicil of the lady who entered into the contract and the *lex loci contractus* were the same. However, in *Sottomayor* v. *De Barros* (2) the Court of appeal laid it down as a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. Westlake considers the English law to be now settled on that footing: Priv. In. L. (3rd Ed.), p. 43. The framers of the Contract Act in s. 11 seem to have adopted the same view. This was also what the contracting parties themselves thought and intended, as they made their contract on paper impressed with a British stamp. We must, therefore, hold that Lakshmibai was a minor at the time when she entered into the contract in question, being governed by the provisions of Act IX of 1875.

The same reasoning also shows that the enforceability or otherwise of her contract must be determined by the provisions of the Contract Act in so far as they relate to her capacity to contract. These provisions in their relation to minors have been the subject of judicial comment and decision in several cases. In this Court it has been laid down that a minor can sue upon a bond passed in his favour—*Hanmant* v. *Jayarao*(3). That carries with it the broader proposition that where the consideration for a contract on the part of the infant is wholly executed he can sue to obtain the benefit of such contract. No reasons are given by the Court for its decision. The ruling in *Sashi Bhusan* v. *Jadu Nath* (4) was probably followed. It was there ruled that the law under the Contract Act was the same as the law in England, where a contract entered into with a minor is only voidable at the option of the minor.

On the other hand, in the latest case, we believe, on the subject, Norris, J., expressed a strong opinion that a minor in British India cannot contract at all—*Fatima* v. *Debnauth* (5). It had **[701]** been previously held in the Calcutta High Court that the conveyance of an infant not avoided by him in his lifetime was valid—*Mohamed Arif* v. *Sarasvati* (6). That was really a decision on s. 7 of the Transfer of Property Act, but the Judges in coming to it purported to follow *Sashi Bhausan* v. *Jadu Nath* (*supra*), which was a ruling on the Contract Act. In the view we take of this case it is not necessary for us to decide whether the contract of a minor under the Contract Act is void or voidable.

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(1) 13 App Ca. 105, (107). (2) L.R. 3 P.D. 5. (3) 13 B. 50.
(4) 11 C. 552. (5) 20 C. 508. (6) 18 C. 259.

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In the case of Lakshmibai, who, as we have held, must be considered to have been a minor at the time she executed the bond, it has not been shown that she has ratified her contract since she has attained her majority. The suit as against her has, therefore, been properly dismissed.

Shripat was also domiciled in British India, as is the plaintiff. The contract of Shripat shortly expressed amounted to this:—If the minor lady does not satisfy the bond, I will do so without pleading her excuse. By English law it is clear that Shripat would be liable under such a contract. The proposition is thus expressed in Chitty on Contracts (12th Ed., p. 588): "But the rule that a party cannot be liable on a contract of guarantee unless the principal be also liable, is in some cases true in form or words rather than in substance. Thus, in the case of a guarantee to answer for the price of goods, not necessaries, to be sold to an infant or other person incompetent to contract, there is no doubt that the party guaranteeing, though professedly contracting only in the character of a surety, would be responsible: for either he could not urge the incapacity of the supposed principal, or he might by construction of law be himself treated as the principal." The same law is laid down in De Colyar on Guarantees, p. 85, where he cites the cases of *Harris* v. *Huntbach* (1) and *Duncomb* v. *Tickridge* (2). The judgment of Foster, J., in the former case and the reasoning of the Court in the latter fully bear out his statement of the law. The other text books are to the same effect—Addison on Contracts (9th Ed.), p. 31; Parson's Law of Contracts, Vol. II, p. 4, an American work.

[702] English law on this subject is thus applied to infants whose contracts are by that law voidable only. The Contract Act does not contain any provision which prevents the same view being taken here. Section 128, which has been relied on for that purpose, only explains the *quantum* of a surety's obligation when the terms of the contract do not limit it as they often do. This is clear both from the language of the section itself and from the illustration. Neither has any reference to the nature of the obligation of the principal. There is nothing unlawful, immoral or even improper in lending money to a minor, and we can see no reason, in the absence of enactment to the contrary, why a person cannot contract to guarantee the performance by a third person of a duty of imperfect obligation.

The case is perhaps still more clear if the promise of the infant to repay the money is void. In that case the contract of the so-called surety is not a collateral, but a principal, contract. It is a conditional promise founded upon valuable consideration. It is like the case of a person, who, to appease the anger of a child, requests another to lend a guinea to the child to play with, and promises, if the child loses or does not give back the coin, to make it good to the lender. The promise in such circumstances is clearly that of a principal, and not of a surety, and the situation is not altered by its being called a guarantee. That case differs from the present in degree only, and not in principle, if the promise of Lakshmibai was void. This is the principle upon which Foster, J., really decided *Harris* v. *Huntbach* (*supra*), and the Court gave judgment in the old case of *Duncomb* v. *Tickridge* (*supra*), though for the reason given by De Colyar in his treatise the latter case cannot be treated as a binding authority.

(1) 1 Burrow. 373. (2) Aleyne. 94.

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The same distinction was taken in *Goodman* v. *Chase* (1). There the defendant, in consideration that the plaintiff would discharge A B., whom he had taken under a writ of *ca sa*, promised to pay A. B.'s debt. The discharge of A. B. from custody operated as a release of the debt of A. B. The promise of the defendant did not come into operation until the debt of A. B. was released. The undertaking of the defendant was, therefore, held to be that of a principal, and not collateral. *Butcher* v. [703] *Steuart* (2) and *Bird* v. *Gammon* (3) are instances of the same kind. See *Berkmyr* v. *Darnell* (4). Whether, therefore, the promise of Lakshmibai contained in her bond be voidable or void, the result is the same. Shripat in either case was liable.

So far as the defendant Ramchandra, Shripat's son is concerned, we must set aside the decree of the District Court, and restore that of the Subordinate Judge, with costs throughout on the defendant Ramchandra. The decree of the District Court in so far as it dismisses the suit against the defendant Lakshmibai will be affirmed, with costs.

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19 B. 703.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* JANARDHAN DAMODHAR DIKSHIT.*

[5th December, 1894.]

Penal Code (Act XLV of 1860), s. 499—Defamation—Publication—Mode of publication defamatory though the imputation be true.

Under s. 499 of the Indian Penal Code (Act XLV of 1860) the person who publishes, and the person who makes, an imputation are alike guilty of defamation.

A Court may find that an imputation is true and made for the public good, but on considering the manner of the publication, (*ex. gr.*, in a newspaper), it may hold that the particular publication is not for the public good, and is, therefore, not privileged.

[R., 6 Bom. L.R. 131 (192).]

THIS was an application by the accused for the exercise of the High Court's Revisional Jurisdiction under s. 439 of the Code of Criminal Procedure (Act X of 1882).

The accused had been convicted of defamation under the following circumstances :—

The complainant, Hari Vinayak, was an inspector in the service of the Thana Municipality. The accused, who was a Municipal Commissioner, sent a letter, dated the 8th November, 1893, to the Municipal Secretary, the material portion of which was to the following effect :—

[704] " Hari Vinayak, Inspector, is a dismissed servant of the Local Board, and it is understood that he is also dismissed from the Forest Department, and that the said Inspector is also fined by the Local Board. Has this fact come to the notice of the (Municipal) Committee? If so, why is a man of such a questionable character employed by the Municipality? Are not other men available? If the fact has come to the notice of the Municipality, is anything being done about it?"

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* Criminal Application for Revision No. 269 of 1894.

(1) 1 B. and A. 297.
(2) 11 M. & W. 857.
(3) 3 Bing. N. C. 883.
(4) Smith L. C. Vol, I, 336.

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Before the Municipality could take any action on the matter, the accused published the letter in a newspaper called the *Suryodaya* in its issue of the 27th November, 1893. The complainant thereupon prosecuted him for defamation both for sending the above letter to the Municipality and for publishing it in the newspaper.

The accused pleaded that the statements in the letter were true, made in good faith, and for the public good ; and were, therefore, protected by exceptions 1, 3, 8, and 9 to s. 499 of the Penal Code.

The First Class Magistrate, who tried the case, convicted the accused under s. 500 of the Penal Code.

On appeal the Sessions Judge held that the imputations, complained of, were true and made in good faith, and in so far as they were communicated to the Municipal Committee were protected by exception I to s. 499 of the Penal Code; but he was of opinion that there was no justification for publishing the letter in a newspaper, and he, therefore, confirmed the conviction.

The following extract from the Sessions Judge's judgment gives his reasons :—

"But in dealing with the publication in a newspaper a different set of considerations come in. The accused, who was himself a Municipal Commissioner, was justified in bringing to the notice of the governing body of the Municipality facts going to show that one of their employes was undeserving of their trust. Some persons indeed would hold, it was his duty to do this. But was he justified in publishing the same facts in a newspaper? What is the public good in a case of this kind? Is it merely that the Municipality, the men's employers, should know of his character? Or that the general public should know of it? I cannot see that the public good is served by spreading abroad facts harmful to a man's reputation more widely than is necessary. It is argued that his employers are the general public of Thana; but this is not so. It is the municipal body and not the general local public that engages and dismisses municipal servants. It is well that the municipal governing body should know the character of their servants, but no good purpose is served by a [705] general knowledge in the public that a municipal servant is not of good character, unless the governing body, being acquainted with that fact, has determined to retain his services when they ought not to be retained. If that be the case, and it is not the case here, it may be for the public good that the public should know. Otherwise an extension of such knowledge beyond the governing body is far more of an injury to the servant than of a benefit to the public. On this point I refer to the second edition of Odger's Digest of the Law of Libel and Slander, pp. 243 to 246. In *Purcell* v. *Sowler* it was held that the charge against the medical officer of a poor law-union ought to be confined, in the first instance, to those whose duty it is to investigate the charges. In the case of *Simpson* v. *Downs* it was held that 'a letter sent to a newspaper by members of the Town Council and published therein, charging certain contractors for the erection of the borough jail with "scamping" their work, is not privileged: although preferring the same charge at a meeting of the Town Council probably would have been.'

"The general principle appears to be that the mode and extent of a privileged communication should not be more injurious than need be. The interests of the individual are entitled to protection as well as the interests of the public. It is for the public interest that a Municipality

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should not be served by an unworthy man, but that public interest would probably be sufficiently secured by informing the Municipality of the man's character; and to go beyond that, at least until it has been tried and failed in its object, is to injure a person more seriously than the public good requires.

"It is as well to note that the article in the *Suryodaya* complained of was not a report of proceedings at a municipal meeting. It states that a special general meeting was called for November 11th, but was not held, as there was no quorum; that the accused had given due notice of certain questions which were not put, as no meeting was held, but which are set out in the article as being of public interest. Amongst them of course is the question relating to Hari Vinayak. The others relate to other matters. Had the article been a full and true report of the proceedings of a meeting actually held, it would perhaps be privileged, but it was not this; it was not even a publication of the notice of questions. The insertion in an article of that kind of defamatory matter about an individual is not for the public good. To hold the contrary would be to give currency to a principle that would be a license to scandal, an encouragement to prying and impertinent curiosity, and an infraction of the right that the privacy of a man's past shall not be needlessly invaded. Therefore, I hold that in publishing the article in the *Suryodaya* the accused was guilty of defamation."

The accused now moved the High Court under its revisional jurisdiction.

Starling (with *Narayan Ganesh Chandavarkar*):—The Sessions Judge has found that the imputations complained of are true, and made in good faith, and for the public good so far as they were addressed to the Municipal Committee, but that their publication in a newspaper was not for the public good. **[706]** The present case falls under Excep. I, which places no limitations upon the mode or manner of publication. The case of *Purcell* v. *Sowler* (1) does not apply. In that case the imputation was clearly false. Here the imputation is true. The reason why it was published in a newspaper was that the attendance at municipal meetings was generally insufficient to make a quorum. The accused, therefore, felt that it was his duty to bring the matter to the notice of the public: Odger on Libel and Slander, p. 243.

There was no appearance for the complainant.

JUDGMENT.

JARDINE, J.—Section 499 of the Indian Penal Code defines defamation. It brings under the criminal law the person who publishes as well as the person who makes the imputation. The same distinction is made in the first exception, the one pleaded for the accused by Mr. Starling. That exception exempts any imputation made or published for the public good, and concludes as follows—whether or not it is for the public good is a question of fact. The learned Sessions Judge dealing with the fact in appeal before him found that the imputations were true and made for the public good. But on consideration of the manner of the publication, *i. e.*, in a newspaper, he held that the publication was not for the public good and cited *Purcell* v. *Sowler* (1). The reasons given show that the finding is substantially one on the facts, and, therefore, such as this Court,

(1) 2 C. P. D. 215.

sitting in revision, is not inclined to interfere with, except for grave reason. We are of opinion, on the words of the sections, that the Sessions Judge was competent, while acquitting under the first exception as regards the mere making, to uphold the conviction on the ground that the publication, namely the particular publication in the newspaper, was not for the public good. We do not differ from his reasons. This interpretation of s. 499 is in accord with the views as to the reasons of the enactment expressed in the *Queen* v. *Sankara* (1) and *Thiagaraya* v. *Krishnaswami* (2.)

Appliction dismissed.

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[707] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

RUSSOOBAI (*Original Plaintiff*), *Appellant* v. ZOOLEKHABAI (*Original Defendant*), *Respondent.** [8th March, 1895.]

Inheritance—Step-mother—Right of step-mother to succeed to her step-son in preference to his paternal first cousin.

A step-mother succeeds to the property of her step-son in preference to the step-son's paternal uncle's son.

[**N.F.**, 37 C. 214=11 C.L.J. 588=14 C.W.N. 443=5 Ind.Cas. 135; **Appr.**, 16 Bom. L. R. 699; **R.**, 36 B. 120=13 Bom. L. R. 863=12 Ind. Cas. 359; 5 Ind. Cas. 748=6 N.L.R. 39; 20 Ind. Cas. 557=9 N.L.R. 102.]

SUIT by a step-mother to recover her step-son's property from his widow on the remarriage of the latter.

The parties were Kutchi Memon Mahomdans, and as such subject to Hindu law (3).

The plaintiff was the widow of one Haji Joonas Haji Abdul Sackoor. The defendant (Zoolekhabai) was the widow of Haji Jackeria Haji Joonas, the son of Haji Joonas Haji Abdul Sackoor. The plaintiff was the step-mother of the said Haji Jackeria.

Haji Jackeria died in 1876, and his widow (the defendant) came into possession of a large amount of moveable property (*viz.*, money, ornaments, jewels, &c.) which had belonged to him. The defendant subsequently remarried, and the plaintiff filed this suit claiming the said property as the nearest heir of Haji Jackeria. She alleged in the plaint as follows:—

"5. The defendant has since remarried; and the plaintiff says that according to the custom and usage of the Kutchi Memon community to which the said Haji Jackeria belonged, the defendant has thereby forfeited all her interest in her said husband's estate, and also in the said ornaments presented to her as aforesaid; and the plaintiff as the nearest heir of the said Haji Jackeria is now entitled thereto."

The defendant filed a written statement in which she stated (*inter alia*) as follows:—

"5. The defendant denies that there is any custom or usage as alleged in paragraph 5 of the plaint. The defendant denies that she has

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* Suit No. 481 of 1891; Appeal No. 833.

(1) 6 M. 381 (396). (2) 15 M. 214 (217).

(3) See *Mahomed Sidik* v. *Haji Ahmed* (10 B. 1); *Abdul Cadur* v. *C.A. Turner* (9 B. 168).

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forfeited her rights and interests in the property mentioned in the plaint by her remarriage as alleged. Even if such a forfeiture did take place on remarriage, the defendant submits that the plaintiff is not the person who would be entitled to such property, nor would she be entitled to any of the property claimed in this suit."

[708] It appeared that the deceased Haji Jackeria left a first cousin (a paternal uncle's son) him surviving.

At the hearing before Farran, J., the following issues were raised :—

(1) Whether the plaintiff is nearest heir of Haji Jackeria, and as such entitled to maintain this suit ?

(2) Whether the custom alleged in paragraph 5 of the plaint is a valid and subsisting custom of the Kutchi Memon community ?

(3) Whether at the date of the defendant's remarriage she had any property liable to be forfeited under the alleged custom ?

(4) Whether the plaintiff is entitled to any and what relief in this suit ?

Counsel for the parties agreed that the first issue should be tried first ; as, if it should be found in the negative, the decision would dispose of the suit.

Lang (Advocate-General) and *Scott*, for plaintiff.—They cited *Ashabai* v. *Hari Tyeb* (1) ; *Abdul Cadur* v. *C. A. Turner* (2) ; West and Bubler's Hindu Law (3rd Ed.), p. 471 ; *Gojabai* v. *Shrimant Shahajirao* (3).

Jardine and *Russell*, for defendant.—They cited Mayne's Hindu Law (5th Ed.), para. 522 ; *Kesserbai* v. *Valab Raoji* (4) ; *Kumaravelu* v. *Virana* (5) ; *Muttammal* v. *Vengalakshmiammal* (6) ; *Mari* v. *Chinnammal* (7) ; Mitakshara, ch. II, s. 5, pl. 4.

FARRAN, J.—I think the case is governed by the Mitakshara, ch. II, s. 5, pl. 4. It appears that Haji Jackeria, the defendant's former husband, whose property is in question here, had an uncle (Haji Cassum) who was his father's brother. That uncle has left a son (Ahmed Haji Cassum). He is, therefore, a named heir, and as such excludes a female as wife of a *gotraja sapinda*, even though nearer in relationship. It is quite clear, [709] upon the authorities, that the term " mata " does not include the step-mother. I find the first issue in the negative and dismiss the suit with costs.

The plaintiff appealed.

Badrudin Tyabji and *Inverarity*, for the appellant.

Lang (Advocate-General) and *Macpherson*, for the respondents.

In addition to those cited in the lower Court the following authorities were cited :— *Rachava* v. *Kalingapa* (8) ; *Rakhmabai* v. *Tukaram* (9) ; *Vithaldas* v. *Jeshubai* (10).

JUDGMENT.

SARGENT, C. J.—The question raised by this appeal is whether the step-mother or a paternal uncle's son has the preferable right of succession. In *Kesserbai* v. *Valab Raoji* (4), Westropp, C. J., says that although the step-mother cannot take as heir under the term " mother," it is a necessary inference from the cases of *Lakshmibai* v. *Jayram Hari* (11) and *Lallubhai* v. *Mankuverbai* (12) that she is entitled to inherit as a *gotraja*

(1) 9 B. 115. (2) 9 B. 158. (3) 17 B. 114.
(4) 4 B. 188 (208). (5) 5 M. 29. (6) 5 M. 32.
(7) 8 M. 107. (8) 16 R. 716 (718). (9) 11 B. 47 (52).
(10) 4 B. 219. (11) 6 B.H. C. R A. C. J. 152. (12) 2 B. 388.

sapinda. The latter case as explained by the judgment in *Rachava* v. *Kalingapa* (1) must be taken as deciding that the widows of *gotraja sapindas* in the case of collaterals are to be preferred to the male *gotrajas* in a more remote line, and a *fortiori* the widow of a male *gotraja* in the ascending line, which is the case here, will have that preference over such collateral. Unless, therefore, there is an exception to that rule, the step-mother would appear to have a prior right to the paternal uncle's son, who represents a remoter line of succession. Mr. Justice Farran, however, considers that the express mention of the paternal uncle's son in Mitakshara, ch. II, s. 5, pl. 4 has that effect.

In *Kesserbai* v. *Valab Raoji* (2), where the question was between the step-mother and the half-sister, Westropp, C.J., says (p. 209): "There was not any intention on the part of the Court which decided *Lallubhia* v. *Mankuvarbai* to displace a person so specially introduced" as included in the term "brothers" who are one of the "compact series of heirs."

[710] The uncle's sons are indeed mentioned in pl. 4 of ch. II, s. 5, of the Mitakshara, which introduces them as belonging to the class described in s. 3 as "sprung from the same family with the deceased and connected by *funeral* oblations, *i.e.*, the paternal grandfather and the rest," but they cannot be regarded as specially mentioned in the succession so as to exclude the operation of the above rule. Moreover, there is force in what is said in West and Buhler (3rd Ed.), p. 472, that the step-mother "ought to be placed, on account of her near relationship to the deceased, immediately after the paternal grandmother, up to whom only the succession is settled by special texts."

We must, therefore, reverse the decree of the Court below and declare that the plaintiff is the nearest heir of Haji Jackeria, and send back the case for disposal after finding on the remaining issues. Costs to abide the result.

Case remanded.

Attorneys for appellant.—Messrs. *Tyabji, Dayabhai and Co.*
Attorneys for defendant.—Messrs. *Bhaishankar and Kanga.*

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19 B. 710.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

JEYNARAYAN MEGHRAJ AND ANOTHER (*Plaintiffs*) *v.* ISMAIL KURIMALI AND OTHERS (*Defendants*)*
KHETSIDAS HURMOOKHROY (*Claimant*).

[15th June, 1895.]

Execution—Decree—Attachment under decree of High Court of property already attached under decree of Small Causes Court—Claim to attached property, by what Court decided—Civil Procedure Code (Act XIV of 1882), s. 272—Jurisdiction—Practice—Procedure.

In execution of a decree obtained in the High Court the plaintiffs, on the 22nd of March, 1895, attached certain property of the defendant, which, however, had been already attached on the 22nd of February, 1895, by one Rajbai, who had obtained a decree against defendant in the Court of Small Causes. The plaintiff's attachment was, therefore, effected under s. 272 of the Civil Procedure Code

* Suit No. 143 of 1894.

(1) 16 B. 716 (718). (2) 4 B. 188 (208).

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(Act XIV of 1882) by a notice addressed by the Prothonotary of the High Court to the Registrar of the Small Causes Court. The claimant was mortgagee in possession and the defendants were his tenants. On the 28th February he had lodged a claim in the Small Causes Court [711] to the said property as mortgagee in possession, and on the 25th March, 1895, a consent order was passed by the Chief Judge of that Court directing that Rajbai's attachment should stand subject to the claimant's claim.

On the 22nd April, 1895, the claimant applied to the Chief Judge of the Small Causes Court to issue a notice to the plaintiffs in this suit, under s. 272 of the Civil Procedure Code, to determine the question of priority of claim to the attached property between him and the plaintiffs. His application was refused, the Chief Judge being of opinion that he could not interfere in a High Court, suit. The claimant then filed his claim in the High Court, and took out this summons to remove the plaintiff's attachment.

Held, that under s. 272 of the Civil Procedure Code, the Small Causes Court was the only Court to decide the question of priority between the claimant and the plaintiffs.

IN chambers. Summons taken out by the claimant (Khetsidas Hurmookhroy) dated 15th May, 1895, calling on the plaintiffs to show cause why an attachment levied by them on certain property as belonging to the defendants should not be removed, &c.

The plaintiffs obtained a decree in this suit against the defendants for a sum of Rs. 5,839. In execution of this decree they on the 2nd March, 1895, attached certain goods as belonging to the defendants. This property had been already attached on the 28th February, 1895, in execution of a decree obtained by one Rajbai against the defendants in the Bombay Court of Small Causes (suit No. 27498 of 1894). The attachment of the plaintiffs on the 2nd March, 1895, was, therefore, effected by a notice under s. 272 of the Civil Procedure Code (Act XIV of 1882) addressed by the Prothonotary of the High Court to the Registrar of the Small Cause Court.

The claimant was the landlord of the house in which the attached property was lying, and the defendants were his tenants. He had on the 28th February, 1895, lodged in the Court of Small Causes a claim to the said goods as mortgagee in possession under a Gujarati writing dated the 20th February, 1895. This claim came before the Chief Judge of that Court for investigation on the 25th March, 1895, and a consent order was passed directing that Rajbai's attachment should stand subject to the claimant's claim.

On the 22nd April, 1895, the claimant applied to the Chief Judge to issue a notice to the plaintiffs, under s. 272 of the [712] Civil Procedure Code (Act XIV of 1882), to attend in order to determine the question of priority of claim to the said property as between the claimant and the plaintiffs, but the Chief Judge declined to grant the application, being of opinion that he had no jurisdiction to issue such a notice against the plaintiffs. In his order he said :—

"I am of opinion that applicant should commence by filing a claim in the High Cout, which may, if that Court so order, be transferred here for this Court to adjudicate under the proviso of s. 272. It would not, I think, be right for this Court to issue the notice prayed for, as that only could be done by in effect assuming a jurisdiction in the High Court suit which this Court does not possess."

The claimant thereupon filed his claim to the said property as mortgagee in possession, and on the 15th May, 1895, took out the above mentioned summons to remove the plaintiffs attachment.

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Motilal, for the claimant, in support of the summons.
Inverarity, for the plaintiffs, *contra*.

JUDGMENT.

STARLING, J.—A suit (No. 27498 of 1894) having been filed in the Court of Small Causes against the defendant in this suit, a decree was passed against him, and certain moveable property was attached in execution thereof and taken into the custody of that Court. The plaintiff in this suit having obtained a decree herein applied to attach the same property in execution, and in accordance with the provisions of the first portion of s. 272 of the Civil Procedure Code (Act XIV of 1882), the Prothonotary sent a notice of attachment to the Court of Small Causes. Thereupon the present claimant applied in that Court to raise the plaintiff's attachment on the ground that the defendant had no attachable interest in the property. The Chief Judge of the Court of Small Causes refused to issue a notice on the ground that such an act would in effect be assuming a jurisdiction in a High Court suit which his Court did not possess. On this the claimant took out the present summons calling upon the plaintiff to show cause why his attachment should not be raised.

At first sight it may seem strange that the Court of Small Causes should be competent to decide upon the validity of an attachment issued by the High Court; but the whole question turns upon what course of procedure has been provided by the Legislature in the Civil Procedure Code. Now, the same section [713] which points out how the attachment of property deposited in or in the custody of any Court is to be effected also provides that in such a case "any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment, or otherwise shall be determined by such Court," *i.e.*, the Court in whose custody the property is. The words of this section seem to me to be too clear to admit of any argument; and in my opinion the Court of the Small Causes is the *only* Court which under the Code can decide the question now raised before me.

The point does not seem to have come up directly before any of the Courts for decision; but in the case of *Debee Pershad* v. *Gujadhar Ram* (1) the meaning of s. 237 of the Civil Procedure Code of 1859, which is similar in effect to s. 272 of the present Code, and the latter portion of which is almost word for word the same as the latter portion of s. 272, was discussed in connection with the question whether the Court in which the attached property was, could decide a question as to the validity of an attachment in a miscellaneous proceeding, or whether it was necessary to file a suit. In delivering judgment, Couch, C.J., said: "Where money or a security is deposited in a Court of justice, any question of title or priority arising between the decree-holder and other persons than the defendant shall be determined by that Court, the reason apparently being that there may not be an unseemly conflict between the Courts."

This is in exact conformity with the opinion which I had formed before I found this case, and I must, therefore, hold that this Court is not the one in which the question which the claimant seeks to raise, can be determined. I must, therefore, dismiss the summons with costs.

(1) 20 W.R. C.R. 73.

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19 B. 710.

As the Chief Judge of the Court of Small Causes has only refused to issue a notice, I see no objection to a fresh application being made to him, and I have no doubt that he will now hear the matter; but if he considers that he is bound by his previous refusal, the only course open to the claimant will be an application [714] to this Court on its appellate side to exercise its extraordinary jurisdiction under s. 622 of the Civil Procedure Code.

Attorneys for the claimant.—Messrs. *Bicknell, Mervanji and Motilal.*
Attoneys for the plaintiffs.—Messrs. *Matubhai and Jamietram.*

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19 B. 714.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE NABISHAH.* [27th September, 1894.]

Criminal Procedure Code (Act X of 1882), s. 431—Appeal by accused against conviction—Death of Appellant—Abatement of appeal—Appeal—Remedy open to the deceased appellant's heirs—Practice.

Two persons, Mahomadshah and Nabishah, were convicted of criminal breach of trust and each sentenced to one year's rigorous imprisonment and a fine of Rs. 1,000. Both prisoners filed an appeal to the High Court. Nabishah died pending his appeal. On Mahomadshah's appeal the High Court passed an order acquitting him and reversing his conviction and sentence. Thereupon one of the relatives of the deceased Nabishah applied to the High Court to set aside the conviction and sentence passed in his case, and order the fine to be refunded.

Held, that on Nabishahah's death his appeal abated under s. 431 of the Code of Criminal Procedure (Act X of 1882).

As the case turned on the appreciation of evidence, the High Court declined to interfere in the exercise of its revisional jurisdiction, referring the legal representatives of the deceased to the Governor in Council for redress.

THIS was an application for the exercise of the High Court's criminal revisional jurisdiction under s. 439 of the Criminal Procedure Code (Act X of 1882).

Two persons, Mahomadshah Rahimanshah and Nabishah Rahimanshah, were convicted by the Sessions Judge of Satara of the offence of criminal breach of trust, and sentenced each to one year's rigorous imprisonment and a fine of Rs. 1,000.

Against the said convictions and sentences both the accused, Mahomadshah and Nabishah, appealed to the High Court.

On 18th August, 1894, and after the appeals had been filed in the High Court, Nabishah died.

[715] On 12th September, 1894, the High Court passed an order on Mahomedshah's appeal, acquitting him and reversing the conviction and sentence passed in his case.

Thereupon the present applicant, who was the nephew of the deceased Nabishah, applied to the High Court to reverse the conviction and sentence passed upon the deceased Nabishah, and order the fine levied from him to be refunded to his heirs.

Manekshah Jahangirshah for the applicant.

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* Application for Criminal Revision, No. 229 of 1894.

ORDER.

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PER CURIAM.—The Court records that the appeal of the deceased Nabishah Rahimanshah has abated under s. 431 of the Code of Criminal Procedure. Under the circumstances we do not think we should take up the case under our revisional powers, as it depends on appreciation of evidence, and the judgment appealed against is not one of the kind about which this Court uses that jurisdiction as a general rule. The representatives of the deceased appellant have their remedy by application to the Governor in Council, and will be furnished, if they so desire, with a copy of the judgment of this Court on the appeal of the co-prisoner to support any such application.

Order accordingly.

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19 B. 716.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* HORMUSJI NOWROJI LORD.*

[29th August, 1894.]

Penal Code (Act XLV of 1860), s. 279—Rash riding on a public way.

The accused was convicted of rash riding on a public way under s. 279 of the Indian Penal Code (Act XLV of 1860). He contended that his conviction was bad, on the ground that there was no proof that any person was on the road in question at the time when he was alleged to have ridden in a rash or negligent manner.

***Held*, that though there was no such proof, it was competent to the Court to take into its consideration the probability of persons using the public way being placed in danger by the act of the accused. The accused's act came within the mischief struck at by s. 279 of the Indian Penal Code and was included within its terms.**

[Appl., Rat. Unr. Cr. Cas. 829; R., 11 Cr. L.J. 362=6 Ind. Cas. 483=8 P.L.R. 1910=39 P.W.R. 1910 (Cr.); 11 Cr. L.J. 610=8 Ind. Cas. 256=40 P.W.R. 1910 (Cr.).]

THIS was an application for the exercise of the High Court's Revisional Jurisdiction under s. 439 of the Code of Criminal Procedure (Act X of 1882).

[716] The applicant, Hormusji Nowroji Lord, was charged under s. 279 of the Indian Penal Code (Act XLV of 1860) with riding along the public road from Matheran to Narel in a manner so rash as to endanger human life, or to be likely to cause hurt or injury.

The accused was convicted of the offence, and sentenced to pay a fine of Rs. 15.

Against this conviction and sentence the accused appealed to the Sub-Divisional Magistrate of the District on the ground, among others, that as there were no persons on the road at the time when he was riding those lives were actually endangered, no offence had been committed.

This contention was overruled, and the conviction and sentence were confirmed on appeal.

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* Criminal Revision, No. 177 of 1894.

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19 B. 715.

The accused thereupon applied to the High Court under its revisional jurisdiction to set aside the conviction and sentence.

Inverarity (with him *Narayan G. Chandavarkar*) for accused.—To sustain a conviction under s. 279 of the Indian Penal Code, the prosecution must prove not only that the accused was riding rashly or negligently so as to endanger human life, but also that some person was actually there in a position of danger. See Starling's Criminal Law, p. 326. In the present case the evidence shows that there were no persons on the road from Matheran to Narel, at the time the accused was riding, whose lives were endangered. The conviction, therefore, is bad.

There was no appearance for the Crown.

ORDER.

JARDINE, J.—We think that although there is no proof of any person being on the part of the road between Narel and Matheran on which and at the time when the accused was riding his horse in a rash or negligent manner, it was competent to the Magistrate to take into his consideration the probability of persons using that road being placed in danger by the act of the accused. What the accused is found to have done comes within the mischief struck at by s. 279 of the Indian Penal Code, and we think is included within the words. The Court, therefore, declines to interfere.

Application rejected.

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19 B. 717.

[717] APPELLATE CIVIL.

Before Mr. Justice Jardine, and Mr. Justice, Ranade.

RAGHAVENDRA (*Original Defendant*) *Appellant*, *v.* KASHINATHBHAT (*Original Plaintiff*), *Respondent.** [8th October, 1894.]

Defamation—Suit for malicious prosecution—Evidence—Burden of proof—Want of reasonable and probable cause—Malice—Information given to police—Privilege—Penal Code (*Act XLV of* 1860), *s.* 182, 211, 498.

Certain property belonging to the defendant having been stolen, he informed the chief police constable entrusted with the inquiry that he suspected the stolen property to be concealed in plaintiff's house. Accordingly the plaintiff's house was searched, and its floor dug up, and the plaintiff was placed in confinement for an hour or so. No property was, however, found. Thereupon the plaintiff sued the defendant to recover damages for loss of character suffered by him in consequence. Both the lower Courts decreed the plaintiff's claim, holding that it lay on the defendant to prove reasonable and probable cause for the suspicion communicated to the police and the search of the plaintiff's house. On second appeal the High Court reversed the decrees and dismissed the suit.

Held (*per* JARDINE, J.) that the rule as to the burden of proof in suits for malicious prosecution should be extended to a case like the present. The *onus*, therefore, lay on the plaintiff not only to allege in the plaint, but also to prove against the defendant malice and absence of reasonable and probable cause for the information given by him to the police. The plaintiff, however, had given no evidence of his own innocence, nor that the suspicion of the defendant was groundless, nor that the defendant had anymali ce.

Per RANADE, J.—The present case was governed by the principles which govern suits for defamation, and under the circumstances the action of the defendant fell within the exception which protects information given to a person in

* Second Appeal, No. 147 of 1897.

authority in the discharge of a public or private duty, where no malice in fact is shown to exist. See *Mohendro Chundro* v. *Surbo Kokhya* (1).

There is a distinction between the case of a false charge falling under s. 211 of the Penal Code (Act XLV of 1860) and that of false information given to the police under s. 182. A person prosecuting another for an offence under the latter section need not prove malice and want of reasonable and probable cause except so far as they are implied in the act of giving information known to the police with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. In an inquiry under s. 211, on the other hand, the absence of just and lawful ground for making the charge is an important element.

Baboo Ganesh v. *Magneeram* (2) distinguished.

[R., 17 C.L.J. 105=17 C.W.N. 554=18 Ind. Cas. 737; 12 C.P.L.R. 24.]

SECOND appeal from the decision of J. L. Johnston, District Judge of Dharwar, in appeal No. 300 of 1891.

[718] The facts of this case were these: The defendant Raghavendra accused one Someshvarbhat of theft. During the course of the police investigation he gave information to the chief police constable that as Someshvarbhat often visited the house of the plaintiff, who was his son-in-law, he suspected that the stolen property was concealed in the plaintiff's house. This house was accordingly searched, and its floor dug up, and the plaintiff was placed in confinement for an hour or so. No property was, however, found.

Thereupon the plaintiff filed the present suit to recover Rs. 100 as damages for loss of character, alleging that the defendant had, without any reasonable and probable cause, and with malicious intent, caused the plaintiff's house to be searched by the police.

The defendant pleaded that he had no motive to damage the plaintiff's character; that having reasonable suspicion against the plaintiff, he had caused the house to be searched, and that the plaintiff had no cause of action.

The Court of first instance held that the burden of proving the existence of a reasonable and probable cause for the search lay on the defendant, and that he had entirely failed to discharge this burden, and that though no pecuniary damage was either alleged or proved, the plaintiff was entitled to recover Rs. 25 as damages for loss of character. The Judge accordingly passed a decree in plaintiff's favour.

This decree was confirmed, on appeal, by the District Judge. His judgment was as follows:—

"Plaintiff is a priest whose reputation must have suffered among his clients from his house being dug up on a complaint of theft or receipt of stolen property. Defendant does not deny that he suspected plaintiff, and caused his house to be searched. The burden was on defendant to show that he had reasonable and probable cause for this suspicion. * * * * * No man has a right to groundlessly accuse a respectable member of society of the degrading offence of receiving stolen property."

Against this decision defendant preferred a second appeal to the High Court, contending that it lay on the plaintiff to prove malice and want of reasonable and probable cause, and that no proof of this had been given.

[719] *N. G. Chandavarkar*, for appellant (defendant):—The verdict against the defendant is wrong. Both the lower Courts have laid the burden of proof on the wrong party. The *onus* lies on the plaintiff to allege and prove that we had no reasonable and probable cause for setting

(1) 11 W.R. 534.

(2) 11 B.L.R. 321=17 W.R. 283.

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the police in motion. He has not discharged this burden. It is not proved that defendant was actuated by malice. All that he did was to inform the police that he suspected the stolen property to be in plaintiff's house. No suit can lie for merely giving information of this sort to the police, unless the criminal law is set in motion. This is really a suit for malicious prosecution, and in such suits it is for the plaintiff both to allege and to prove absence of reasonable and probable cause, and also a malicious motive for the prosecution—*Hall* v. *Venkata Krishna*(1); *Fowler* v. *Homer* (2); *Abrath* v. *North-Eastern Railway Company* (3); *Ashby* v. *White*(4). A plaint which does not allege malice and want of reasonable and probable cause does not disclose any cause of action—*Chejmal* v. *Gambhirmal* (5). In the present case the plaintiff gave no evidence to prove that our suspicions were groundless. His suit should, therefore, be dismissed.

B. A. Bhagwat, for respondent (plaintiff):—This is a suit to recover damages for loss of character, and not an action for malicious prosecution. The information given by the defendant to the police did not charge us with theft or any other offence. There was no complaint and no prosecution before a Magistrate. This, therefore, is not a suit for malicious prosecution, and the rule relating to the burden of proof in such suits does not apply. The rule in suits for defamation applies. The plaintiff has only to prove the falsity of the statement made to the police, and then the burden shifts on to the defendant. The lower Courts have, therefore, rightly placed the *onus* on the defendant, on whose information the police searched our house, and placed us in confinement for a time. The defendant is, therefore, justly held liable for the injury done to our reputation by his reckless act.

[720] *N.G. Chandavarkar* in reply:—I admit that, if this suit be treated as a suit for defamation, the *onus* will lie on the defendant. But, in that case, no suit will lie, and no damages can be awarded, as the alleged defamatory statement is privileged.

JUDGMENT.

JARDINE, J.—The plaintiff sued to recover Rs. 100 as damages for loss of character, alleging that the defendant spoke to the chief constable of Bankapur that he had a suspicion against the plaintiff in respect of some of the defendant's property that had been stolen, and that in order to get a search made, and without reasonable and probable cause for the suspicion, he with malicious intent to injure the plaintiff's character caused the plaintiff's house to be searched by means of the chief constable.

The defendant answered that he had no enmity or cause of enmity against the plaintiff and no motive to damage his character; that having reasonable suspicion, upon information, against the plaintiff he caused the house to be searched; that he was not acquainted with the plaintiff before; that the suit was without cause and intended to injure the defendant.

The search of the house by the police being admitted, the Subordinate Judge, although he found that no actual damage was either alleged or proved, held that the plaintiff's character could not but have been injured,

(1) 13 M. 394. (2) 3 Campbell, 294. (3) L.R. 11 Ap. Ca. 247.
(4) 1 Sm. L. C. 9th Ed. 304. (5) P. J. (1876), 159.

and he awarded Rs. 25 as damages. The District Judge on appeal by the defendant confirmed the decree. Both Courts held that the *onus* lay on the defendant of showing the existence of reasonable and probable cause "for the search" as the Subordinate Judge expresses it—"for the suspicion" as the District Judge expresses it.

The defendant appeals here against this ruling and because malice was not proved. On examining the evidence, no mention of malice is found. No authorities are cited in the judgments of the Courts below, and no case of damage to fame or otherwise resulting from the action of a police officer on a complaint made has been cited from the Indian Reports. Under s. 157 of the Code of Criminal Procedure (Act X of 1882) the police officer may investigate, on the information received, if he has reason to suspect the commission of the offence. But he shall not do so [721] if it appear to him that there is no sufficient ground. He may make a search at his discretion under s. 165.

If the statement, whereof the plaintiff complains, had been made to a Magistrate, it is clear that it would have lain on the plaintiff, not only to aver in his plaint (*Girdharlal* v. *Jagannath* (1)), but also to show that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive for the prosecution (*Hall* v. *Venkatakrishna* (2)), following the decision of the House of Lords in *Abrath* v. *North-Eastern Railway Company* (3). The Privy Council had in *Baboo Ganesh* v. *Mugneeram* (4), taken much the same view in a suit for damages for defamation of character which their Lordships dealt with as an action for malicious prosecution. See also *Gunga* v. *Ramphul* (5). If the police officer had referred the defendant to a Magistrate for a search warrant, this rule will apply, *Wyatt* v. *White* (6), so far as regards reasonable and probable cause. See also *Hope* v. *Evered* (7) where there was *bona fides* in moving for the search warrant. We have been referred to the Notes on *Ashby* v. *White* (8) (see also *Skinner* v. *Gunton* (9)) for the authorities in support of the general proposition there laid down as regards legal proceedings instituted for the *bona fide* purpose of asserting some supposed right, or prosecuting a criminal charge, which, however, in the event proves groundless. "In such cases, in order, it should seem, to facilitate the administration of justice, it is established that unless there be both malice and an absence of reasonable and probable cause, the person against whom the proceedings are taken has no legal ground of action." *De Medina* v. *Grove* (10) is one of these authorities. There a judgment-debtor was taken in execution for more than was due on the judgment. In *Fowler* v. *Homer* (11) Lord Ellenborough said about an accusation and detention: "The accusation though unfounded was not malicious. No doubt it may prove very detrimental to the object of it; but this is one of many [722] instances where there being a loss without an injury, the sufferer must consider himself not wronged, but unfortunate." A later case, *Padmore* v. *Lawrence* (12), much like the above, was, however, dealt with as depending on privilege.

The same principles have been applied by the Indian Courts as in *Raj Chunder* v. *Shama Soondari Debi* (13), a suit for damages for the injury

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(1) 10 B.H.C.R. 182. (2) 13 M. 394. (3) L. R. 11 Ap. Ca. 247.
(4) 11 B. L. R. 321=17 W.R. 283. (5) 20 W. R. 177.
(6) 29 L. J. (Ex.) 193. (7) L.R. 17 Q.B.D. 338. (8) 1 Sm. L.C. (9th Ed.), 304.
(9) 1 W. Saunders, 278, note. (10) L.R. 10 Q.B. 152.
(11) 3 Campbell, 294. (12) 11 Adol. and E. 380. (13) 4 C. 583.

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done to reputation and honour by an improper arrest in an *ex parte* decree. In *Mohendro* v. *Surbo*(1), a suit for defamation in a statement to the police that he the defendant had heard that the plaintiff had been guilty of a criminal offence, the learned Judges held that the plaintiff must first start her case by proving that she was not guilty, and that it would lie on the defendant to show that the imputation was made in good faith and for the public good. In a case in the note to *Mohant Gaur* v. *Hayagrib* (2) these terms are treated as tantamount to good cause. Probably the Court meant the same thing, as the Privy Council laid down later in 1872 in *Baboo Ganesh* v. *Mugneeram* and again in 1876 in *Ram Coomar* v. *Chunder Canto* (3), where the principle stated in *Cotterell* v. *Jones* (4) is approved as to what must be alleged and proved by the plaintiff suing a third person for improperly setting the law in motion, which case had been followed by the High Court of Bengal—*Chunderkant* v. *Ramcoomar* (5).

The pleader for the respondent sought to exclude the present case from the rules of pleading and evidence in suits for malicious prosecution by arguing that the statement made by the defendant to the police officer did not accuse the plaintiff of any offence. He means probably that what was said was mere defamation and did not amount to a false charge. But this distinction was not taken in *Sheikh Roshan* v. *Nabin* (6), and no authority for it has been cited. The plaint describes it as a mere expression of suspicion. The fact that it was made to a policeman, not to a Magistrate, has not been urged ; and in *Fowler* v. *Homer* Lord Ellenborough made no such distinction. Nor is any such [723] suggested in *Sheikh Roshan* v. *Nabin*(6) or in the allusion to the same in *Mohant Gaur* v. *Hayagrib* (2).

If by labelling a suit like the present as one for defamation it is to be taken out of the rules applied to suits for malicious prosecution, then all similar suits will be so named and, as pointed out in *Sheikh Roshan* v. *Nabin*, people will not risk giving information to the police, and the ends of justice will be frustrated. The question is really, as observed by the Privy Council in *Baboo Gunesh* v. *Mugneeram*, one of substance rather than of form. In *Fowler* v. *Homer*, a suit for defamation, the rule requiring proof of malice and want of good cause was applied. So also in *Sheikh Roshan's* case and *Mohendro* v. *Surbo*, as well as in some, where the proceedings had been before Magistrates and suit was brought for defamation, *e.g.*, *Kazee* v. *Motee* (7). On consideration of these authorities I see no difficulty in extending to cases like the present the rule as to burden of proof laid down in *Abrath* v. *North-Eastern Railway Company* (8).

But, whether we go the whole length or only as far as their Lordships in *Baboo Ganesh* v. *Mugneeram* went as to the burden of proof, the plaintiff cannot succeed. It has been argued that the effect will be to encourage false and malicious informations. No such inconvenience has been felt in England; and s. 182 of the Indian Penal Code (Act XLV of 1860) has a discouraging operation : see *Queen-Empress* v. *Ganesh* (9), approved in *Queen-Empress* v. *Soshi* (10). The protection against criminal prosecution and a suit for defamation in such circumstances is not absolute, as has been adjudged in favour of a witness—*Baboo Ganesh* v. *Mugneeram*(11);

(1) 11 W. R. 534.
(2) 6 B.L.R. 371.
(3) 4 I.A. 23 (38)=2 C. 233=L.R. 2 App. Cas. 186.
(4) 11 C.B. 713.
(5) 13 B.L.R. 530 (547).
(6) 6 B.L.R. 377.
(7) 13 W.R. 276.
(8) L.R. 11 App. Cas. 247.
(9) 13 B. 506.
(10) 15 A. 210 (218).
(11) 11 B.L.R. P.C. 321 (329).

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Luckumsey v. *Hurbun* (1); *Nathji* v. *Lalbhai* (2); *Queen-Empress* v. *Balkrishna* (3). It must also be remembered that the detection of crime is made easier when people give information of their suspicions; and that under ss. 44 and 45 of the Code of Criminal Procedure, the giving of certain information in many matters of actual, intended, or suspected crime, [724] becomes an imperative duty, failure to perform which is punishable.

The plaint does not aver that the defendant was the cause of the arrest or the digging up of the premises by the police at the search, nor that after the arrest the plaintiff was discharged by a Magistrate on a report made under s. 169 of the Criminal Procedure Code (Act X of 1882) or by special order under s. 63. As no final discharge could be given by the chief constable, it is doubtful if the present suit will lie. See *Venu* v. *Coorya* (4). Moreover, the plaintiff has given no evidence of his own innocence, nor that the suspicion expressed was groundless, nor that the defendant had any malice. He did not even tender evidence of malice, or attempt even to prove the terms in which the defendant had expressed his suspicions. The mere fact that no stolen property was found, does not suggest anything against the defendant, as stolen property often passes through many hands, and is often removed from fear of search.

For the above reasons I would reverse both decrees and dismiss the suit with all costs on the respondent.

RANADE, J.—I agree with Mr. Justice Jardine in his final decision, but my reasons for so doing are somewhat different from those which have been set forth in his judgment.

Both the lower Courts have treated the original claim in this case as a suit for damages for loss of character. The appellant's pleader admitted that, if the claim be regarded as a suit for loss of character, the lower Courts were right in placing the burden of proof on the appellant (defendant). It was, however, contended that the claim was really a suit for malicious prosecution, and as such the burden of proving malice and want of probable and reasonable cause should have been placed on the respondent (plaintiff).

It appears from the record that the appellant accused one Someshwar Bhat of a theft of his property, and as this Someshwar was respondent's father-in-law, and used to visit respondent's house, appellant informed the police constable entrusted with the inquiry that he suspected that the stolen property was concealed [725] in respondent's (plaintiff's) house, and this house was accordingly searched, and its floor dug up, and respondent and his wife were placed in confinement for an hour or so. No property was found, and thereupon the respondent brought his suit for the loss of character suffered by him in consequence of this imputation. The question for consideration is, whether a claim brought under such circumstances can be regarded as a suit for malicious prosecution.

There was admittedly no prosecution in this case, and no complaint made to the Magistrate. In many of the cases cited by appellant's pleader in support of his contention, there had been either complaint, or a prosecution before a Magistrate, or both. In the case of *Baboo Ganesh* v. *Mugneeram* (5), the plaintiff had been brought before a Magistrate, who had dismissed the charge for want of proof. This element was also present in the cases of *Hall* v. *Venkatakrishna* (6) and *Chejmal* v. *Gambhirmal*(7), both which authorities were relied upon by the appellant's pleader

(1) 5 B. 580. (2) 14 B. 97. (3) 17 B. 573. (4) 6 B. 376.
(5) 11 B.L.R. 321. (6) 13 M. 394. (7) P.J. (1876), 159.

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in support of his contention. It is true that their Lordships of the Privy Council have in their judgment in *Baboo Ganesh* v. *Mugneeram* (1) stated that the evidence in that suit, which was ostensibly for loss of character, raised the same questions which would be raised in an action for malicious prosecution in England. However, for the reasons given above, that case, and the other cases cited before furnish no analogy to the present case where there has been no prosecution, and no complaint before a Magistrate, and I do not think that it will be proper to extend the protection given to an honest complainant before a Magistrate to cases of false information supplied to the police. The criminal law makes a clear distinction between a false charge which falls under s. 211 of the Penal Code, and false information given to the police, in which latter case the offence falls under s. 182 of the same Code. If plaintiff in the present case had chosen to prosecute the offender under s. 182, it would not have been necessary for him to prove malice and want of probable or reasonable cause, except so far as they were implied in the act of giving information known to be false, with the knowledge or likelihood that such information would lead a public servant to use his power to the [726] injury or annoyance of the complainant. In an inquiry under s. 211, on the other hand, proof of the absence of just and lawful ground for making the charge is an important element. There is good reason for this distinction. People in this country, as elsewhere, think twice before bringing a regular complaint before a Magistrate. No such precautions are taken or deemed necessary in the case of information given to the police. It is no doubt necessary in the public interests that people should be encouraged to give true information, but it serves no public interest to protect persons who, without thought of consequences, set the police in motion on random suspicions. If every injured person has to prove the presence of malice in fact as an operative motive in the false informer, and he is further required to prove absence of reasonable cause, the results will be certainly detrimental to the interests of the public generally.

It may indeed be urged that the criminal remedy under s. 182 is open to such injured persons. Proceedings under that section cannot, however, be taken without the sanction of the public servant, and that is not always easy to obtain. I do not see any reason why the injured party whose house is searched and the floor dug up on the strength of false information, and who with his wife are kept under confinement in the presence of a Panch for a time, should not be permitted to sue for loss of character, and why when he brings such a suit, he should be required to prove not merely the falsehood of the imputation, but also the presence of malice, and the absence of probable and reasonable cause in the complainant.

At any rate, both the lower Courts have treated the suit in the present case as a claim for damages for loss of character, and I think in second appeal the rights of the parties must be judged accordingly. The principles which govern suits for defamation must, in my opinion, govern the decision of the present case. These principles are clearly laid down in *Mohendro Chunder* v. *Surbo Kokhya* (2) where the defendant had informed the police that he had heard that plaintiff had been guilty of a criminal offence. It was laid down in that case that plaintiff must only show the falsity of the information, and it would then be for the

(1) 11 B.L.R. 321 (329).

(2) 11 W. R. 534.

[727] defendant to prove that the charge was made in good faith, and for the public good,—in other words, that his act was protected by one or other of the exceptions of privilege recognized by both civil and criminal law. Applying these rules in the present case, it has to be noted that the theft was of defendant's own property, and he accused a near relation of the plaintiff, who used to visit plaintiff's house. The information given was confined to a suspicion that the property might be concealed in plaintiff's house. The search and the digging up of the floor was the act of the police constable, apparently not taken by him at the instance of the defendant. The defendant did not inform any body else but the police, and admittedly no special damages were claimed or alleged. Under these circumstances, the action of the defendant falls under the exception which protects information given to a person in authority, and in the discharge of a public or private duty, where no malice in fact is shown to exist. "If fairly warranted by any reasonable occasion or exigency, and it is honestly made, such communications are protected for the common convenience and welfare of society (Addison on Torts, page 165, 5th Ed.). Lord Campbell in *Harrison* v. *Bush* (1) and *Whitely* v. *Adams* (2) has laid down that a communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although without such privilege the communication would be actionable." The appellant had a duty and interest in communicating his suspicions to the police constable, who also had a duty in the matter. The appellant was not responsible for the subsequent annoyance caused by the search. The suspicion was not wholly without ground, seeing that there were the alleged relationship and the visits. Under these circumstances, I must hold that the defendant was protected by the privilege. It was not a case of a wanton, reckless, or inconsiderate charge.

On this ground I concur with Mr. Justice Jardine in holding that the decrees of the lower Courts must be reversed, and the claim dismissed with costs.

Decree reversed.

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19 B. 728.

[728] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS v. GHARYA AND OTHERS.* [8th October, 1894.]

Evidence—Confession—Retracted confession—Necessity of corroborative evidence—Practice.

A retracted confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case.

There is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law.

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* Criminal Appeal No. 169 of 1894.

(1) 25 L. J. Q. B. 25. (2) 33 L. J. C. P. 89.

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Queen-Empress v. *Rangi* (1) and *Queen-Empress* v. *Bharmappa* (2) dissented from. *Regina* v. *Balvant* (3) and *Queen-Empress* v. *Sangappa* (4) followed.

[R., 23 B. 316 (317) ; 1 L.B.R. 238 (246) ; Rat.Unr.Cr.Cas. 842 (843) ; Rat.Unr.Cr. Cas. 952.]

APPEAL by the Local Government from the order of acquittal passed by A. S. Moriarty, Sessions Judge of Ratnagiri.

The three accused were charged with the murder of one Sakharam Deoli, a money-lender, on the morning of the 4th March, 1894.

On the 20th of March, 1894, accused Nos. 1 and 3 confessed before the First Class Magistrate of Ratnagiri. Their confessions were recorded under s. 164 of the Code of Criminal Procedure (Act X of 1882).

On the 27th of March, 1894, these confessions were retracted during the course of the preliminary inquiry, the accused stating that they had been made owing to ill-treatment by the police.

The confessions were also retracted and the same allegations of ill-treatment made at the trial before the Court of Sessions.

The assessors were of opinion that the confessions were false and induced by fear of the police. The Sessions Judge, however, was of opinion that the confessions had been voluntarily made by the accused, but as they were not corroborated by any independent reliable evidence, he held that it would be unsafe to convict upon them. He, therefore, passed an order acquitting all the accused.

[729] Against this order of acquittal the Government of Bombay appealed to the High Court.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown: —The Sessions Judge has found that the confessions were not made under the influence of any threats or ill-treatment offered by the police. He finds that they were truly and voluntarily made by the accused Nos. 1 and 3. That being the case, they can be accepted as conclusive proof of guilt, without material corroboration. In the present case the confessions are supported by ample corroborative evidence. The weapon produced by accused No. 1 was blood-stained. There was a strong motive for the crime, as the property of the accused was to be sold in a few days in execution of decrees obtained by the deceased. The accused were identified soon after the murder, and there is no reason whatever why the evidence on this point should be disbelieved. The Sessions Judge was, moreover, wrong in holding that the confession of accused No. 1 could not be used against accused No. 2, because it was not made while the two were being jointly tried. This is an erroneous view of s. 30 of the Evidence Act.

M. V. Bhat, for the accused:—Both Judge and assessors disbelieve the witnesses who speak to the identification of the accused. Their story is inherently improbable. Their evidence is, moreover, in direct conflict with the medical evidence, which clearly shows that the deceased did not die of wounds inflicted with a stick like that produced in Court. There is thus no reliable independent evidence to corroborate the confessions of the accused. Those confessions were recorded by the Magistrate under s. 164 of the Criminal Procedure Code (Act X of 1882). But the Magistrate does not certify, as required by the section, that at the time the confessions

(1) 10 M. 295.
(2) 12 M. 123.
(3) 11 B.H.C.R. 137.
(4) B.H.C.Cr. Rulings of 25th April 1889.

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were made before him, the prisoners were not in police custody. This is an irregularity which makes the confessions worthless.

Manekshah Jehangirshah, for the complainant.

JUDGMENT.

JARDINE, J.—In a judgment in which the Sessions Judge discusses the evidence with his usual carefulness he acquitted the three prisoners whom he tried for the murder on Sunday, the [730] 4th March, 1894, before day-dawn, of Sakharam Deoli, a money-lender at Kinjawade, in the Devgad Taluka. The two assessors also held that the charge was not brought home. The learned Judge found the fact of murder proved; and, differing from the assessors, who said the confessions made by the prisoners Gharya and Ratnak to the Magistrate of the First Class at Ratnagiri, on the 20th March, were, in their opinion, false and made through fear of the police, he found that they were truly and voluntarily made. These prisoners retracted their confessions on the 27th March; and for reasons chiefly based on the want of corroboration of these confessions, the Sessions Judge held that it was unsafe to act upon them. Against these acquittals, an appeal was preferred by the Governor in Council, and admitted by this Court as regards Gharya and Ratnak, who have been re-arrested.

It is urged for the Crown that the Court below has not given proper weight to the confessions. As regards the acquitted prisoner Bhornak, we draw the attention of the Judge to the ruling on s. 30 of the Indian Evidence Act in *Imperatrix* v. *Tanya*, Criminal Ruling 30 of the 24th July, 1890. The learned Judge, following as it seems the rule laid down by Mr. Justice Kernan in *Queen-Empress* v. *Rangi* (1) and followed in *Queen-Empress* v. *Bharmappa* (2), has acquitted the two confessing prisoners. The rule followed in Madras is that "a retracted confession must be supported by independent reliable evidence corroborating it in material particulars." These cases have often been cited to us, but, so far as we are aware, this Court while fully conscious of the need of caution in dealing with retracted confessions, has refrained from laying down any binding rule, but treated the value of a retracted confession as a matter of prudence rather than of law. We have often in dealing with such cases declined to treat the Madras practice as based on a rule of law. The view hitherto taken by this High Court is stated in the case relied upon by the committing Magistrate, *Reg.* v. *Balvant* (3) and in *Imperatrix* v. *Sangappa* (4). We have had further evidence taken on the point, where the assessors differ from the Judge, [731] as to whether the confessions were made under terror of the police. We have also taken the evidence of the Magistrate, and are now satisfied that there is no reason to suppose that the prisoners were induced by threat or ill-treatment to make these confessions. They appear to have been quite voluntary: and as the prisoners were in a different custody at Ratnagiri on the 20th March, it is probable that if the ill-treatment they allege as given at Kinjawade on the 12th and 13th March did really occur, they would have complained about it to the Magistrate at Ratnagiri.

We, therefore, agree with the Judge that the two confessions were voluntarily made; and we have next to consider them along with the other evidence in the manner pointed out in the earlier decisions of this High Court, as has been urged for the Crown. Viewed in that light, the

(1) 10 M. 295. (2) 12 M. 123. (3) 11 B. H. C. R. 137.
(4) B. H. C. Cr. Rulings of 25th April 1889 (Rat. Unrep. Cr. Cas. 463).

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corroborating evidence becomes more weighty. It is proved that the prisoners had motive of ill-will. It is possible that the eye-witnesses may have spoken incautiously or falsely about their recognition of the prisoners; but even if the recognition is untrue, the rest of their story may be true. The police patel says they denied all knowledge on the 4th March, and they appear not to have spoken till the 7th, and the finding of the stick, bill-hook, shoes, &c., was two or three days after the murder. As the patel did not hold the inquest as required by Bombay Act VIII of 1867, it is possible that no prompt or searching inquiry was made until the arrival of the district police. The omission of the patel ought to have been pointed out by the Courts below on the principle stated in *Kendillon* v. *Maltby* (1), as otherwise it may not come to the notice of the District Magistrate. The Court refrains from passing capital sentences, as all the facts of the case are not clear, and as the prisoners have once been acquitted. The Court reverses the order of acquittal and discharge, and convicts Gharya Suryaji and Ratnag bin Mahadnak of murder, and under s. 302 of the Indian Penal Code sentences them to transportation for life.

Order of acquittal quashed.

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19 B. 732.

[732] CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* BHIMAPPA BIN RAMANNA.*

[3rd December, 1894.]

Criminal Procedure—Practice—Procedure—Appeal by accused—Order rejecting appeal as barred by limitation—Review of such order—Finality of judgments in criminal matters—Criminal Procedure Code (Act X of 1882), ss. 421, 430.

A Sessions Judge dismissed an appeal on the ground that it was barred by limitation. On a subsequent application by the accused, the Judge admitted the appeal and at the hearing acquitted him. The High Court sent for the record in the exercise of its revisional jurisdiction.

Held, that the order of acquittal was *ultra vires* under s. 430 of the Code of Criminal Procedure (Act X of 1882). The order dismissing the appeal was final and not open to review.

It was argued that s. 421 of the Criminal Procedure Code (Act X of 1882) only applies to orders passed on the merits, and that as the order rejecting the appeal was not of that class, it was not an order "upon appeal" and was not final under s. 430.

Held, that s. 421 was not limited to orders passed on the merits, and that the order in question was an order upon appeal and final under s. 30.

The Criminal Procedure Code (Act X of 1882) makes no provision for review of judgments in criminal matters by subordinate appellate Courts. The jurisdiction of revision is vested in the High Court, which has ample powers under chap. 32 to rectify any inadvertent failure of justice.

[F., 13 Cr. L.J. 710=16 Ind. Cas. 518=23 M.L.J. 371=12 M.L.T. 350=(1912) M.W. N. 982; R., 29 M. 126 (135)=3 Cr. L.J. 274=16 M.L.J. 79=1 M.L.T. 31.]

ON the 15th February, 1894, the accused Bhimappa bin Ramanna was convicted by the First Class Magistrate of Dharwar of theft, and

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* Criminal Review, No. 236 of 1894.

(1) 2 Moo. and R. 438.

sentenced to pay a fine of Rs. 60, or in default to suffer one month's rigorous imprisonment.

On the 9th May, 1894, the accused appealed to the Sessions Court, and on the 30th May, 1894, the appeal was dismissed on the ground that it was barred by limitation.

On the 1st August, 1894, the appeal was re-admitted, the Sessions Judge being satisfied that it was owing to the negligence of the accused's pleader, that it had not been presented in time.

On 4th September, 1894, the appeal was finally heard, and the accused was acquitted.

On examining the monthly return of criminal cases the High Court sent for the record of this case in the exercise of its revisional jurisdiction.

[733] Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, as *amicus curiæ*.—The Sessions Judge had a right to re-consider his order of rejection and to re-admit the appeal. No doubt it may be suggested that the order of rejection was an order under s. 421 of the Criminal Procedure Code (Act X of 1882), and was, therefore, final under s. 430. But the order of rejection was not really an order under s. 421. That section only applies where an appeal has been dismissed on the merits. It has no application to a case like the present where the appeal is rejected on the ground of limitation. Even if the order was an order under s. 421, and was an order on the merits, the Sessions Judge had power to rehear the case : see 7 Mad. H. C. R., (Appendix) 29. An appellate Court can re-hear the appeal on the merits, if it is satisfied that the delay in presenting the appeal is sufficiently accounted for. See also *The Government of Bengal* v. *Meir Surwar Jan* (1) where the High Court of Calcutta cancelled a previous order made by it under an error in law. There are, no doubt, cases in which it has been held that neither the High Court nor any subordinate Court has the power to review its own judgment in criminal cases: see *Queen* v. *Godai Kaout* (2); *Reg.* v. *Mehtarji Gopalji* (3) ; *Queen-Empress* v. *Durga Charan* (4) ; *Queen-Empress* v. *C. P. Fox* (5) ; *Empress* v. *Mahomed Yashin* (6). But in these cases the orders of which review was sought, appear to have been passed on the merits. They are, therefore, distinguishable from the present case. The question is whether the Sessions Judge's order rejecting the appeal as time-barred was an order passed "upon appeal" within the meaning of ss. 430 and 421 of the Code of Criminal Procedure (Act X of 1882). I submit it was not. It was an order of dismissal under s. 4 of the Limitation Act (XV of 1877), and as such open to revision under s. 5 of that Act. The Judge, therefore, had power to re-admit the appeal and to acquit the prisoner.

There was no appearance for the accused.

JUDGMENT.

JARDINE, J.—The Sessions Judge, after receiving the criminal appeal, recorded a written order of rejection on the ground that **[734]** it was barred by limitation. On a later representation by the prisoner, he admitted the appeal, and at the hearing acquitted him. The High Court called for the record, and has had the advantage of the argument of the learned Government Pleader.

The High Court of Madras, in the case in 7 Mad. H. C. R., (Appendix) 29, held on s. 278 of the Code of Criminal Procedure of 1872,

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(1) 18 C.W.R. Cr. R. 33. (2) 5 C.W.R. Cr. R. 61. (3) 7 B.H.C.R. Cr. Cas. 67.
(4) 7 A. 672. (5) 10 B. 176. (6) 4 B. 101.

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corresponding to s. 421 of the present Code, that a District Magistrate, who had rejected an appeal, might hear it on the merits, it being proved to his satisfaction that the appellant's pleader had been absent with an adequate excuse. In *Empress* v. *Mahomed* (1), this Court, after referring to s. 285 (corresponding to s. 430), held its own order of rejection under s. 278 to be final. The learned Government Pleader points out that the petition of appeal in that case had been duly presented by a pleader, and that it had been apparently rejected on the merits. He suggests that the words in s. 421, " no sufficient ground for interfering," imply an order passed on the merits ; and that the order of the Sessions Judge rejecting an appeal is not an order passed " upon appeal" within the meaning of s. 430, but to be distinguished as a dismissal under s. 4 of the Limitation Act (XV of 1877) and open to review by the Sessions Judge. On this point we are aware of no reported authority ; but after consideration, we decline to import into the Code a refinement which would seriously impair the finality of criminal judgments. In civil matters, review may sometimes be obtained, but only after a careful procedure. The Criminal Procedure Code, however, makes no such provision. The jurisdiction of revision is vested in the High Court, which has ample powers under Chap. 32 to rectify any inadvertent failure of justice.

We are of opinion, therefore, that the order of acquittal was made without jurisdiction ; but as no reason appears for holding it wrong on the merits, and no motion has been made by the Government, we return the record and proceedings.

Order of acquittal quashed.

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19 B. 735.

[735] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* MADHAVRAO.* [12th December, 1894.]

Criminal Procedure Code (Act X of 1882), Ss. 298 and 302—Jury—Verdict—Special verdict—Duty of Judge—Practice—Procedure.

The accused was tried for rape. The jury, after considering their verdict, announced through their foreman that the accused " did the act with consent." The Sessions Judge thereupon, without requiring them to reconsider their verdict or giving them any fresh directions, asked them whether they found the accused guilty or not guilty. The jury again retired and brought in a verdict of guilty, upon which the Sessions Judge sentenced the prisoner to three years' rigorous imprisonment.

Held, reversing the conviction and sentence, that the first verdict of the jury being a special verdict, and there being no real ambiguity about it, the Sessions Judge was bound under s. 302 of the Code of Criminal Procedure (Act X of 1882) to record the verdict and apply the law thereto.

Held, also, that the second verdict could not be sustained, as there was nothing to show that the Sessions Judge gave the jury any fresh directions, or explained to them that a finding that the woman had consented was tantamount to an acquittal.

[N.F., 13 Cr. L.J. 586=15 Ind. Cas. 1002 ; R., 23 B. 412=6 Bom. L.R. 361 (364); Rat. Unr. Cr. Cas. 982 (985).]

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* Criminal Appeal, No. 320 of 1894.

(1) 4 B. 101.

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19 B 735.

APPEAL by the accused from the conviction and sentence recorded by W. H. Crowe, Sessions Judge of Poona.

The accused was tried by the Court of Sessions on a charge of rape. At the close of the trial the jury having considered their verdict, stated through their foreman that the accused "did the act with consent." The Judge without desiring them to reconsider their verdict, or giving them fresh directions, required them to say whether they found the accused guilty or not guilty.

The jury again retired and subsequently brought in a verdict of guilty, with a recommendation to mercy. Whereupon the Judge sentenced the prisoner to three years' rigorous imprisonment.

The accused appealed to the High Court.

Macpherson (with him *N. G. Chandavarkar*), for the accused.—The first finding of the jury amounted to a verdict of not guilty. That verdict ought to have been recorded and the prisoner discharged. It was the duty of the Judge to apply the law to the facts as found by the jury. He was wrong in asking the jury **[736]** to return a second verdict without explaining to them the law on the subject. The second verdict, therefore, cannot stand.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.—The second verdict being the final expression of the opinion of the jury ought to prevail. If not, the Sessions Judge should be called upon to report under what circumstances they returned their second verdict, apparently inconsistent with the first, and what they really meant by it. There is no evidence of consent, and possibly, on second thoughts, they abandoned that theory and returned a verdict of guilty without any qualifying words.

JUDGMENT.

JARDINE, J.—The prisoner Madhavrao was on trial for rape. The jury having retired to consider their verdict returned to Court and announced through their foreman that the prisoner "did the act with consent." This is what is called a special verdict: it is at the option of the jury to return a verdict in that form— *Queen-Empress* v. *Dada Ana* (1). There is no real ambiguity about it, as the question whether the consent was induced by fear or fraud seems not to have come in: and the Sessions Judge might have, and according to the rulings of the High Court at Calcutta—*Queen* v. *Joy Kisto Gossamy* (2); *The Government of Bengal* v. *Mahaddi* (3); *Empress* v. *Dhunum Kazi* (4)—was bound under s. 302 of the Code of Criminal Procedure to record the verdict, and apply the law thereto. As said by Vaughan, C. J., in *Bushell's* case (5), "in special verdicts, the jury inform the naked fact, and the Court deliver the law."

The question whether, when the complainant, an adult woman, had consented to the act, the offence of rape within the meaning of the Indian Penal Code had been committed, was a question of law which it was the duty of the Sessions Judge to decide under s. 298 of the Procedure Code, and not one for the jury. See Plowden's R. 114 that the function of the Judge is not merged in the jury. The learned Judge for some reason, not apparent on the record, then required the jury to say whether Madhavrao was guilty or not guilty. It does not appear that **[737]** he

(1) 15 B. 452 (465). (2) 7 W.R. Cr. R. 22. (3) 5 C. 871.
(4) 9 C. 53. (5) 6 Howell's State Trials, 999; Vaughan's R. 135.

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required them to re-consider their first verdict, as has been held to be a legal course in England—*Reg.* v. *Meany* (1), or that he gave them any fresh directions or explained to them that a finding that the woman consented was tantamount to acquittal. The jury again retired and brought in a verdict of guilty with a recommendation to mercy; whereupon the Sessions Judge convicted and sentenced the prisoner. There are no express words on the record, nor anything except the formal verdict implying that the jury had changed their mind, nor any suggestion that the consent being induced by fear or fraud, the special verdict was incomplete.

We are of opinion under these circumstances, and especially the absence of any fresh directions to the jury, that the second verdict cannot be allowed to stand. The statements made by the woman to the Magistrate have in two important particulars been abandoned by her as a witness at the trial: and we are not disposed to infer on the evidence that the first verdict to the jury was wrong. The Government Pleader does not press for a new trial. The Court, therefore, acquits and discharges the prisoner.

Conviction quashed.

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19 B. 737.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

In re JAMNA DAS BHUKHANDAS.* [13th December, 1894].

Nuisance—Noise—Music in neighbouring house—Bombay District Police Act (Bombay Act IV of 1890), *s.* 48 *cl.* (*b*)—"*Near a street*"—*Meaning of the words—Power of the police to regulate the playing of music in private houses—Construction.*

(2) Section 48, cl. (*b*) of Bombay Act IV of 1890 does not empower the District Superintendent or Assistant Superintendent of Police to stop music in private houses.

[738] The words in the clause "near a street" are intended to mean open spaces by the sides or at the ends of streets.

THIS was an application for the exercise of the High Court's Revisional jurisdiction under s. 439 of the Code of Criminal Procedure (Act X of 1882).

The accused was prosecuted for disobedience of an order issued by the District Superintendent of Police under s. 48, cl. (*b*), of the Bombay District Police Act (IV of 1890).

On the 26th January, 1893, a proclamation was issued by the District Superintendent of Police with the sanction of the District Magistrate to the effect that no person should beat or sound noisy instruments within the municipal limits of the town of Broach between 10 P. M. and 6 A. M.,

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* Criminal Application for Revision, No. 292 of 1894.

(1) 9 Cox. C.C. 231.

(2) Section 48, cl. (*b*) of Bombay Act IV of 1890 provides as follows:—"The District Superintendent or an Assistant Superintendent may regulate and control, by the grant of licenses or otherwise, the playing of music, the beating of drums, tom-toms or other instruments and the blowing or sounding of horns or other noisy instruments *in or near a street*."

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without a permit from the city police inspector, and that, if anybody disobeyed the order, he would be liable to a fine of Rs. 200 under s. 68 of Bombay Act IV of 1890.

On the night of the 28th July, 1894, the accused had a *bhajan* (or religious service) at his house, which was situated in a street near a public road. A number of persons assembled in a room on the upper story of his house, who kept up singing hymns and beating noisy instruments till 2 A. M.

As the accused had not obtained a permit from the police inspector to play music in his house on this occasion, the second class police constable prosecuted him under s. 62 of Bombay Act IV of 1890 for disobeying the proclamation issued by the District Superintendent of Police.

The accused contended, on the authority of *Regina* v. *Lakhma Chango* (1), that the police had no power to stop music in a private house.

The First Class Magistrate who tried the case convicted the accused and sentenced him to pay fine of Rs. 5, or in default to suffer one day's simple imprisonment.

The following extract from his judgment gives his reasons for the conviction :—

"It is contended by the accused's pleader that the law is not applicable to the beating of such instruments in a house, and my attention has been drawn to the **[739]** Bombay High Court ruling in *Reg.* v. *Lakhma Chango* printed at p. 153, Vol. IX, 1872. This ruling is laid down on s. 27 of Bombay Act VII of 1867, and does not empower the police to prohibit the use of music in a private house.

"The question then for consideration is whether this ruling would be applicable to the present offence under s. 48 of Bombay Act IV of 1890. Section 27 of Bombay Act VII of 1867 runs to the effect that the District Superintendent and Assistant District Superintendent of Police may also regulate the use of music in the streets of towns on occasion of festivals and ceremonies. While s. 48, cl. (*b*) of Act IV of 1890, which is substituted for the above section, runs to the effect that the District Superintendent or an Assistant Superintendent may regulate and control, by the grant of licenses or otherwise, the playing of music, the beating of drums, tom-toms and other instruments and the blowing or sounding of horns and other noisy instruments in or near a street.

"This clause is framed subsequent to the above quoted ruling of the High Court, and I think the phrase 'near a street' embodied in the clause is intended by the Legislature to include all places and even a house in or near a street. Had that not been the intention of the Legislature, the phrase 'near a street' would not have been inserted, because the phrase 'in a street' can safely be contemplated to include roadways and open space in a street.

"I am fortified in the above conclusion by the wording of the proclamation dated 26th January, 1893, issued by the District Superintendent of Police under the sanction of the District Magistrate. The proclamation is to the effect that no person should beat or sound noisy instruments within municipal limits at night from 10 o'clock to 6 in morning without a permit from the city police inspector, and that if any one would disobey the order he would be liable to a fine of Rs. 200 under s. 68.

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(1) 9 B. H. C. R. 153.

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"This proclamation includes and contemplates all places within municipal limits; it does not distinguish houses from roadways or open space.

"The accused's house is situate within municipal limits; and under the above circumstances I think that the above ruling of the High Court cannot be applied in accused's favour.

"The Court, therefore, finds that accused Jamnadas Bhukhandas is guilty under s. 68, cl. (*b*) of Bombay Act IV of 1890, and directs that he do pay a fine of Rs. 5. In default to suffer simple imprisonment for one day. Fine should be levied according to law."

Against this conviction and sentence the accused applied to the High Court under its Revisional jurisdiction.

Nagindas Tulsidas for accused.—The place where the music was played was a room on the upper story of a private house belonging to the accused. No permit was necessary under s. 48 (*b*) of Bombay Act IV of 1890. That section empowers the police to regulate music "in or near a street." These words do not apply to a private house in or near a public street. The **[740]** words "near a street" would include by-ways, lanes, or open spaces near a street, but not private houses. In a large town most houses are situate in or near a street, and if the Magistrate's construction of the Act were adopted, the police would have intolerable powers of interference with the right of every subject to enjoy music in his private dwelling-house. The Magistrate relies on the proclamation issued by the District Superintendent of Police on 26th January, 1893. That proclamation forbids music within municipal limits. Municipal limits mean streets and other public places, but not private houses. The proclamation is, moreover, issued under s. 48 of the District Police Act. So far as it goes beyond the scope of the Act, it is *ultra vires*. If the Act does not stop music in private houses, neither does the proclamation, which is based on the Act.

The case of *Reg.* v. *Lakhma Chango* is in point (1).

There was no appearance for the Crown,

JUDGMENT.

JARDINE, J.—The words about music "in the streets of towns on the occasion of festivals and ceremonies" in Bombay Act VII of 1867, s. 27, were interpreted by this Court as not including a private house. The trying Magistrate is of opinion that the change of language enacted in Bombay Act IV of 1890, s. 48 (*b*), indicates an intention on the part of the Legislature, by the words "in or near a street," to enable a District Superintendent or Assistant Superintendent of Police to regulate the playing of music in private houses. The District Superintendent had by written orders prohibited noisy music within municipal limits between 10 P. M. and 6 A. M., unless a permit had been obtained. The accused had music one night in an upstair room. The orders make no mention of houses. The constable prosecuted and the Magistrate convicted as if houses were included both in s. 48 (*b*) and the orders.

The real and important question is whether, to use the words of Lord Blackburn in *Skinner* v. *Usher* (2), the Legislature meant by a side wind to stop music in houses. Such great domiciliary interference is not suggested by the context in s. 48, or by the use of similar words in s. 53 and s. 61. The **[741]** words "near a street" are no doubt large,

(1) 9 B.H.C.R. 153.

(2) L. R. 7 Q. B. 423

but not larger than the words "in any street or place" in the Act of Parliament interpreted in *Case* v. *Storey* (1), where "place" was taken to mean only a place *ejusdem generis* with a street. The words "near a street" can be construed as meaning open spaces by the sides or at the ends of streets, and thus a plain and sufficient meaning can be given to the section we have to interpret, without the Court resorting to the supposition that while knowing that the older law had been held not to include houses, the Legislature meant to include them here by inference from the word "near." The only possible view is that, if it had meant to interfere to such an enormous extent, it would have used the word house. We reverse the conviction and sentence for the above reasons.

Conviction and sentence reversed.

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19 B. 741.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* REGO MONTOPOULO.*

[21st January, 1895.]

Zanzibar—Jurisdiction—Local allegiance—English Consular Court—Greek residents at Zanzibar—Jurisdiction of the British Consular Court at Zanzibar over foreign subjects enjoying British protection—Order in Council dated 29th November, 1884, s. 6.

The Greek residents at Zanzibar having been by international action placed under British protection are liable to the British criminal law in force at Zanzibar.

The accused, who was a Greek under British protection at Zanzibar, was convicted by the British Consular Court at Zanzibar of culpable homicide not amounting to murder and sentenced to ten years' rigorous imprisonment under s. 304 of the Indian Penal Code (Act XLV of 1860). He appealed to the High Court of Bombay, contending (*inter alia*) that he was a Greek subject, and as such not liable to be tried by the Consular Court.

Held, that it was competent to Her Majesty to exercise jurisdiction in one foreign State over the subjects of another foreign State; that under s. 6, cl. (*b*) of Her Majesty's Order in Council dated 29th November, 1884 (2), the provisions referring to British subjects were applicable to foreigners enjoying British protection in so far as by treaty, capitulation, grant, usage, sufferance, or other lawful means, Her Majesty had jurisdiction at Zanzibar in relation to such persons; and that the prisoner, being a British protected person within the meaning of s. 4, cl. (*b*) of the Order, was amenable to the jurisdiction of the Consular Court.

[R., 22 B. 54 (86).]

[742] THE accused was a Greek under British protection at Zanzibar. He was tried in the Consular Court at Zanzibar on a charge of murder. He was found guilty of culpable homicide not amounting to murder, and sentenced under s. 304 of the Indian Penal Code (Act XLV of 1860) to ten years' rigorous imprisonment.

Against this conviction and sentence the accused appealed to the High Court. He contended (*inter alia*) that he was a Greek subject and as such not amenable to the jurisdiction of the Consular Court at Zanzibar.

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* Criminal Appeal, No. 1 of 1895.

(1) L. R. 4 Ex. 319.

(2) See *Bom. Govt. Gazette* for 1885, p. 533.

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Manekshah Jehangirshah, for the accused.—The British Consular Court has no jurisdiction over a Greek subject residing at Zanzibar. There is no evidence to show that the Greek Government made over its own jurisdiction to the British Government. It is doubtful if the Greek Government could do so without renouncing the allegiance of the subject. But supposing it could, such a transfer of jurisdiction must be distinctly proved, and cannot be spelt out of vague diplomatic correspondence, as is attempted by the committing Magistrate. As regards the merits of the case, the Consular Judge has misdirected the jury in material particulars. He told the jury that self-defence was out of the question. This was a question of fact to be left to the jury.

There was no appearance for the Crown.

JUDGMENT.

JARDINE, J.—The prisoner was tried in the Consular Court at Zanzibar. The jury returned a verdict finding him guilty of culpable homicide not amounting to murder, whereon the Consular Judge, Mr. De Sausmarez, sentenced him, under s. 304 of the Indian Penal Code, to ten years' rigorous imprisonment. His appeal here has been fully argued by Mr. Manekshah.

Mr. Manekshah contended that the heads of the charge to the jury showed that the Judge did not merely content himself with an expression of opinion, but used such positive language, *e.g.*, where he describes the defence of self-defence as "impossible," as was calculated to leave the jury no loophole for coming to an opinion of their own as the judges of all matters of fact.

The Code of Criminal Procedure (Act X of 1882) in ss. 298 and 299 very plainly distinguishes the duties of the Judge and the **[743]** jury; and s. 297 shows clearly how the Judge is to charge them, namely, by summing up the evidence for the prosecution and defence and laying down the law. The offence of murder being one of the most serious with which a prisoner can be charged, it was highly important that the Judge should discuss the evidence fully; and it does not appear that anything more was said to the jury than is contained in the record of the heads of charge, or that this was supplemented by reading the depositions of the most important witnesses, "a practice universally adopted by English Judges in serious cases, and which precludes the possibility of the jury coming to a decision without having all the facts fresh in their memory." *Per* Sargent, J., in *Reg.* v. *Fattechand* (1).

We are of opinion that the Judge, while giving, as he certainly may, his opinion on questions of fact, might well have dealt more fully with the evidence, the material on which the jury had to deliver their verdict. But we do not think the prisoner has been prejudiced. He was defended by a pleader who was entitled, under s. 290, to sum up his case after it closed on the third or fourth day of the trial. The record does not show whether he used this opportunity. Moreover, it appears that the jury as judges of the facts rejected the conclusions expressed by the Judge and found the prisoner guilty of culpable homicide only, not murder.

It has been several times ruled by this Court that as s. 304 of the Penal Code (Act XLV of 1860) deals with two kinds of culpable homicide, the jury ought to be asked to say under which part they find him guilty.

(1) 5 B.H.C.R.Cr. C. 85 (95).

We point this out to the Court below for future guidance. The sentence passed is a legal one under both parts of s. 304; and the learned pleader for the appellant has not argued that on the evidence the jury might have held that there was no intention to cause death, and that on such a formal verdict, bringing the case under the second part of s. 304, the learned Judge might have refrained from passing the maximum sentence. The pleader here has not dealt with this particular defect in the charge. He has, however, urged that this Court should reduce the sentence as excessive, giving further weight to the provocation [744] which was probably the reason why the jury declined to convict of murder. This Court is of opinion that no sufficient reason appears for judicial interference with the sentence on the merits. It is open to the prisoner to petition the Crown.

We have next to deal with the objection taken in the Consular Court to its exercising jurisdiction over the prisoner and faintly urged by Mr. Manekshah in the appeal. He admits that the prisoner is a Greek under British protection at Zanzibar. It is clear from a letter of the 14th June, 1892, from our Consul-General at Zanzibar to the Consul of France there, that the protection of the Greeks was assumed by the Consul-General with the knowledge of the Sultan of Zanzibar. The record also contains the views of Mr. Berkeley, the Consular Officer who committed the prisoner for trial. It appears therefrom that the Greek Government was a party to this placing of the Greeks under British protection.

The question raised below was whether, under the circumstances of this international action, a Greek coming under the British protection became also liable to the British criminal law in force in Zanzibar. This law is to be ascertained from Her Majesty's Orders in Council, the chief being that of 1884 passed under the Foreign Jurisdiction Acts, 1843 to 1878. It applies several Acts of the Government of India, among them being the Indian Penal Code, the Codes of Civil and Criminal Procedure, and the Indian Evidence Act. It creates a Consular Court with the Consul-General as Sessions Judge under the High Court of Bombay. Later Orders in Council have modified some of the judicial arrangements, but it is only necessary to refer to the Jurisdiction Order of 1893, which makes ch. 33 of the Criminal Procedure Code inapplicable to Zanzibar.

A substantive law of crimes, a procedure and a forum being thus created, we have next to see what persons are made subject thereto. Section 6, cl. (*b*), applies such provisions of the Order as refer to British subjects to British-protected persons, in so far as by treaty, capitulation, grant, usage, sufferance or other lawful means Her Majesty has jurisdiction in Zanzibar in relation to such persons. Mr. Manekshah concedes, and it does not seem [745] open to doubt, that the prisoner comes within the definition in s. 4, cl. 6, of British-protected person, which means "a person enjoying Her Majesty's protection in Zanzibar."

The question of the Consular Court's jurisdiction over him thus becomes narrowed to the issue whether the lawful effect of the protection arrangements made in 1892 at the transfer, taken along with the treaties made with His Highness the Sultan of Zanzibar, as s. 8 requires, was to place the prisoner under the criminal laws and jurisdiction specified in Her Majesty's Order in Council, like the subjects of Indian Princes and States, or the persons brought under by the Order of 1893, natives of any protectorate of Her Majesty outside Zanzibar when within Zanzibar, and certain Zanzibar subjects. As regards these last, see art. 17 of the Treaty signed on the 30th April, 1886, and the declaration between Great Britain and Zanzibar of the 16th December, 1892 (cited at p. 211 of a Treatise

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on Foreign Jurisdiction by W. E. Hall). In art. 16 of the Treaty occurs the following provision :—"The authorities of His Highness the Sultan have no right to interfere in disputes between subjects of Her Britannic Majesty amongst themselves, or between them and members of other Christian nations; such questions, whether of a civil or criminal nature, shall be decided by the competent Consular authorities." This makes it clear that the jurisdiction over the prisoner's act is not with the Sultan's Government; and there is nothing on the record to show any claim by that Government, although the First Minister of the Sultan appeared as a witness to the facts; and the record shows that in the Court of Mr. Berkeley, where objection was first taken to the jurisdiction, there was an appearance for the Government of Zanzibar. The case has been argued on the understanding that the Government of Greece has no Consul at Zanzibar. There is no suggestion of any arrangement empowering the British Consul-General to deport the prisoner to Greece for trial. It would appear, therefore, that, unless the Consular Courts assumed jurisdiction in such a case, the foreigner under the British protection might slay British subjects with impunity. We have no information whether the Courts in Greece would punish the offence. Forsyth in his Constitutional Law, p. 233, cites Wheaton and Dana for the [746] statement that as a general rule a State will not try its own subjects for offences committed abroad against foreigners.

The record contains a declaration by Her Majesty's Diplomatic Agent and Consul-General, that the two Courts below overruled the objection to the jurisdiction after reference to him and with his full approval and authority. The reasons are to be gathered from the minute recorded by Mr. Berkeley; that officer considers that "British Consul protection in Zanzibar connotes British jurisdiction." As a principle this seems in accord or analogy with that on which local allegiance is based by Coke in Calvin's case (1). "Concerning the local obedience it is observable that as there is a local protection on the King's part, so there is a local ligeance of the subject's part," as when a Frenchman comes into England. The principle seems also in accord with that on which Lord Stowell decided *The Indian Chief* (2), where other cases of older time were mentioned. In the East," he said, "from the oldest times an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and foreigners as all their fathers were. *Doris amara suam non intermiscuit undam*: not acquiring any national character under the general sovereignty of the country and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade."

In considering what power and jurisdiction is conceded to Great Britain within the territories of a foreign State, it must be borne in mind, as pointed out in Forsyth's Constitutional Law, 13, 231, that the Judicial Committee of the Privy Council, when their Lordships referred with approval to Lord Stowell's judgment, have noticed that in transactions, whether political or mercantile, a difference subsists between Oriental and Christian States. In *Papayanni* v. *Russian Steam Navigation and Trading Co.*, *The Laconia* (3), it was held that any mode of proof by

(1) 7 Coke's Rep. 6a.
(2) 3 Chr. Rob. Admir. Rep. 29.
(3) 2 Moo. P.C.N. S. 161=33 L. J. Adm. Cas. 11.

which it was shown that a privilege is conceded, would be sufficient for [747] the purpose. The consent may be expressed in various ways: by constant usage permitted and acquiesced in by the authorities of the State; active assent or silent acquiescence where there is full knowledge. Thus the Ottoman Government had acquiesced in allowing to the British Government within the Ottoman dominions jurisdiction between British subjects and the subjects of other Christian States. This case shows beyond all doubt that it is competent for Her Majesty to exercise jurisdiction in one foreign State over the subject of another foreign State. One peculiarity of that case was, however, that the part of the Order then interpreted was a proviso similar to that in s. 33 of the Zanzibar Order in Council of 1884, restraining the Consular Court from assuming that jurisdiction where the consent of the territorial Sovereign or of the Consul of the state to which the foreigner belonged had not been obtained. No such restriction appears in the Zanzibar orders in Council as regards criminal matters.

There remain to be considered the objections taken for the prisoner by Mr. Lascari in Mr. Borkeley's Court, and apparently also in the Consular Court at the trial. He urged that it was the duty of the Consul-General to forward the prisoner for trial to Athens, as it would have been the duty of the French Consul before 1892. But Mr. Berkeley points out that the deportation could not be made in the absence of any arrangements for extradition. No convention about deportation has been suggested to us, nor has it been argued that the law of Greece extends to a homicidal offence at Zanzibar. Mr. Berkeley makes mention of the only stipulation made by the Greek Government in the arrangement of 1892, *viz.*, that Greek subjects should not be submitted to any measure not equally applicable to the subjects of other European powers established in the island and who have no treaty with the Sultan. Mr. Berkeley says that the subjects of non-treaty nations would necessarily fall under the territorial jurisdiction of the Sultan, a result avoided only by their coming under the protection of a treaty power. On this, however, we would remark that the Sultan had, by art. 16 of the Treaty, ceded the jurisdiction over cases like the present to the different Consular authorities. The Government of Greece cannot in the [748] year 1892 be presumed ignorant of our treaty of 1886 or of our Consular order of 1884, and its provision about British protected persons. It would be mere surmise to suppose, in the complete absence of any stipulation or any arrangement to that effect, that it is intended that in a case like the present the prisoner should be sent to Athens. The presumption that the Court below has acted rightly, is not to be weakened by mere suggestion or surmise. The Act of Parliament, the Foreign Jurisdiction Act, 1890, 53 and 54 Vict., c. 37, provides a means of obtaining a conclusive determination of questions of jurisdiction. On the application of the Court in the manner provided, a Secretary of State shall within a reasonable time send it his decision. This Court has not been moved to use this means and as it is of high importance that the decision of questions of criminal law should not be delayed, and as we see no sufficient reason to doubt that the Court below had jurisdiction, we do not avail ourselves of the procedure. Mr. Manekshah was instructed that the Greek community at Zanzibar intended to bring the subject to the notice of the King of the Hellenes. If His Majesty's Government consider that the jurisdiction lay with the Courts of Greece, that view will probably be stated to Her Majesty's Government by the usual diplomatic means, and if Her Majesty's

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Government are of opinion that the result of past international arrangement is different to what this Court takes to have been the case, it will be able to give appropriate directions. The Court now rejects the appeal of the prisoner.

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[749] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* RAMCHANDRA GOVIND HARSHE.*

[12th March, 1895.]

Fraud—Misappropriation—Charge of misappropriation of specific sums of money—Evidence—Evidence of general deficiency—Criminal Procedure Code (Act X of 1882), ss. 503, 507—Commission—Evidence taken on commission, admissibility of—Evidence Act (I of 1872), s. 33—Right and opportunity to cross-examine—Evidence improperly admitted—New trial—Evidence Act (I of 1872), s. 167—Practice—Procedure.

The accused was charged with abetting the offence of criminal breach of trust committed by the nazir of the Small Causes Court at Poona. The accused was a karkun in the nazir's office and it was his duty to keep the accounts of moneys received in the office from judgment-debtors and of moneys paid out to decree-holders. He was charged with abetting the misappropriation of three sums, *viz.* Rs. 20 on the 19th November, 1885, Rs. 45 on the 23rd November, 1885, and Rs. 10 on the 26th June, 1886. As to the first sum, it was alleged that an instalment of Rs. 25 due under a decree had been paid into the nazir's office by a judgment-debtor on the 19th November, 1885, but the accused had entered in the office day book only Rs. 5, thereby enabling the balance of Rs. 20 to be misappropriated. It appeared, however, that a sum of Rs. 25, being the instalment due to the decree-holder under the above decree, had been in due course paid out to him on the 4th December, 1885. As to the second sum of Rs. 45, it was alleged that a sum of Rs. 50 had been paid in, but only Rs. 5 had been entered by the accused, the balance being misappropriated. It appeared, however, in this case also that the full amount of the instalment, *viz.* Rs. 50, had been duly paid out to the decree-holder a few days after its receipt. As to the third sum, it was alleged that the total receipts entered in the book on the 26th June, 1886, were Rs. 55, but the figure entered as the total was only Rs. 45 and that the balance of Rs. 10 had been misappropriated. The jury found the accused guilty on all three charges. On appeal by him it was contended that there was no evidence of the misappropriation of the specific sums in respect of which he was charged. There was evidence of a general deficiency, but there was no evidence that these specific sums formed part of that deficiency. On the contrary the evidence showed that the instalments paid into the office had been duly paid out to the persons to whom they were payable.

Held, that the jury having had the facts brought to their notice, their verdict was final, and the High Court would not interfere with the verdict.

Depositions taken on commission in criminal cases although inadmissible under Chap. 40 of the Criminal Procedure Code (Act X of 1882) may be admitted under s. 33 of the Evidence Act (I of 1872), if the requirements of the proviso to that section have been complied with.

The words "opportunity to cross-examine" in the proviso to s. 33 do not imply that the actual presence of the cross-examining party or his agent before the tribunal taking the evidence is necessary.

[750] To make evidence admissible against an accused person under s. 33 of the Evidence Act, the fact that he had full opportunity of cross-examination, if not admitted, must be proved.

Quære—Whether the opportunity to administer cross-interrogatories under a commission is an "opportunity to cross-examine" within the meaning of the proviso to s. 33 of the Evidence Act so as to render the evidence taken on interrogatories admissible.

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The provisions of s. 167 of the Evidence Act (I of 1872) apply to criminal trials by jury.

Held, that when part of the evidence, which has been allowed to go to the jury, is found to be irrelevent and inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under s. 167 of the Indian Evidence Act (I of 1872), or to quash the verdict and order a retrial.

The law as settled in England by the *Queen* v. *Gibson* (1) and as stated by the Privy Council in *Makin* v. *Attorney-General of New South Wales* (2) with reference to the granting of new trials where evidence has been improperly admitted, does not apply to India. *Wafadar Khan* v. *Queen-Empress* (3), not followed.

[F., Rat. Unr. Cr. Cas. 855 (857); R., 25 M. 61 (67) (P.C.); 10 M.L.J. 147 (171) (F.B).]

APPEAL from the conviction and sentence recorded by G. Jacob, Sessions Judge at Poona.

The accused had been employed as a karkun from 1872 to 1889 under the nazir of the Small Causes Court at Poona. It was his duty (*inter alia*) to keep the account of moneys received in the nazir's office from judgment-debtors and of moneys paid out to decree-holders. In 1890 large defalcations amounting to several thousands of rupees were discovered in the nazir's accounts, and the nazir was tried and convicted of criminal breach of trust.

In 1894 the accused was arrested and tried upon charges framed against him in connection with the same defalcations. The charges were with respect to three sums of money alleged to have been misappropriated, *viz.*, Rs. 20 on the 19th November, 1885, Rs. 45 on the 23rd November, 1885, and Rs. 10 on the 26th June, 1886, and they were framed under ss. 409, 109 and 218 of the Indian Penal Code. The accused was convicted by the jury of abetting the misappropriation of each of the above sums of money, and for each offence he was sentenced to eighteen months' rigorous imprisonment.

The first set of charges related, as above mentioned, to a sum of Rs. 20, as to which it was alleged that an instalment of Rs. 25 [751] due under a decree had been paid into the nazir's office by a judgment-debtor on the 19th November, 1885. But the accused entered in the office day-book only Rs. 5, thereby enabling the balance of Rs. 20 to be misappropriated either by himself or by the nazir. It appeared, however, that a sum of Rs. 25, being the instalment due to the decree-holder, had been in due course paid out to him on the 4th December, 1885.

The second set of charges related to a sum of Rs. 45. On the 23rd November, 1885, a judgment-debtor under another decree had paid in an instalment of Rs. 50, but the entry made by the accused was Rs. 5, thereby (it was alleged) enabling the balance of Rs. 45 to be misappropriated either by himself or by the nazir. It appeared, however, in this case also, that the full amount of the instalment, *viz.*, Rs. 50, was duly paid out to the judgment-creditor on the 27th November, 1885.

The third set of charges related to a sum of Rs. 10. As to this it appeared that the total receipts entered in the books for the 26th June, 1886, amounted to Rs. 55, but the total entered was only Rs. 45, and it was alleged that the difference, *viz.*, Rs. 10, had been misappropriated, and that the total had been wrongly entered by the accused in order to render misappropriation possible.

(1) L.R. 18 Q.B.D. 537. (2) L.R. (1894) A.C. 57 (69-70). (3) 21 C. 955.

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The case for the prosecution was that the accused either himself misappropriated the difference on each of these occasions, or aided and abetted the nazir in misappropriating the money by wilfully making false entries in the books.

The case for the defence was that the entries in question were made through mistake under pressure of work, and not with any guilty knowledge or dishonest intention.

During the course of the preliminary inquiry, the committing Magistrate issued a commission under s. 503 of the Criminal Procedure Code (Act X of 1882) to the Agent to the Governor-General at Indore for the examination of Rao Bahadur K. C. Bedarkar, Divan of Indore, who had been Judge of the Court of Small Causes at Poona at the time when the offences were alleged to have been committed. The witness was examined by means of interrogatories and cross-interrogatories. At the trial before the Sessions Court, the deposition of this witness was [752] tendered in evidence by the prosecution. The accused's pleader objected to its admissibility. But the Sessions Judge overruled the objection, holding that the deposition was admissible under s. 33 of the Indian Evidence Act (I of 1872), as the attendance of the witness could not be procured without unreasonable delay and expense.

The jury unanimously acquitted the prisoner of the principal offence of criminal breach of trust under s. 409 of the Indian Penal Code, but by a majority of four to one found him guilty of abetment of criminal breach of trust in respect of each of the items under s. 109 of the Code. The jury were of opinion that the moneys had been misappropriated by the nazir with the knowledge of the accused, and that the accused deliberately made the false entries with the intention of enabling the nazir to misappropriate the moneys.

The Sessions Judge, concurring with the verdict of the jury, convicted the prisoner under ss. 409 and 109 of the Indian Penal Code (Act XLV of 1860) of abetment of criminal breach of trust, and sentenced him to eighteen months' rigorous imprisonment for each of the said offences. He also convicted the prisoner under s. 218 of the Code, but did not pass any separate sentence for the offence charged under that section.

Against this conviction and sentence the accused appealed to the High Court.

Kirkpatrick (with *N. C. Chandavarkar*), for the appellant.—The Judge has misdirected the jury. The charge was inadequate in not pointing out that there was no evidence given that the principal offence had been committed. That being so, the charge of abetment cannot be sustained. Further, the prosecution is bound to prove the misappropriation of the specific sums in respect of which the accused is charged. This is not proved, nor is there any evidence of it. There is evidence of a general deficiency, but no evidence that these sums formed part of that deficiency. On the contrary the instalment of Rs. 25, which is the subject of the first charge, and which was paid in by the judgment-debtor on the 19th November, was paid out in full on the 4th December to the judgment-creditor. So also the sum of [753] Rs. 50 which was paid in by the judgment-debtor on the 23rd November was paid out to the judgment-creditor on the 27th November—Russell on Crimes (5th Ed.), Vol. 2, pp. 377-378; *Reg* v. *Wolstenholme* (1); *Rex* v. *Grove* (2); *Reg* v. *Lloyd Jones* (3).

(1) 11 Cox. C. C. 313. (2) 7 C. and P. 635. (3) 8 C. and P. 288.

As to the third charge, nothing is proved except that the addition of the day's receipts is wrong, and the total is less by Rs. 10 than it ought to be. There is no evidence but the mere fact of the discrepant figures—s. 34 of the Indian Evidence Act (I of 1872). There is no evidence that the wrong figures are fraudulently and intentionally entered.

Next we contend that the evidence taken on commission was wrongly admitted by the Sessions Court. The commission had not been issued by that Court, but by the Police Court—*Queen-Empress* v. *Jacob* (1); *Empress* v. *Dabee Pershad* (2). It was rightly held inadmissible under the Criminal Procedure Code (Act X of 1882), ss. 503—507. It ought not, then, to have been admitted under the Evidence Act. The former Code gave the right to a commission and laid down the limits within which the right could be exercised. It was not intended that although the terms of the Code were not complied with, the evidence could be admitted under some other Act. If so, the limitations laid down by the Code would be futile. But even under s. 33 of the Evidence Act (I of 1872) the evidence was not admissible—*Queen-Empress* v. *Burke* (3); *Queen-Empress* v. *Jacob* (1); *Empress* v. *Dabee Pershad* (2).

[JARDINE, J.—Had the accused the right and opportunity to cross-examine? See *Reg* v. *Day* (4).]

No. Mere cross-interrogatories could not be cross-examination under s. 33.

If the evidence taken on commission was improperly admitted and allowed to go to the jury, the verdict is bad. We say there should be a new trial notwithstanding s. 167 of the Evidence [754] Act—*Queen* v. *Gibson* (5); *Makin* v. *Attorney-General of New South Wales* (6). This last is a Privy Council case which this Court is bound to follow, although it is contrary to previous decisions of this Court. See per Melvill, J., in *Manjunath* v. *Venkatesh* (7).

JARDINE, J.—We do not think it necessary to call on the prosecution as to the first point raised in argument; for we think that as to that point the jury were sufficiently directed by the Sessions Judge, and their decision is final. The facts were brought to their notice, and they appear to have considered them and to have given their verdict accordingly. We do not think that we should be justified in interfering with that verdict. But we desire to hear the pleader for the Crown upon the other two points, *viz.*, (1) was the evidence taken on commission admissible? (2) If not, if that evidence was improperly admitted, what course should this Court adopt in dealing with the case, having regard to the principles laid down in *Makin* v. *Attorney-General of New South Wales* (6) and to s. 167 of the Evidence Act (I of 1872) and the series of decisions upon this section?

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.—The commission to examine Mr. Bedarkar was issued by the committing Magistrate under s. 503 of the Code of Criminal Procedure (Act X of 1882). Reading ss. 503 and 507 of the Code together, the evidence taken on commission becomes part of the record of the case. I adopt the argument of the Advocate General in *Queen-Empress* v. *Jacob* (1). A commitment is only a preliminary stage of the trial, and the trial continues until it ends in verdict. The evidence taken on commission is, therefore, admissible under s. 507 of the Code of Criminal Procedure.

(1) 19 C. 113 (117). (2) 6 C. 532. (3) 6 A. 224. (4) 6 Cox. C. C. 55.
(5) 18 Q. B. D. 537. (6) L. R. (1894) A. C. 57; see pp. 69 and 70.
(7) 6 B. 54 (57, 58).

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But it is also admissible under s. 33 of the Indian Evidence Act (I of 1872). The accused had the opportunity of cross-examining the witness, and he availed himself of that opportunity by putting cross-interrogatories. The cross-interrogatories take the place of cross-examination within the meaning of s. 33 of the Evidence Act. The provisions of this section are not [755] affected in any way by s. 507 of the Code of Criminal Procedure. The deposition of Mr. Bedarkar taken on commission is, therefore, admissible in evidence.

Even if it were inadmissible, the remaining evidence on the record is sufficient to sustain the conviction. Section 167 of the Evidence Act would then apply. This section applies to criminal as well as to civil Courts. This Court has often held that the improper admission of evidence would not be a ground for interference with a verdict if the remaining evidence on the record be sufficient to warrant a conviction—*Reg.* v. *Amrita* (1); *Imp.* v. *Pitamber* (2); *Imp.* v. *Pandharinath* (3); *Reg.* v. *Futa Adaji* (4); see also *Queen* v. *Hurribole* (5).

JUDGMENT.

JARDINE, J.—The prisoner was convicted, on the verdict of the jury, on three heads of charge relating to different sums of money, of abetment of criminal breach of trust under ss. 109 and 409 of the Indian Penal Code, and upon this verdict sentences were passed by the Sessions Judge. At the same trial the Judge after taking the opinion of the members of the jury as assessors convicted the prisoner on three heads of charge under s. 218 of making incorrect entries of the above three sums of money, by stating the sum received at each payment as less than it was. No sentence was passed under s. 218.

At the hearing of the appeal Mr. Kirkpatrick argued several questions of law on behalf of the prisoner. The first point taken was misdirection. He argued that the Judge ought to have directed the jury that there was no evidence of the substantive misappropriation, nor of the abetment. He cited some of the cases in 2 Russell on Crimes, Book IV, Chap. 19, s. 4, such as *Reg.* v. *Lloyd Jones* (6), *Reg.* v. *Wolstenhome* (7), to show that there must be proof to satisfy the jury of receipt of the particular sum and misappropriation of the same as distinguished from evidence of a general deficiency. The charge delivered by the Judge shows sufficiently that he required the jury to find separately as to each specific misappropriation charged, [756] and the verdict delivered is specific as to each. It was, however, contended that the absence of evidence should have been pointed out. But we are of opinion that there was evidence on which the jury might judge, not merely conjecture—*Queen-Empress* v. *Vajeram* (8). The present is distinguished from all the cases cited by evidence that the sums in each case accounted for by the written entries were less than the sums received. Not one of the three transactions is merely one of non-entry or general deficiency. It was for the jury as judges of the facts to form an opinion whether the evidence disclosed fraud or mere negligence, and in so doing the jury might draw such presumption about facts from the course of business and the conduct of persons as s. 114 of the Indian Evidence Act allows a Court to do. Being satisfied that there was no misdirection, we did not call on the learned Government Pleader to reply on this point.

(1) 10 B.H.C.R. 497. (2) 2 B. 61. (3) 6 B. 34.
(4) 11 B.H.C.R. 247. (5) 1 C. 207. (6) 8 C. & P. 228.
(7) 11 Cox. C. C. 313. (8) 16 B. 414 (423).

The second question raised by Mr. Kirkpatrick was as to the admissibility as evidence at the trial of the deposition of a witness obtained by a commission issued by the committing Magistrate and forming part of the record of his inquiry. When tendered for the Crown, and objected to for the prisoner, the learned Judge held that s. 33 of the Indian Evidence Act applied to the deposition; and in the exercise of the judicial discretion allowed by that section admitted it on the ground that the attendance of the witness who was at Indore, in a Native State, could not be obtained without unreasonable delay and expense. It has been only faintly argued by the Government Pleader that the deposition may be held admissible under chap. 40 of the Code of Criminal Procedure (Act X of 1882); and so far we see no reason to differ from the contrary view expressed by Wilson, J., in *Queen Empress* v. *Jacob* (1), or from the reasons given in the report. The argument of Mr. Kirkpatrick does not contest the exercise of the discretion by the Judge as wrong; and, therefore, the particular question arising on s. 33 in the last mentioned case and before Oldfield, J., in *Queen-Empress* v. *Burke* (2) is not before us, at least not in the same form. It does not appear to have been urged at the trial that there was something very special in the case [757] which rendered personal presence necessary—*Empress* v. *Bal Gangadhar* (3). We must, therefore, hold, in the absence of objections, that the first part of s. 33 applied to the deposition. So does the explanation. We mean that there is nothing in the language used showing that a deposition like the present was meant to be excluded. No authority has been cited on the construction. Mr. Kirkpatrick's argument was that as special provision is made in chap. 40 of the Code of Criminal Procedure for commissions in criminal cases, that chapter must be treated as exhaustive. We think, however, that no sufficient reason exists for making that concession, or limiting the force of general words in s. 33. This view is not against the principle of s. 390 of the Code of Civil Procedure (Act XIV of 1882) and the use made of depositions taken in Zanzibar in *Empress* v. *Dossajee* (4). The same judicial discretion used as to depositions of witnesses examined by the committing Court or in another Court in a case between the same parties under s. 33 of the Indian Evidence Act, has to be used and was used about this commission evidence, and the cases show that the use of this discretion may be challenged in appeal. Thus safeguards exist against abuse.

In the argument on s. 33, the question was discussed whether the proviso had, as is necessary, been satisfied. As we are of opinion that much of the matter of the deposition was inadmissible for reasons we will give, it is perhaps not necessary for our decision to construe the proviso: and as my brother Fulton refrains, therefore, from giving an opinion on that point, I state my own views with some diffidence. The only point in doubt was, whether at the taking of the evidence by the Commissioner at Indore, the prisoner had "the opportunity to cross-examine," the right to cross-examine being expressly given by s. 505 of the Code of Criminal Procedure (Act X of 1882). As to the opportunity, the record shows that the prisoner had questions, headed "cross-examination" questions and "supplemental cross-examination" questions, put as counter interrogatories, and also got notice of the day appointed for taking the evidence. Neither he nor his pleader attended. There may be circumstances where, although a prisoner has the right, he has not the opportunity, [758] *e.g.*, where the witness is at a great distance and the prisoner cannot go

(1) 19 C. 113. (2) 6 A. 224. (3) 6 B. 285 (287). (4) 3 B. 334.

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to the place and is too poor to employ a pleader or too unfamiliar with the ways of the place to get legal help there. When the want of opportunity is pleaded, the trying Court makes inquiry before admitting the evidence—*Queen* v. *Mowjan* (1); *Reg.* v. *Day* (2); *Reg* v. *Williams* (3).

At the Court's suggestion the Government Pleader called on the committing Magistrate for information; and that officer's statement, which is accepted here on behalf of the prisoner, shows that no desire to be present at Mr. Bedarkar's examination was expressed. No objection on the ground of want of opportunity was apparently made to the Magistrate, nor to the Sessions Judge, nor is it set forth in the appeals, nor after the invitation of this Court has this want been shown to exist. The ruling in *Hitchins* v. *Hitchins* (4) is under the circumstances an authority for declining to hold that the deposition is inadmissible on the ground suggested. To hold that the proviso in s. 33 of the Evidence Act requires proof of the presence before the Commissioner of the cross-examining party or his agent, would be to put a strain on the words and lead to inconvenience. If presence were necessary, the word would have been used as in 11 and 12 Vic., c. 42, s. 17. In 30 and 31 Vic., c. 35, a statute enabling the depositions of sick witnesses in criminal cases to be taken before trial, we find provision in s. 6 that on proof of death of the witness the deposition may be read on proof "that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or attorney had, or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same." In s. 7 follows a power to convey the prisoner in actual custody to the place where the statement is to be taken. The Indian law has made no provision of that sort: a prisoner under sentence cannot insist on being brought before the Court to support his appeal, as is ruled in this Court's Resolution in Chambers, in *Re Antoine Jose*, dated 4th September, 1869. If, then, we were to hold that presence or opportunity of presence is required to **[759]** satisfy the proviso, much difficulty would be found in getting evidence under the enabling s. 33 of the Evidence Act where a party is in custody.

These considerations favour the construction of the words "opportunity to cross examine" as including the method of cross-interrogatories which for many years was the chief mode of cross-examination in the Courts of Equity and the Admiralty Courts in England, and for which provision is made in the Common Law Procedure Acts. Where the whole examination was in writing—epistolary as Jeremy Bentham calls it—as distinguished from *viva voce* examination at the trial, the cross-examination was in writing too, and is so treated in the reports—*Pole* v. *Rodgers*(5); *Williamson* v. *Page*(6). The whole system is described in Gresley's Evidence in the Court of Equity, Part III, c. 5, s. 1: and its ineffectual character discussed as compared with the *viva voce* method, the opinions of the Chancery Commission and of eminent Judges being cited. Though the point was not taken by Mr. Kirkpatrick, we paused in order to consider whether counter-interrogatories, though described in these books as a form of cross-examination, were to be treated as such in interpreting our codes. With reference to my brother Fulton's doubt, I may recall the

(1) 20 W. R. Cr. R. 69.
(2) 6 Cox. C. C. 55.
(3) 12 Cox. C. C. 101.
(4) L. R. I P. and D. 153.
(5) 3 Bing, N. C. 780.
(6) 1 C. B. 464.

remark of Bentham—in his work on judicial evidence if my memory is right—that the method of cross-examination *viva voce*, that which the term first suggests and the only effective method, is peculiarly English, and the word has no exact equivalent in the civil law or any continental jurisprudence. It is of high importance that no security for truth, especially in criminal cases, should be weakened. On our rules of evidence, said Lord Abinger, the property, the liberty and the lives of men depend: and, therefore, while I give my opinion, I agree with Fulton, J., that this point ought to be more solemnly argued before it is decided solemnly.

In the present case the Court, having noticed that there was no evidence nor admission on the record to support the statement of the Sessions Judge that the accused had full opportunity of cross-examining, had to make its own inquiries. We are of opinion that this fact, if not admitted, must be proved, as was ruled **[760]** in *Queen* v. *Mowjan*(1), and as may be inferred from s. 136 of the Evidence Act. Commissions ought not to be issued without good and sufficient reasons: the discretion is judicial, as shown by the Indian cases and the practice of the Courts of England—*In Re Boyse*, *Crofton* v. *Crofton* (2); *Cock* v. *Allcock & Co.* (3). The exercise of the discretion in the present case by the Sessions Judge, is open to re-consideration in appeal as shown by *Queen* v. *Mowjan* (1) and *Cleave* v. *Jones* (4) and 1 Taylor on Evidence, s. 22.

This brings us to two objections taken by Mr. Kirkpatrick, though not taken at the trial, *viz.*, that certain questions and certain answers in the evidence of Mr. Bedarkar are inadmissible, and that the general tenor of the statements is to prejudice the prisoner in the eyes of the jury. We are of opinion that some of the questions are unfairly framed and some of the answers stating mere opinions and suspicions are inadmissible as evidence—to which in a Court of Equity just objections would have been taken—to which under s. 507 of the Criminal Procedure Code (Act X of 1882) just exception might and ought to have been taken before the Magistrate, which also the Sessions Judge ought in his discretion under s. 298 of that Code to have prevented being read in the trial. To avoid imperilling the verdict, the admission of such evidence ought not to be pressed by the prosecution—*Reg.* v. *Russell* (5). See also *Reg.* v. *Kasinath Dinkar* (6). It is probable that the jury were much influenced by Mr. Bedarkar's opinions on the chief issue they had to try. The facts occurred when Mr. Bedarkar was a Judge and the prisoner was a clerk in his Court. Juries usually give weight to the opinion of Judges. They know that Judges are used to deal with conflicting evidence, to question, to sift, to weigh it impartially; to test it by the presumptions based on general experience which are now settled rules of law. I remember a reported case in England where the learned Judge says: "If two Judges came and swore to the fact I would believe it," as if that would be equal to a confirmatory oath in which it would be impossible to lie. So also the poet Browning, who is fond of these legal questions, makes "Sludge the Medium" or **[761]** spirit-rapper explain that his imposture gained the common belief as soon as it was made to appear that a Judge believed in it. The jury must have known that the issue in this case, whether the prisoner's conduct showed fraud or negligence, is one with which Judges are dealing so constantly as to acquire great experience. As the Sessions Judge drew

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(1) 20 W.R. (Cr.R.) 69. (2) 20 Ch.D. 760. (3) 21 Q.B.D. 178.
(4) 7 Exch. Rep. 421. (5) 6 Cox. 60. (6) 8 B.H.C.R. Cr. Ca. 126 (153).

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their attention to Mr. Bedarkar's evidence in general terms, the jury probably were influenced by his opinions and suspicions that frauds had been committed in which the prisoner took part, the very issue on which they had to pronounce a verdict as judges of the facts, but on the evidence before them, not on the opinions of other persons.

The result of my consideration is to hold the evidence taken on commission to have complied with and to be admissible under s. 33 of the Indian Evidence Act. We are both clear, however, that part of it was inadmissible as irrelevant, and must be excluded as prejudicial under that Act and s. 507 of the Code of Criminal Procedure.

As this Court holds part to be inadmissible, it becomes necessary to decide whether this Court in dealing with the remaining evidence on the record should adhere to the practice based on former decisions such as *Reg.* v. *Fattechand* (1), *Reg.* v. *Ramswami* (2), *Reg.* v. *Naorojee* (3), *Reg.* v. *Amrita* (4), *Imperatrix* v. *Pitamber* (5), *Imperatrix* v. *Pandharinath* (6) as to the power of the Court where there has been misdirection or where inadmissible evidence has been allowed to go to the jury; or whether, as has been strongly pressed by Mr. Kirkpatrick, this Court should follow Beverley and Banerjee, JJ , in *Wafadar Khan* v. *Queen-Empress* (7) as to the application of some passages in the judgment of the Judicial Committee of the Privy Council in *Makin* v. *Attorney General of New South Wales* (8). The Indian cases above cited being based on special Indian enactments, such as Act II of 1855 and the corresponding s. 167 of the present Evidence Act (I of 1872) and ss. 537 and 423, cl. (*d*) of the Criminal Procedure Code (Act X of 1882), propound a **[762]** different view of the law to what is settled in England by the *Queen* v. *Gibson*(9). We would remark also that in the recent case from New South Wales before the Privy Council no such special enactment as s. 167 of the Indian Evidence Act was referred to, either in the arguments or the decision.

The words "in any case" used in this section are wide, and long ago were interpreted to include criminal trials by jury. It is also obvious in interpreting a statute applying to the Mofussil of India, where trial by jury is the creation of statute—*Reg* v. *Khanderao* (10), *Queen* v. *Hari Prasad* (11), *Queen-Empress* v. *Dada Ana* (12), *Queen* v. *Elahi Bax* (13) (where Sir Barnes Peacock says that in the Mofussil, trial by jury is in its infancy), analogies from a system where the statutes deal with that institution as part of the common law must be warily used. In the recent Calcutta case (7) no authority is cited for the interpretation of the word "erroneous" in s. 423, cl. (*d*), at p. 976 of the report: and the procedure under s. 307 shows that the Legislature in certain circumstances throws on the Judges of the High Court the duty either of determining the facts which have been already before a jury, or of ordering a new trial. Sometimes it appears after error found that the case depends on conflicting testimony which ought to be weighed by a Court before whom the witnesses appear; and this may be a reason for ordering a new trial. It is difficult to lay down with precision rules to meet all cases—*Queen* v. *Gagalu*(14), but not

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(1) 5 B.H.C.R. Cr. Ca. 85. (2) 6 B.H.C.R. Ca. 47. (3) 9 B.H.C.R. Cr. Ca. 358.
(4) 10 B.H.C.R. Cr. Ca. 497. (5) 2 B. 61. (6) 6 B. 34.
(7) 21 C. 955. (8) L.R. (1894) A.C. 57. (9) 18 Q.B.D. 537.
(10) 1 B. 10 (13). (11) 8 B.L.R. 557 (562) = 14 W.R. 59.
(12) 15 B. 452 (481, 483).
(13) B.L.R. Sup. Vol. (Full Bench) 459 (472) = 5 W.R. (Cr. R.) 80.
(14) 4 B.L.R. Appx. 50.

so difficult in practice. In *Imperatrix* v. *Rupya* (1) the Court (Birdwood and Jardine, JJ.) followed *Reg* v. *Ramswami*(2), *Reg* v. *Amrita* (3) and the case of *Elahi Bax*(4), and a new trial by jury was directed. In *Imperatrix* v. *Kushya* (5), where the facts were hard to determine, a new trial by the Judge and assessors was directed by Jardine and Ranade, JJ. In *Imperatrix* v. *Nanu* (6), the same Judges ordered a new trial by jury as judges of the facts, *Reg* v. *Fattechand* (7) being **[763]** cited. In *Government of Bombay* v. *Dhanji* (8), where the jury had been misdirected that confessions must be corroborated, the same Judges ordered a new trial. It cannot be supposed that the Indian Legislature in its successive recastings of the Procedure Code was ignorant of the tenor of the decisions for the reasons given for them in such full judgments as that of Sir B. Peacock in *Elahi Bax's* case.

The present decided inclination of our opinion, as may be gathered from the above, is that the language used by the Judicial Committee in the case from New South Wales does not apply to the Codes of India. In *Reg* v. *Ramswami* (2) this Court ordered a new trial, as the evidence was of such a character as to render it difficult to pronounce upon its value without hearing the witnesses. It has been conceded for the prisoner that the present case differs: the evidence is one-sided and practically undisputed: the result depends on the inference from that evidence, whether only negligence or fraud is proved beyond reasonable doubt. As remarked already, such issues are constantly determined by the Judges here; and this one has been fully argued. We see no reason, then, for ordering a fresh trial.

We have then to apply the test adopted from *Elahi Bax's* case (4) by Warden and Sargent, JJ., in *Reg* v. *Fattechand* (7)—whether if the case had been tried by a Judge and assessors, the Court would set aside the verdict. We cannot say on the evidence that the verdict is wrong. In two of the cases the receipt of the money by the prisoner is admitted. In the third it may be inferred. The ledger entries show the real sums received; they differ from and were made later by the prisoner from the false entries he made in the day-book. It may beyond reasonable doubt be found as a fact that the prisoner had a hand in the fraudulent misappropriation of each of the three sums. With regard to the conviction passed under s. 218 by the Judge with the aid of assessors we see no sufficient reason to differ from his conclusions. For the above reasons the Court confirms the convictions and sentences, and dismisses this appeal.

Appeal dismissed.

(1) Cr. Rul. 12 of 1886 (Rat. Unrep. Cr. Cases 246).
(2) 6 B.H.C R. 47.
(3) 10 B.H.C.R. 497.
(4) B.L.R. Sup. Vol. (Full. Bench) 459 (472) = 5 W.R. (Cr. Rul.) 80.
(5) Ap. 377 of 1893, 21 Nov. 1893.
(6) Ap. 400 of 1893, 30th Jan. 1894.
(7) 5 B.H.C.R. Cr. Ca. 85.
(8) Ap. 240 of 1894, 11th Oct. 1894.

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Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice Starling.

CALLIANJI HARJIVAN (*Original Plaintiff*), *Appellant v.* NARSI TRICUM (*Original Defendant*), *Respondent.** [29th July, 1895.]

Specific performance—Injunction—Negative agreement—Discretion of Court—Agreement not to work for a rival tradesman—Specific Relief Act (I of 1877), ss. 22, 56 and 57—Damages.

The plaintiff was a milliner carrying on business in Bombay, and the defendant was in his employment up to the year 1890. In that year he left the plaintiff's service and the plaintiff alleged that at the time he left it he was indebted to the plaintiff for moneys not accounted for and also in respect of loans made to him. The plaintiff instituted criminal proceedings in the Police Court against the defendant for criminal breach of trust, and procured a warrant for his arrest. The defendant surrendered, and at the time of the agreement hereafter mentioned, the proceedings in this matter were going on. The defendant was out on bail, and was then in the service of a rival milliner named Bhimji Jivan. On the 1st February, 1893, an agreement in writing was made between the plaintiff and the defendant whereby the defendant agreed as follows:—(1) to pay the plaintiff Rs. 1,950 in full settlement of the plaintiff's claim; (2) to enter the plaintiff's service as cutter and to serve him for ten years from the date of agreement; (3) to serve plaintiff honestly; (4) in case plaintiff was obliged to dismiss him for some "fault," then until the expiration of the said period of ten years the defendant should not carry on the business of a cutter or tailor, either directly or indirectly, on his own account or as partner or servant of another, and in case he should do so, the plaintiff should be at liberty to stop him.

On the 15th February, 1893, the charge of criminal breach of trust against the defendant was dismissed, the plaintiff offering no evidence in support of it. The plaintiff subsequently called on the defendant to enter his employment in accordance with the agreement, but the defendant refused, and remained in the service of Bhimji Jivan. The plaintiff, therefore, filed this suit praying for an injunction restraining the defendant from carrying on business as a cutter or tailor for ten years from the date of the agreement. The lower Court dismissed the suit.

Held, on appeal, that the lower Court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant, but that inasmuch as it had refused an injunction on the ground that pecuniary compensation was the plaintiff's proper remedy, it ought not to have dismissed the suit, but ought either itself to have awarded damages or to have ordered an inquiry as to damages. The plaintiff being held to be entitled to a remedy, the appropriate remedy should be awarded.

The appellate Court accordingly passed a decree against the defendant and awarded the plaintiff Rs. 10 as damages, with costs of the appeal.

[R., 26 B. 735.]

[765] SUIT for an injunction (1).

The plaintiff carried on business in Bombay as a milliner under the name of Callian Moti & Co. The defendant had been formerly a cutter in the plaintiff's service, but left the plaintiff's employment in 1890. The plaint stated that the defendant was then largely indebted to the plaintiff in respect of moneys not accounted for, and also in respect of loans made by the plaintiff to him.

The plaint further stated that after the defendant had left the plaintiff's employment the plaintiff instituted criminal proceedings against

* Appeal No. 855; suit No. 537 of 1893.

(1) 18 B. 702.

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him in the Police Court on a charge of criminal breach of trust, and that in February, 1893, the defendant, who had in the meantime entered the service of one Bhimji Jivan, a milliner in Bombay, came to the plaintiff and requested him to come to a settlement in regard to the claims made against him, and also begged that the plaintiff would take him again into his employment. The plaintiff ultimately agreed to this, and an agreement, dated 1st February, 1893, was made between them which was reduced to writing. It contained the following terms :—

(1) The defendant was to pay the plaintiff Rs. 1,950 within eight days in full settlement of all the claims which the plaintiff had against him.

(2) The defendant was to enter into the plaintiff's service as a cutter and tailor, and to serve as such for ten years from the date of the agreement, receiving Rs. 37 per month as remuneration.

(3) The defendant was to serve the plaintiff honestly and to be obedient to the plaintiff's order.

(4) Except for some "fault" of the defendant the plaintiff was not to dismiss him within the said period of ten years, and if "by reason of a fault or ungratefulness" the plaintiff should be obliged to dismiss the defendant, "then until the aforesaid fixed period shall expire, the defendant is not to do or carry on in Bombay the work or business of a cutter or a tailor or the sewing business, either directly or indirectly, either on his own account or as a partner or servant of somebody else, and in case [766] he shall carry on the same, then the party of the second part, (*i.e.* the plaintiff) shall be at liberty to stop him."

(5) The defendant bound himself to get a similar agreement executed by his brother, Hari Tricum, and the plaintiff was to make a similar agreement and to pay him Rs. 31 per mensem.

On the 15th February, 1893, the charge of criminal breach of trust, which, as stated above, had been brought by the plaintiff against the defendant, was dismissed by the Magistrate, the plaintiff offering no evidence in support of it.

The plaint further stated that after the execution of the above agreement the plaintiff at the defendant's request consented to the latter remaining for a limited time in the service of Bhimji Jivan for the convenience of all the parties, but that subsequently the plaintiff had called upon the defendant to enter into his employment in accordance with the said agreement, but the defendant refused to do so and remained in the service of the said Bhimji Jivan. The said Bhimji Jivan was a rival in the business of the plaintiff.

The last paragraph of the plaint was as follows :—

"9. The plaintiff says that the said agreement comprises a negative agreement by the defendant not to work as a cutter or tailor on his own account or to serve any other milliner in either of these capacities; and the plaintiff brings this suit for an injunction ordering the defendant to perform the said negative agreement, the plaintiff having in no respect failed to perform the said agreement on his part."

The plaintiff prayed that the defendant should be restrained by injunction from carrying on business as a cutter or tailor on his own account, or as a servant or partner of any person other than the plaintiff, for a period of ten years from the date of the above agreement.

In his written statement the defendant (*inter alia*) stated that he had been obliged to leave the plaintiff's service in consequence of the false prosecution which the plaintiff instituted against him in order to

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bring pressure upon him and thus prevent his entering into the service of a rival establishment, and that the plaintiff having issued a warrant against him compelled him by undue influence to enter into the above agreement. He pleaded that the agreement was not, therefore, binding upon him, and that the plaintiff was not entitled to the injunction prayed for.

[767] At the hearing the following issues were raised :—

(1) Whether the agreement was to any and what extent void?

(2) Whether the plaintiff was entitled to the injunction prayed for?

Candy, J., held (1) that the parties to the agreement were not on equal terms, and in the exercise of the discretion given to him by s. 22 of the Specific Relief Act (I of 1872) he refused the injunction and dismissed the suit.

The plaintiff appealed.

Macpherson (Acting Advocate General) and *Inverarity*, for the appellant.

The respondent did not appear.

Macpherson.—The Court below found the facts in our favour, but did not give us an injunction or even damages. There was an implied agreement that the defendant should not enter other employment. He has joined a rival trader, and that is damaging to the plaintiff. Counsel referred to s. 57 of the Specific Relief Act (I of 1877); *Madras Railway Company* v. *Thomas Rust* (2).

JUDGMENT.

FARRAN, C. J.—In this case the plaintiff sued for an injunction to restrain the defendant from carrying on the business of a tailor or cutter for the period of ten years from the 1st February, 1893, on which day an agreement was made between them which the plaintiff in this suit sought to enforce. By that agreement the defendant had contracted to enter into the plaintiff's employment and to serve him for ten years at a remuneration of Rs. 37 per month.

The Judge of the lower Court rightly held that although that contract could not be directly enforced against the defendant so as to compel him to work for the plaintiff, yet that the Court had power under s. 54 of the Specific Relief Act (I of 1877) indirectly to enforce it, by restraining the defendant from working for any other person than the plaintiff during the period mentioned in the agreement. Illustration (*c*) to s. 57 leaves no doubt as to the power of the Court to do this. The Judge, [768] however, in his discretion has decided not to grant this injunction, and we have now to enquire whether that discretion was properly exercised.

In considering this question we must keep in mind that to grant an injunction in a case like the present amounts in substance, although not in form, to a decree for specific performance. It is obvious that to a man in the defendant's position there would be no alternative—in the event of his being prevented by order of the Court from taking other employment—than to enter the plaintiff's service, and to remain in it as long as the injunction remained in force. It would be practically impossible for him now to learn another trade or to find other employment. It is clear, therefore, that the same considerations which would prevent us from

(1) 18 B. 702.

(2) 14 M. 16.

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giving the plaintiff a decree for specific performance of the contract ought to prevent us from granting such an injunction.

The circumstances which we are required to take into consideration in granting specific performance are indicated in s. 22 of the Specific Relief Act, and it, therefore, becomes necessary to state the facts of this case in order to see whether they bring it within that section.

The defendant was formerly in the plaintiff's service. He had left it, and it was alleged that when he left it the plaintiff had large claims against him in respect of moneys for which he had not accounted. The plaintiff instituted criminal proceedings in the Police Court against him, and those proceedings were pending in January, 1893. The defendant, however, was out on bail and had obtained employment in another milliner's shop in Bombay carried on by one Bhimji Jivan, in which service he has remained ever since.

This was the position of the parties when the negotiations between them began in January, 1893. It appears that in the course of these negotiations the defendant was told that the Police Court proceedings against him would be abandoned. It is said, however, that the abandonment of these proceedings was quite independent of the agreement with the defendant, who indeed himself says that Mr. Bhaishankar, the plaintiff's solicitor, told **[769]** him that in any case the criminal case was to be withdrawn. The case was postponed for a fortnight and ultimately, *viz.*, on the 15th February 1893, it was dismissed.

The defendant, as I have stated, was then in the service of Bhimji Jivan. Subsequently the plaintiff called upon him to leave it and to enter his employment, as he had undertaken to do by the agreement of the 1st February, 1893, and the defendant refused.

Now we think it is impossible to believe that in entering into this agreement with the plaintiff the defendant was not influenced by the idea that by doing so he was getting rid of the criminal charge against him. It is surely much more likely that this was his object than that he should have been led to do so by a desire to re-enter the plaintiff's service. The case was pending against him and might be proceeded with, and it was no doubt a matter of great importance to him that it should be withdrawn. If that was so, it is clear that the parties at the time of making the agreement cannot be said to have been on equal terms. The defendant was at a disadvantage. He was to some extent in the power of the plaintiff, and he was apparently without any legal advice. Thus situated, and without taking any time for consideration, he signed the agreement. If we look at the terms of the agreement, we find it to be one which we think it is unlikely that a man would sign unless under some pressure of circumstances, for by it the defendant bound himself to serve the plaintiff for a long period of time, and during all that time his remuneration was to remain the same.

Having regard to these circumstances, we think that the parties to the agreement of the 1st February were not on equal terms, and that the Judge of the lower Court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant.

The lower Court was also of opinion that pecuniary compensation was sufficient to satisfy the plaintiff's claim against the defendant. Speaking for myself, I question whether compensation can be regarded as an equivalent for the defendant's agreement to work for him for ten years. There is always a **[770]** difficulty in proving damages with any accuracy in such a case. It is, indeed, almost impossible, and I confess that this

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fact has caused me to feel much doubt as to whether an injunction is not the proper remedy for the plaintiff, but on the whole I think that the considerations which I have mentioned should prevail.

The lower Court, however, while holding in its discretion that pecuniary compensation was the plaintiff's remedy, has dismissed his suit with costs. We think it ought either itself to have awarded damages to the plaintiff, or to have ordered an inquiry as to damages. The reason why an injunction was not given was because the Court considered damages to be the proper remedy. That being so, damages ought to have been awarded. In England, no doubt, a bill in equity would have been dismissed, but then the plaintiff would have his suit at law for damages. Here, however, a new suit would not lie, and consequently when the plaintiff is held entitled to a remedy, the appropriate remedy should be awarded.

An inquiry as to damages would be costly, and in any case a decree for damages against the defendant would not be of much value. We think a decree for Rs. 10 as nominal damages will be the proper decree in this case and without costs.

As to the costs of the appeal, we must award them to the plaintiff. It is a hard case, but he was no doubt entitled to appeal, and he has obtained a decree.

Order accordingly.

Attorneys for appellant.—Messrs. *Bhaishankar* and *Kanga*.

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19 B. 770.

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Before Mr. Farran, Chief Justice and Mr. Justice Starling.

BECHAR AKHA AND OTHERS (*Original Plaintiffs*), *Appellants v.* P. DE CRUZ AND OTHERS (*Original Defendants*), *Respondents.**

[3rd August, 1895.]

Will—Construction—Absolute gift—Gift over to widow or issue of donee—Life-interest—Costs.

Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died in April, 1884, leaving three sons, Michael, Silveiro and Joaquim (defendant No. 3) and two daughters, Rose and Caroline. By her will she directed that her daughter Rose should enjoy [771] the rents and profits of certain immoveable property for her life, and that after her death the said property should be sold, and the sale proceeds (after payment of two legacies thereout) be divided equally between her two sons Silveiro and Joaquim (defendant No. 3). The seventh clause of the will was as follows:—

7. "I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (*c*) of paragraph 6 above should be held in trust by my executors hereinafter named and converted by them into Government securities; the interest accruing therefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim Amador Bocarro reform himself, and take off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make

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* Suit No. 57 of 1894.

over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (c) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

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Held, on appeal, confirming the decree of the lower Court, that under the above clause of the will there was a clear gift to the wife or issue of Joaquim, but that Joaquim was to have the power of designating how they were to take. To that extent the absolute gift to Joaquim was qualified. Should the gift over fail, the absolute gift to Joaquim would remain unimpaired.

APPEAL from Candy, J.(1)

One Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died on the 19th April, 1884, leaving three sons (Michael, Silveiro Joseph, and the third defendant Joaquim) and two daughters Rose Maria and Caroline.

Anna Maria Bocarro at the time of her death possessed both moveable and immoveable property. She left a will, dated 12th March, 1884, and a codicil of the same date, and the first and the second defendants were the executors. With reference to certain immoveable property belonging to the testatrix the will contained the following directions :—

"4. If my daughter Rose Maria Bocarro should survive me, I direct that so long as she lives, my large house No. 57 and such of my smaller buildings Nos. 55, 56 and 71 as may not be sold should be rented, and the rents which may be received therefrom should, after deducting such sums as may be necessary for the payment of all kinds of tax on property and for whitewashing and repairing the said houses, be applied for the maintenance of my aforesaid daughter Rose Maria Bocarro."

[772] "5. But should my said daughter Rose Maria Bocarro predecease me, or should she die after me, then I direct that my executors herein named should sell within a reasonable time, either privately or by public auction, my large house No. 57 and such of my smaller houses Nos. 55, 56 and 71 which may not be sold, preference being given to any of my sons and heirs hereafter named who may desire to purchase any or all of the said houses."

"6. After the houses, referred to in the preceding paragraph 5, are sold, I direct that out of the proceeds of the sale (*a*) a sum of Rs. 500 (five-hundred) should be made over by my executors to my daughter-in-law Anna Joaquina Bocarro, wife of my eldest son Michael Bocarro, to be assigned by her in such proportion and in such manner as she may deem proper for the benefit of her four daughters, namely, Anna L. Bocarro, Cecillia Bocarro, Rosaline Bocarro and Catherine Bocarro; (*b*) that a sum of Rs. 1,000 (one-thousand) should be given to my daughter Caroline Britto, wife of Julius Lucas Britto, for her own and absolute use; (*c*) and that the remainder should be divided among my two sons, Joaquim Amador Bocarro and Silveiro Joseph Bocarro, in equal proportions."

"7. I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (*c*) of paragraph 6 above, should be held in trust by my executors hereinafter named and converted by them into Government securities; the interest accruing therefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son Joaquim Amador Bocarro die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim

(1) 19 B. 221.

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Amador Boccaro reform himself, and shake off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (*c*) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

The further facts of the case are fully stated in the report of the trial in the lower Court (*supra* p. 223). The points argued in appeal were as to the construction of the above will. Counsel for the appellants contended that Joaquim was absolutely entitled to a moiety of the sale-proceeds of the houses mentioned in the will. Counsel for the executors submitted that under the seventh clause of the will, Joaquim's wife (if she survived him) and his children (if any) took an interest in his share.

Macpherson (Acting Advocate General) and *Inverarity*, for the appellants.

They cited s. 225 of the Succession Act (X of 1865); Theobald on Wills (3rd Ed.), p. 353 ; *Brook* v. *Brook* (1) ; *Green* v. **[773]** *Spicer* (2) ; *Gough* v. *Bult*(3); *Younghusband* v. *Gisborne*(4) ; *Mayer* v. *Townsend* (5) ; *Whittell* v. *Dubin*(6); *Martin* v. *Martin*(7); *Re Boyd* (8), Jarman on Wills, p. 829 and p. 443 ; *Percy* v. *Percy* (9) ; *Byng* v. *Lord Strafford*, in appeal *Hoare* v. *Byng* (10).

Kirkpatrick and *Lowndes*, for the executors.

Robertson, for defendants Nos. 4 to 12.

Respondents Nos. 3 and 13 did not appear.

JUDGMENT.

FARRAN, C.J.—The main difficulty which I have felt in dealing with the will which we have to construe upon this appeal is to determine whether the intermediate clause in paragraph 7 creates a power in Joaquim to appoint his half-share to his widow or issue or whether the widow and issue are the direct and independent objects of the bounty of the testatrix. There can, I think, be no doubt but that the directions given in the concluding words of paragraph 6 to divide the residue of the sale-proceeds of the house between Joaquim and Silveiro would amount to an absolute gift of the half-share of the residue to Joaquim, unless there is contained in the seventh paragraph a clear gift over, upon his death, of his half-share to his widow or issue. The rest of the seventh paragraph which prescribes the mode in which he is to enjoy his half-share, seems to me to be quite insufficient to qualify the preceding absolute estate. See, as to restrictions on enjoyment, *Wharton* v. *Maserman* (11).

The words to which I have alluded are these: "Should my said son Joaquim Amador Bocarro die, leaving a widow or issue, his share shall be given to such widow or issue according as he may devise or bequeath." The general rule of construction is that where you find a gift in clear and express terms, you are not to permit subsequent and less distinct words to throw a doubt upon the former clear expressions. This is the law as laid down by Vice-Chancellor Wood in *Martin* v. *Martin* (7) and in the passage cited from Jarman on Wills, p. 443. That rule of construction

(1) 3 Sm. and G. 280. (2) 1 Russ. and M. 395. (3) 16 Sim. 45.
(4) 1 Colly. 400. (5) 3 Beav. 443. (6) 2 Jac. and W. 279.
(7) L.R. 2 Eq. 404. (8) 63 L.T.N.S. 92. (9) 24 Ch. D. 616.
(10) 5 Beav. 558. and 10 Cl. and Fin. 508.
(11) L. R. (1895) A. C. 186.

and [774] the position of the clause with which I am dealing in the middle of the paragraph which is conversant with the mode in which the fund is to be enjoyed, caused me to doubt whether the construction put upon it by the Advocate General was not the correct one. Neither of these considerations ought, however, to have weight if the clause properly construed amounts to a clear executory gift over on the death of Joaquim. In that case, the later clause will control the earlier one. Upon consideration I have come to the conclusion that the clause amounts to a clear gift in favour of the wife or issue of Joaquim, but that he is to have the power of designating how they are to take.

Mr. Lewin in his work on Trusts thus states the law: "If a fund be limited upon trust for the children of A as B shall appoint, the construction is that the children of A take a vested interest by the gift subject to be divested by the exercise of the power. Therefore, on failure of the power the children who were the objects of the power become absolutely entitled just as if the discretion had not been annexed." Most of the cases upon the subject are referred to in *Lambert* v. *Thwaites* (1). If a mere power to appoint is conferred, no trust arises—Lewin p. 135; *Brook* v. *Brook* (2)—unless under particular circumstances—*Butler* v. *Gray* (3).

Here there is an express gift of the share of Joaquim to his widow or issue. It is unnecessary to determine now how they would take in default of appointment. Probably the gift to the issue would be held substitutionary. I consider, therefore, that there is a gift over to the widow or issue of Joaquim, and that to that extent the absolute gift to Joaquim is qualified. Should the gift over fail, the absolute gift to Joaquim would remain unimpaired—Succession Act (X of 1865), s. 126. I have not referred in my judgment to the several cases mentioned in the argument, though I have read them. Their result is embodied in that section. This was substantially the result at which the Judge of the Division Court arrived, and I am of opinion, therefore, that the appeal must be disallowed.

[775] As to costs the decree will be varied. The executors' costs taxed as between attorney and client to be paid out of estate as well as the costs of defendants Nos. 4 to 12. Plaintiffs and defendant No. 3 to bear their own costs respectively. Plaintiffs to be at liberty to add their costs to their mortgage security. In other respects the decree of the lower Court is affirmed with costs other than the costs of defendants Nos. 4 to 12, whose costs may be added to their costs in the Court below.

Appeal dismissed.

Plaintiffs' Attorneys.—Messrs. *Little and Co.*

Defendants' Attorneys.—Messrs. *Bicknell, Mervanji and Motilal*, and Mr. *M. H. Khan.*

(1) L. R. 2 Eq. 151; (2) 3 Sm. and G. 280. (3) 5 Ch. D. 26.

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19 B. 775.

ORIGINAL CIVIL.

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice B. Tyabji.

MUNCHERJI BOMANJI PANTHAKI (*Original Defendant*), *Appellant v.* DORABJI JEHANGIR RANDIVA (*Original Plaintiff*), *Respondent.**

[16th August, 1895.]

Limitation—Limitation Act (XV of 1877), sch. II., art. 60—Deposit—Loan.

The plaintiff claimed to recover from the defendant, who was his grandfather, the sum of Rs. 4,917, which was the amount standing to his credit in an account in the defendant's books. In November, 1869, the plaintiff being then one year old, his mother (the defendant's daughter) paid over to the defendant the sum of Rs. 650, and at her request the money was credited in the books of the defendant's firm in the name of her son the plaintiff. A further sum was similarly paid over by her in December, 1871, and at her request was credited to the same account. The plaintiff alleged, and the Court found, that these sums were presents which had been made to him on his birthday and other auspicious occasions. The said sums were carried over from year to year in the firm's books, the interest being added each year, but no payment had ever been made to the plaintiff, or on his behalf, out of the sum so standing to his credit. Compound interest had been allowed in the account, and on the 9th November, 1893, the amount standing to the credit of the plaintiff was Rs. 4,917.

The plaintiff contended that the money had been paid to, and accepted by, the defendant as a deposit to be held in trust for him. The defendant alleged that the money in question had been lent to him by the plaintiff's mother, and contended that the plaintiff's claim was barred by limitation.

Held, that the defendant had held the money not as a loan but as a deposit; that art. 60 of the sch. II of the Limitation Act (XV of 1877) applied, and that the plaintiff's claim was not barred.

[R., 15 C.P.L.R. 147.]

[776] APPEAL from Candy, J. (1).

The plaintiff was the grandson of the defendant. He alleged that at his birth, and subsequently on ceremonial occasions, presents of money had been made to him which were recovered by his mother Virbaiji (the defendant's daughter) and were deposited by her on his behalf with the defendant as a deposit and in trust for the plaintiff, opening an account in the plaintiff's name in the books of his firm. The said moneys were credited to the said account and were credited every year and its balance carried forward. The plaintiff now sued to recover the amount standing to the credit of this account.

The defendant contended that the moneys in question were given to him by the plaintiff's mother Virbaiji as a loan and not as a deposit, and he pleaded limitation.

The other facts of the case will be found stated *supra*, p. 352.

Candy, J., held that the moneys received by the defendant was received and held by him as a deposit; that art. 60 of sch. II of the Limitation Act (XV of 1877) applied; and that the suit was not barred, as time ran only from the date of demand.

He accordingly passed a decree for the plaintiff.

The defendant appealed.

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* Suit No. 368 of 1894.

(1) 19 B. 352.

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19 B. 775.

Macpherson (Acting Advocate General) and *Lowndes*, for the appellant; they relied on the authorities cited in the Court below.

Inverarity and *Scott*, for the respondent, were not called on.

JUDGMENT.

FARRAN, C. J.—This case raises the question as to the distinction between a loan and a deposit which has frequently come before this Court, and which is generally difficult to decide. Ordinarily money paid into a banking account is regarded as a loan upon the authority of *Foley* v. *Hill*(1). That is a well-known rule. But there are circumstances here which distinguish the payments which were made to the defendant from payments made of money into a bank. It is pretty clear that the sum of Rs. 650, which was the foundation of the account between the defendant and Virbaiji, was really paid to him by her as belonging to her son. The child [777] was only a year old, and it is difficult to believe that the defendant did not know that this money paid over to him in the child's name was the child's property and paid over to him (the defendant) as a deposit. When a mother pays her son's money into his grandfather's firm, as was done in this case, the intention must be that it is to be kept as a deposit for her son and to be ultimately given to him when he demands it. unless indeed in the meantime it has already been applied in some way or other for his use and profit.

Then we find that the amount thus paid in was regularly carried forward in the firm's books from year to year with compound interest. That I think is also a significant fact. The son when he attained full age made no demand for payment, nor did his grandfather offer to repay it, but the account still continued to run, and the interest was added from year to year. No statement of account was rendered either to Virbaiji or to her son. All these circumstances, I think, show that this money was not treated as a loan by Virbaiji to the defendant, but as a deposit for and on account of her son. Both the sums of money stand in the same position, and the same rule applies to both. We must hold that both were deposits made with the defendant; and that the case consequently comes within art. 60 of the Limitation Act. The appeal must be dismissed.

TYABJI, J.—I am of the same opinion. There are several circumstances which show that this was not the case of an ordinary loan, but was a transaction of a fiduciary character.

The first point is that the money belonged to the son and was paid to the defendant by Virbaiji in the son's name. That shows, I think, it was for his benefit. If it was intended as a loan, she would have paid it to the defendant in her own name.

Next, it is significant that the interest runs at 5 per cent. and not at 9 per cent. which is the usual mercantile rate. The probability is that, if this transaction was intended as a loan, the usual rate would have been charged.

Then, lastly, we have the fact that the defendant was not a banker at all. He was a shopkeeper and was not in the habit of borrowing. It is well known that in this country it is a common [778] thing for the younger members of a family to deposit money belonging to them with the older members. That, I think, was really what took place in the present case. The money remained with the defendant as a deposit, and no part of it has since been withdrawn from him. On all these grounds, I

(1) 2 H.L. Ca. 28.

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am of opinion that we should hold this money to be a 'deposit.' If the circumstances here do not make it a deposit within the meaning of the word as used in the Limitation Act, it is difficult to understand what a deposit can be.

Appeal dismissed

Attorneys for the appellant.—Messrs. *Bicknell, Mervanji and Motilal.*
Attorney for the respondent.—Mr. *M. M. Saklatwalla.*

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19 B. 778.

INSOLVENT JURISDICTION.

Before Mr. Justice Parsons and Mr. Justice Starling.

IN THE MATTER OF HORMARJI ARDESHIR HORMARJI, AN INSOLVENT. [30th August, 1895.]

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic , c. 21), s. 86—Entering up judgment against insolvent—Final discharge—Discretion.

In August, 1892, the insolvent was found guilty of various offences under ss. 50 and 51 of the Indian Insolvent Act (11 and 12 Vic., c. 21) and was sentenced to imprisonment for three months, his discharge being also postponed for a further period of twelve months. In December, 1894, on his application for final discharge under s. 60 of the Act, the Official Assignee applied that before the order of discharge was made, judgment should be entered up against him under s. 86 for the amount of his debts. The Commissioner of the Insolvent Court in the exercise of the discretion given to him by the Act ordered judgment to be entered up accordingly. On appeal by the insolvent.

Held, reversing the order, that under the circumstances of the case the discretion of the Commissioner had been improperly exercised, and that the order to enter up judgment against the insolvent should be discharged.

[R., 28 M. 168.]

APPEAL from an order made by Farran, J. (1).

The insolvent had filed his petition on the 1st May, 1891. In August, 1892, at the hearing of his application for discharge under s. 47 of the Insolvent Act (Stat. 11 and 12 Vic., c. 21) **[779]** he was found guilty of reckless speculation and other offences and was sentenced to a term of imprisonment under ss. 50 and 51 of the Act. The case is reported at I.L.R., 17 Bom. 313.

In December, 1894, the insolvent applied for his discharge under s. 60 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21). On that occasion the Official Assignee intervened, and applied under s. 86 of the Act to enter up judgment against the insolvent for the amount of his debts, which were over 30 lakhs. The Court made the order, and directed that judgment should be sustained up. From that order the insolvent now appealed, on the ground that the discretion given to the Court by s. 86 had not been properly exercised, and that the insolvent had been already sufficiently punished by imprisonment.

The debts and liabilities proved against the insolvent amounted to Rs. 46,66,205, and his total assets realised Rs. 11,92,666, out of which dividends amounting to 23 per cent. had been declared.

Scott for the appellant.

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(1) See 19 B. 297.

Macpherson (Acting Advocate General) and *Inverarity* for the respondents.

The following authorities were cited:—*In re Clagett's estate* (1); *Re Goud* (2); *Re Lloyd* (3); *Re Jones* (4); *Re Shackleton* (5); *In re Manuel Grant Costello* (6); *In re English* (7); *In re Richards* (8); *In re Bullen* (9); *Ex parte Salaman* (10); Stat. 46 and 47 Vic., c. 52, s. 28, sub-s. 6; Stat. 7 Geo. IV, c. 57, s. 57.

JUDGMENT.

STARLING, J.—The appellant in this case having applied for his personal discharge was opposed by the respondents, and the Commissioner after hearing all the evidence in the case found that he had concealed a sum of Rs. 17,000 and also had been guilty of reckless trading. For the first offence, the Commissioner sentenced the appellant to three months' imprisonment on the criminal side of the jail, and for the second, ordered that he should [780] not get his personal discharge until he had been in jail on the civil side for the term of six months at the suit of each of the two opposing creditors. The appellant served his period of three months, and was in jail for eight months at the suit of his creditors, when he was released on medical certificate.

On the 6th December, 1893, he obtained a rule *nisi* for his discharge in the nature of a certificate which was returnable in twelve months. That rule came on for hearing on the 5th December, 1894, when Mr. Macpherson on behalf of the opposing creditors argued that the proper notices to creditors in England had not been given, but the Commissioner overruled that contention and the appellant obtained his discharge in the nature of a certificate. At the same time, on the motion of Mr. Macpherson, the Court made an order that judgment should be entered up against the insolvent under s. 86 of the Insolvent Act, for the full amount of the schedule debts due.

The point argued in appeal was whether the Commissioner had properly exercised his discretion in passing the above order. The Acting Advocate-General contended that judgment ought to be entered up almost as a matter of course, and relied upon the course of procedure under the old Insolvent Acts in England. Under Stat. 7 Geo. IV, c. 57, a person must have been in prison in execution of some process for the payment of money. He could then petition the Court for the Relief of Insolvents, executing at the same time an assignment to the provisional assignee of all the property he was then possessed of. Then came the hearing, after which the petitioner had to execute a warrant of attorney authorizing judgment to be entered up against him, and on that he could be adjudicated an insolvent and be released from jail, freed from all liability in his person for his debts, but his property was never discharged from liability. It is true that s. 57 of the Act just referred to is almost identical with s. 86 of the Indian Insolvency Act, but it must be borne in mind that in England while a trader could get a final discharge from his debts, a non-trader who had become involved in debt could never get one, and the Indian Insolvent Act provides that both traders and non-traders may get a discharge in the nature of a certificate. [781] We are of opinion,

(1) 20 Ch. D. 637 (650). (2) 63 L. T. N. S. 292. (3) 62 L. T. N. S. 366 (367).
(4) 62 L. T. N. S. 370. (5) 61 L.T. N. S. 648. (6) 8 B. L. R. Appx. 57.
(7) 7 C.L. R. 378. (8) 9 L. T. N. S. 398. (9) 5 Morr. B. C. 243.
(10) 14 Q. B. D. 936.

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therefore, that the provisions of, and the practice under, the English Insolvency Act which only culminated in a discharge from prison, are no certain guide to the Court in this matter. In the English Bankruptcy Acts there was no provision for entering up judgment until that of 1883 was passed, in which it appeared as s. 28, sub-s. 6.

In making the order in the present case, the learned Commissioner did so on the ground that the insolvency was brought about by reckless trading. That question had been gone into on the previous hearing, and the insolvent's personal discharge had been deferred for twelve months on account of it. On his application for his final discharge the opposing creditors could have again opposed him on the same ground, and the Court could have suspended his getting the advantage of a further indulgence if it had thought that he was not entitled to get a full discharge at once. Entering up judgment is, however, quite a different matter. Its effect is to send a man into the world with a certificate that he is entirely free from all the liabilities he had incurred up to the date of the petition, whether actually included in the schedule or not, provided they could have been proved, but at the same time there is a judgment entered up against him which is probably unknown to the world, by which all that he makes from time to time over and above what is necessary for the maintenance of himself and family and the carrying on of his business is liable to be swept away, possibly to his utter ruin. Suppose a man who, after starting afresh, has been very successful, and has put by some 20,000 rupees. The Court possibly might order that to be handed over to the Official Assignee on his application for execution of the judgment already entered up. A year or two afterwards bad times come, prices go down, and the man is in straits. If he had the Rs. 20,000 by him he might weather the storm, but not having it, he has to succumb.

The question as to the circumstances under which judgment should be entered up against a bankrupt or insolvent have been discussed in England under the Act of 1883, and a general rule of practice has been established there which should, we think, [782] be followed by the Court here. In the case of *Re Bullen* (1) Lindlay, L. J., at p. 247 says: "There is no evidence at all that the man will ever have any after-acquired property, and under those circumstances I think *prima facie* one ought not to tie up a man by such adjustment as that under s. 28, sub-s. 6. It would give rise to great difficulties and possibly litigation." This case was cited to the Court in *Re Shackleton* (2) and Cave, J., in delivering judgment, said: "Unless it finds a man in possession of income, derived by his earnings or otherwise, which is more than sufficient to keep his family in the enjoyment of the ordinary necessaries of life according to their station, or unless he is likely to succeed to considerable property, it is not a wise thing to grant the order subject to conditions as to after-acquired property. The Court must see that they do not by prescribing conditions of that kind, do away with a great motive in men to exert themselves in their business. If you impose a burden that prevents a man from looking forward to better his position, he will not make an effort to do so." Again in *Re Goud* (3) Cave, J., says, after referring to the case of *Re Bullen*: "Now I have in cases before me acted upon that principle, and I expressed in a recent case of *Re Jones* (4) which went up to the

(1) Morrell's B. C. 243.
(2) 61 L.T.N.S. 648.
(3) 63 L. T. N S. 292.
(4) 62 L.T.N. S. 370.

Court of Appeal and was there affirmed, and I think we must sitting here take it as now being established that, "*prima facie*" you ought not to make an order of this kind upon a debtor unless you show that he has got some expectation of coming into property in the future which, but for an order of this kind, he would be able to enjoy without paying his debt."

In the present case there was no suggestion that the appellant was likely to come into any property in the future. On the contrary the Official Assignee in his affidavit of the 18th December, 1883, said that there is no probability of anything more being realized, and the whole argument in the Insolvent Court proceeded upon his infraction of insolvency law before he had filed his petition: consequently we are of opinion that the order [783] to enter up judgment ought not to have been made, and must now be discharged except as to costs, but as the case was argued in the Insolvent Court on different grounds from what it has been here, each party will bear their own costs.

Order discharged.

Attorneys for the appellant.—Messrs. *Chalk, Walker and Smetham.*
Attorneys for the respondents.—Messrs. *Craigie, Lynch and Owen.*

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19 B. 783.

ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Starling.

DAGREE (*Original Defendant*), *Appellant v.* PACOTTI SANJAO (*Original Plaintiff*), *Respondent.** [30th August, 1895.]

Native Christian—Koli caste of fishermen—Converts to Christianity from Hinduism—Succession Act (X of 1865), ss. 2 and 331—Inheritance—Custom—Evidence of custom of inheritance—Practice—Koli caste.

The Indian Succession Act (X of 1865) and the rules of inheritance prescribed by it, apply to Hindus who have become Christians; and the evidence to show that they and the community to which they belong have retained the Hindu custom of inheritance, is inadmissible.

[**F.**, 12 C.L.J. 459=15 C.W.N. 158=8 Ind. Cas. 41; **R.**, 7 Bur. L.T. 133=24 Ind. Cas. 638; **D.**, 1 Ind. Cas. 697=36 P.R. 1909=52 P.W.R. 1907.]

APPEAL from Farran, J.

The plaintiff (respondent) was the husband of one Dumu, who died in October, 1891, leaving him by her will all her moveable and immoveable property. He alleged that she was entitled to a house which she inherited from her maternal grandfather (Dhurma) and to two-thirds of a house and certain moveable property left by her father (Dama Budia), who died in December, 1890.

The defendant Dagree was the widow of Dama Budia and the stepmother of Dumu. She had taken possession of all the property in question, and claimed, by the custom of the community, to have a life-interest in it.

The plaintiff contended that the property had devolved upon his wife Dumu under the rules of inheritance laid down in the Indian Succession

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* Suit No. 268 of 1892.

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Act (X of 1865), by which the community was governed, and he, therefore, brought this suit to recover it.

[784] The parties were Christians and belonged to the Koli caste of fishermen in Bombay, who were all originally Hindus, but some of whom had become Christians (1). The defendant alleged that the community to which she and the plaintiff belonged had retained the Hindu usage of inheritance, and that this usage had always been observed by its members.

At the hearing the following issue (*inter alia*) was raised by the defendant, *viz.*, whether the succession to the estate of Dhurma and Dama Budia respectively is not governed by the Hindu law, and not Act X of 1865, having regard to the custom of the caste to which they both belonged, or otherwise?"

Thereupon counsel for the plaintiff raised the further issue "whether the alleged custom is one which can be proved, having regard to Act X of 1865." He contended that no evidence of the alleged custom could be admitted, and cited *Ponnusami Nadan* v. *Dorasami Ayyan* (2) and *Tellis* v. *Saldanha* (3).

The two sections of the Succession Act (X of 1865) upon which the plaintiff relied, were s. 2 and s. 331 (4). It was contended that under these sections the Act and the rules of inheritance prescribed by it were universally applicable in India except to such persons as were exempt by s. 331; that the word "Hindu" in that section meant a person professing the Hindu religion; that as the parties did not belong to that class, but were Christians, they were not exempt under that section, and that, therefore, the property in question had devolved according to the rules laid down by the Act.

FARRAN, J., on the above authorities held that the Succession Act (X of 1865) applied to the parties, and that evidence in [785] proof of a custom of inheritance inconsistent with the provisions of that Act was inadmissible. He, therefore, passed a decree for the plaintiff.

The defendant appealed on the grounds (*inter alia*), (1) that the Court ought to have allowed her to call evidence to prove the customs of the Christian Koli community of Bombay (to which both the parties belonged) with regard to succession, and (2) that the Court was wrong in holding that the said community was governed, with regard to intestacy and succession, by the Indian Succession Act (X of 1865), s. 331.

Macpherson (Acting Advocate-General) and *Kirkpatrick*, for the appellant.—The defendant's community although it has become Christian has retained the Hindu usage of inheritance. We submit that the defendant ought to be allowed to give evidence of this, and that the community is not necessarily bound by the rules of inheritance prescribed by the Succession Act X of 1865. We admit that the only decisions upon the point raised in this case are against us. But they are all cases decided by the Madras High Court and are not binding here. We contend that they are wrong.

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(1) See Sherring on Caste, Vol. 2, pp. 307, 313; and the Bombay Gazetteer, Vol. 13, Pt. I. p. 165.

(2) 2 M. 209. (3) 10 M. 69.

(4) Section 2 of the Succession Act.—Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession.

Section 331 of the Succession Act.—The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist; nor shall they apply to any will made, or any intestacy occurring, before the 1st day of January 1866.

The effect of them is to make the Indian Succession Act a penal law. This could not have been intended by the Legislature. To substitute the English law of inheritance, as prescribed by that Act, for the Hindu law, would result in breaking up the social system of the Hindus. To enforce such a change by legislation as a consequence of adopting a particular form of religious faith, is to inflict a penalty upon a mere opinion, and amounts to religious persecution. The Legislature in 1865 could not have intended this. The Madras Courts have misconstrued s. 331. They have held that the words "Mahomedan" and "Buddhist" are used in a theological sense in the section, and argue that, therefore, the word "Hindu" must be similarly construed. But these words are not used in that section in a theological sense. They are used merely to indicate the communities known by those names, and not with reference to the religious opinions professed by them. These communities happen to have adopted the names of their founders, and there was, therefore, no other possible way of describing them. Mahomedans are exempted by this section, **[786]** not because they profess certain religious opinions, but because they have a law of succession of their own. It is for this same reason that Hindus are exempt. They, too, have their own law. It is not possible that the Legislature could have intended to deprive them of it and compel them to adopt a foreign law wholly repugnant to their ideas if they should change their opinions and become Christians. In all free countries, men may change their religion and yet remain in their communities, conforming to their usages and governed by their laws. That is what the parties to this case have done. To hold that merely because they have changed their religious views they have ceased to be Hindus, and are no longer entitled to the advantages of belonging to the Hindu community, is persecution of opinion never intended by the Legislature. The Indian Legislature has never desired to interfere with religious opinion in this country, or to make civil rights dependent on religion. See Act XXI of 1850. Why should the adoption of Christianity involve a change in the law of succession? The adoption of Mahomedanism necessarily involves such a change, because Mahomet taught not merely a system of religion, but also a system of law, and to become a Mahomedan implies the acceptance of both. But the Founder of Christianity taught no law, and the Christian faith may be accepted and professed under any system of law and without any change of law. Unless, therefore, we are to attribute to the Legislature the intention of enacting a penal law against Christianity in India it is impossible to accept the construction of the section adopted by the Madras Courts. The law as administered in the Bombay High Court allows Hindus to retain their own usages although they become Jains (1), Khoja Mahomedans (2), Memon Mahomedans (3), Borah Mahomedans (4). We contend that it allows them the same liberty if they become Christians.

[787] Further we say that all native Hindu communities, whether they become Christian or not, are included in the term "Gentu" in Stat. 37 Geo. III, c. 142, s. 13. The word is clearly used there with reference to race or community and not religion: see *Lopes* v. *Lopes* (5). That Act preserved their usage of inheritance to all Gentus, and the

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(1) See 10 B.H.C.R. 241; see also 3 A. 55.
(2) See 12 B.H.C.R. 294; 3 B. 34; 12 B. 280 (294); 13 B. 534.
(3) See Perry's Oriental Ca., pp. 110, 115, 116; 6 B. 452; 9 B. 115; 9 B. 158; 10 B. 1.
(4) P.J. (1894) p. 350, and see 20 B. 53. (5) 5 B.H.C.R. 172 (193), *et seq.*

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Indian Legislature had no power to take it away. See Indian Councils Act (Stat. 24 and 25 Vic., c. 67) and see Stat. 21 and 22 Vic., cap. 106, s. 64. If the Madras decisions rightly construe the Succession Act, that Act as to Hindus does take it away. It is, therefore, *ultra vires* and ought not to be enforced against them.

The Court below ought to have allowed the defendant to give evidence of the custom of inheritance prevailing in the community. The Succession Act was not intended to overrule *Abraham* v. *Abraham*(1).

Inverarity and *Russel*, for the respondent.—We rely on the decisions of the Madras High Court—*Joseph Vathiar*, appellant (2); *Ponnusami Nadan* v. *Dorasami Ayyan* (3); *Administrator-General of Madras* v. *Anandachari and others*(4); *Tellis* v. *Saldanha*(5). There is no hardship really imposed on this caste by enforcing the rules of the Succession Act upon them; for its members can escape from these rules by making wills, or they can procure exemption under s. 332 of the Act—Stokes' Anglo-Indian Codes, Vol. I, p. 483.

JUDGMENT.

PARSONS, J.—The question for our determination is whether the Indian Succession Act, 1865, governs the succession in the family of the parties, who are Christians. The answer depends upon the meaning of the term "Hindus" in s. 331 of the Act. It is admitted that the ancestors of the parties were long ago converted to the Christian religion, and that the parties are Christians, but it is argued that they have not on that account ceased to be Hindus, that they are not, therefore, subject to the provisions of the Succession Act, and that the term "Hindus" in s. 331 is denominative of a race, and not of a religion. I think there is no ground for such an argument. There is no race of [788] Hindus. It is not the inhabitants of Hindustan who are Hindus, but those only of them who profess a religion which is called the Hindu religion. Just so there is no race of Mahomedans, or of Buddhists, or of Christians. An argument that a Christian, who has adopted the Mahomedan religion, is nevertheless still a Christian, is on the face of it an absurdity; but it is as good an argument as one that a Hindu, who has been converted to the Christian religion, is still a Hindu.

The cases cited to show that Hindus, who have become Memons or Borahs, may set up customs of inheritance, show that these customs must be evidenced by an observance after change of religion, and can only be proved as being different from the law of the new religion when there is no legislative enactment declaring the latter. They do not show that a Hindu, who has changed his religion, is still a Hindu, and as such is governed by Hindu law. They in fact show distinctly the contrary, *ex. gr.* I. L. R., 6 Bom. 460. Cutchi Memons are held to be Mahomedans.

I am, therefore, of opinion that the term "Hindus" in s. 331 does not include persons who or whose ancestors were at one time Hindus, but who became, or are, at the time of inquiry, Christians. I fully agree on this point with the decisions of the Madras High Court (7 Mad. H. C. Rep., 121; I.L.R., 2 Mad., 209, 9 *ib.*, 466, 10 *ib.*, 69), which decisions the learned Judge below has unhesitatingly followed. We confirm the decree with costs.

STARLING, J.—The sole point for determination in this appeal is whether the provisions of the Indian Succession Act, 1865, apply to those

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(1) 9 M. I. A. 195 (239). (2) 7 M.H.C.R. 121. (3) 2 M. 209.
(4) 9 M. 466. (5) 10 M. 69.

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members of the Koli caste who profess the Christian religion, or whether it is open to them to prove that they have governed themselves, in matters of succession, by the Hindu law or some modification thereof. The Succession Act (X of 1865), s. 2, provides that "except as provided by this Act or by any other law in force, the rules therein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession." It is thus of universal application, unless the person claiming to be excepted can show that by this or some other Act he specifically is excepted from the operation of its provisions.

[789]The appellant claims that the class to which she and the respondent belong, are thus specifically excepted by s. 331, which provides that "the provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan, or Buddhist," and the appellant claims that the class to which she belongs must be designated as Hindus. Now in the class of Kolis, some profess the Hindu religion, some the Mahomedan, and some the Christian, and probably all were originally Hindu by religion, but some have been converted to Christianity, and some to Mahomedanism. Mr. Stokes, in his notes on this section in his Anglo-Indian Codes, Vol. I, 483, is of opinion that, from the connection of Hindu with Mahomedan and Buddhist, that term is used as a theological term as denoting any person professing any form of the Brahminical religion or religion of the Puranas; and with this opinion I agree. It is evident with regard to Mahomedans that the Courts look at what they profess at the present time, and not at the stock whence they were derived, nor at the fact that they may, in matters of succession and inheritance, be governed by Hindu law in whole or in part: see *In re Haji Ismail Haji Abdulla* (1). I think that the same principle must be applied to the parties in the present case. We must look at them as they are, and it is then clear that they, by embracing and following the Christian religion, have ceased to be Hindus, although they may be of Hindu descent, and may have retained some Hindu customs. Consequently they are not Hindus within the meaning of s. 331 of the Indian Succession Act. This appears to have been the opinion of the Government of India shortly after the Succession Act was passed; for under the powers conferred by s. 332, the Native Christians of Coorg were, on the 25th July, 1868, exempted retrospectively from the 16th March, 1865, from the operation of that Act.

The same point has come up for consideration before the High Court of Madras on several occasions in the cases cited by counsel during the argument of this case, and that Court has always held that native Christians could not claim to be Hindus within the meaning of the Succession Act.

[790] On the authority of these decisions, the learned Judge in the Division Court passed a decree against the appellant, and I am of opinion for the reasons already given that his decision was according to law, and that the present appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for appellant :—Messrs. *Wadia and Gandhi.*
Attorneys for respondent :—Messrs. *Chalk, Walker and Smetham.*

(1) 6 B. 452.

19 B. 790.

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Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

BAI DEVKORE (*Original Petitioner*), *Applicant v.* LALCHAND JIVANDAS AND ANOTHER (*Original Opponents*), *Opponents.**

[10th September, 1894.]

Succession Certificate Act (VII of 1889), *ss.* 9 *and* 19—*Order granting certificate on the applicant's furnishing security—No appeal from such order—Practice—Procedure—Discretion—Jurisdiction—Civil Procedure Code (Act XIV of* 1882), *s.* 622—*Extraordinary jurisdiction.*

The widow of a deceased person having applied for a certificate under the Succession Certificate Act (VII of 1889). the Judge ordered the certificate to issue on the applicant's furnishing security under s. 9 of the Act.

Held that such an order was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and was, therefore, not appealable.

Bhagwani v. *Manni Lal* (1) followed.

[N.F., 4 Ind. Cas. 639=139 P.R. 1908=4 P.L.R. 1909=156 P.W.R. 1908; F., 26 A. 173=23 A.W.N. 225; D., 36 B. 272=13 Bom. L.R. 1208=12 Ind. Cas. 921.]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) to reverse the order of R. S Tipnis, Assistant Judge, F. P., of Broach.

Applicant Bai Devkore applied under Act VII of 1889 to the Subordinate Judge for a certificate of succession to her husband, Manekchand Jivandas, who died on the 16th December, 1892.

The opponents were brothers of the deceased Manekchand. They objected to her obtaining the certificate unless substantial security were required from her, as they alleged she had been wasting the property in which they had a reversionary interest.

The Subordinate Judge ordered that a certificate should issue [791] on the applicant furnishing security under s. 9 of the Act (VII of 1889).

The applicant appealed to the District Court on the ground that no security should be required from her. The Judge rejected the appeal, holding that the order was not appealable, not being one contemplated by s. 19, sub-section 1 of the Act.

The applicant then applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling upon the opponents to show cause why the order of the District Judge regarding the appeal should not be set aside.

Goverdhanram M. Tripathi appeared for the applicant in support of the rule.—The Judge was wrong in holding that the order of the Subordinate Judge was not appealable. The order of the Subordinte Judge giving us a certificate was a final order and is, therefore, appealable. The Judge should have heard the appeal and disposed of the case on its merits.

We further contend that the applicant is not liable to give security. She has succeeded to her deceased husband's estate by right of inheritance and has full right over his moveables. A rightful owner cannot be asked

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* Application No. 3 of 1894 under the extraordinary jurisdiction.

(1) 13 A. 214.

to give security for property to which he is fully entitled. The order is irregular, and should be reversed.

Chimanlal H. Setalvad appeared for the opponents to show cause.—The order is not appealable—*Bhagwani* v. *Manni Lal* (1). The Subordinate Judge has exercised his discretion in requiring security, and such an order should not be set aside under the extraordinary jurisdiction.

Goverdhanram, in reply.

JUDGMENT.

BAYLEY, Acting C. J.—This was an application for a certificate of succession under Act VII of 1889 made by Bai Davkore, widow of Manekchand Jivandas, the petitioner, alleging that her husband died on the 16th December, 1892, at Anklesvar, and that she was his heiress.

The application was opposed by the brothers of her deceased husband, and they alleged that the petitioner had wasted some [792] property of the deceased, and that no certificate should be issued to her without taking substantial security from her.

The Subordinate Judge of Anklesvar ordered a certificate to issue on the petitioner furnishing security under s. 9 of Act VII of 1889. That section enacts that the Court 'may require as a condition precedent to the granting of a certificate, that the person to whom it proposes to make the grant shall give to the Judge of the Court, to enure for the benefit of the Judge for the time being, a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.' The petitioner appealed to the District Court of Broach on two grounds:—1, that the order requiring security was erroneous, as she was the absolute owner of the moveables of her husband; 2, that the Legislature did not intend that security should be required from absolute owners by right of heirship.

The pleader for the respondents in the District Court took the preliminary objection that no appeal lay from the order of the Subordinate Judge. On referring to the rojnama I find it there stated that the pleader for the appellant said that she was not going to give security until the decision in the appeal was given.

When the appeal came on for hearing before the Assistant Judge of Broach, F. P., he held that the order of the Subordinate Judge was neither one for granting a certificate, nor for refusing it, and that on the authority of *Bhagwani* v. *Manni Lal* (1) no appeal lay against an order made under that Act requiring that security should be given. That case was decided in 1891 by Edge, C. J., and Straight, J., who agreeing with Mahmood, J., held that where on an application for a certificate of succession under Act VII of 1889 an order was made granting the certificate conditionally on the applicant's furnishing security, such order was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and that, therefore, no appeal would lie therefrom.

Bai Devkore then petitioned the High Court, praying for the exercise of its revisional powers under s. 622 of the Civil [793] Procedure Code, apparently on the ground that the lower appellate Court had failed to exercise a jurisdiction vested in it by law. The petition was rejected by Mr. Justice Ranade, but upon an appeal being made under the Letters

(1) 13 A. 214.

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Patent of the High Court, my learned colleague and I, thinking that the points raised were worthy of argument, restored the application to the file, and directed notice to issue to the opponents.

Mr. Goverdhanram, who appeared for Bai Devkore on the hearing before us, endeavoured to distinguish the case of *Bhagwani* v. *Manni Lal* (1) from the present one. There are, no doubt, some points of difference between the two cases, but I think they are immaterial, and that in principle the cases are the same. There, as here, the order was conditional, and was not, in my opinion, one granting or refusing the certificate. That decision appears to me to be a correct one, and one which this Court may well follow. The Assistant Judge was, therefore, I think, fully justified in holding that no appeal lay, and in rejecting it with costs.

It will be noticed that the appeal to the District Court of Broach was on the ground that the order requiring security was erroneous, and that such security ought not to have been required from Bai Devkore. In the petition to the High Court, this Court is asked to reverse the decisions of both the lower Courts, and also to hold either that the security ought not to have been ordered, or that the appeal did lie. With regard to the latter prayer, I have already expressed my opinion that there is no ground for the interference of this Court.

Ought then this Court, in pursuance of the powers conferred on it by s. 622 of the Civil Procedure Code, to hold that security ought not to have been ordered by the Subordinate Judge? The question of security was one purely for the discretion of the Subordinate Judge Whether the exercise of such discretion could be reviewed or interfered with, came up for decision in the High Court in a case I referred to during the argument —*Mhalsabai* v. *Vithoba Gulve* (2) decided by Sir M. Sausse, C. J., Hebbert and Forbes, JJ., in 1862. That was an appeal from an order of [794] the District Judge of Thana granting a certificate under Act XXVII of 1860 to Vithoba K. Gulve enabling him to get in the debts and outstandings due to the deceased. Section 5 of that Act, which enabled the Court 'to take such security as it shall think necessary from any person to whom it shall grant a certificate,' was very similar in its terms to s. 9 of the Succession Certificate Act, 1889 (Act VII of 1889). When granting the certificate the Judge did not require any security from the respondent under s. 5 of the Act (XXVII of 1860). Mr. Westropp in arguing the appeal for the appellant contended that if the Judge below had exercised an unwise discretion in refusing to require security, the High Court as a Court of extraordinary and superintending jurisdiction would review it. In the judgment of the Court, after time taken to consider, the Judges say: 'This Act gives the Court a discretion in taking security from the person to whom the certificate is granted, and so did Act XIX of 1841; and the whole course of legislation on this subject proceeds on the assumption that the Court below is to exercise its discretion, and we do not think we should be justified in interfering with that discretion,' p. 30. In *Kirani Ahmedula* v. *Subabhat* (3) West and Nanabhai Haridas, JJ., asserted the appellate Court's power to interfere with the discretion of the District Judge of Kanara who had refused to restore an appeal to the file of the District Court, and they set aside the order of that Judge who had rejected the application on the ground that the appellant had not satisfactorily accounted for the absence of his pleader without leave of the Court.

(1) 13 A. 214. (2) 7 B.H.C.R. Appx, 26. (3) 8 B. 28.

That decision, however, seems to me to stand on a different footing from *Mhalsabai* v. *Vithoba Gulve* (1), and there have been several cases in recent years in England where the right of a Court of Appeal to interfere with a judicial discretion has been distinctly recognized. I will refer to the one in which the facts most nearly approach those of the present case, as it was a question whether security ought or ought not to be given, *viz.*, *Ex parte Marshall* (2) decided by the Court of Appeal in 1877. Sir George Jessel, M. R., in his judgment said that the Registrar in the first [795] instance and the Chief Judge in Bankruptcy in the second instance 'in the exercise of the judicial discretion reposed in them have decided that security should be given by the alleged debtor for the debt and costs at a condition of his being at liberty to defend an action. No doubt the Court of Appeal can, if it thinks fit, reverse the decision so come to, but before interfering with the exercise of a judicial discretion, the Court must be satisfied not merely that it would itself have arrived at a different conclusion in the first instance, but that the discretion has been clearly improperly exercised.' Lord Coleridge, C.J., was of the same opinion. Beggaliay, L.J., said: 'It would require a strong case to induce a Judge of Appeal to reverse a decision upon a matter of discretion.'

In *Golding* v. *Wharton Salt Works Company* (3) decided by the Court of Appeal in 1876 Lord Justice James said: 'The Court of Appeal in Chancery has laid down over and over again that, on a question which depends on the discretion of the Judge, the Court of Appeal does not in general interfere with that discretion. Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the Court below would not be overruled where serious injustice would result from that decision, but as a general rule the Court of Appeal declines to interfere'.

In the present case I do not collect from the judgment of the Assistant Judge that the allegation of the opponents that the applicant had wasted some property of the deceased was denied by her, or that she produced any evidence to controvert such allegation, and her ground of complaint to District Court was that the order requiring her to give security ought not to have been made, as she was the absolute owner of the moveables of her husband. So doubtless she was, but such moveables would be liable for any debts that her husband left. The proceedings now before the Court do not show whether or not he left any debts. He may have done so, or he may not. The Subordinate Judge in the exercise of his discretion thought it necessary to require, as a condition precedent to the granting of a certificate, that Bai Devkore, to whom he proposed to make the grant, should give security. [796] We have no right to assume, and we have no materials before us to enable us to hold, that he acted improperly in inserting such condition in the order he made. The question was one entirely within the jurisdiction and powers of the Subordinate Judge.

It must be borne in mind that this matter comes before the Court under s. 622 of the Civil Procedure Code (XIV of 1882) and the Judicial Committee of the Privy Council have said in *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh* (4): 'The question is, did the Judges of the lower Courts in this case in the exercise of their jurisdiction act illegally or with material irregularity. It appears they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they

(1) 7 B.H.C.R. Appx. 26.
(2) 5 Ch. D. 873.
(3) 1 Q.B.D. 374.
(4) 11 I.A. 237.

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decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

I am, therefore, of opinion, that the applicant has failed in showing that this Court ought to interfere in her behalf in the exercise of its extraordinary jurisdiction, and that the rule *nisi* obtained by her in June last must be discharged with costs.

FULTON, J.—Though when this application was argued I was doubtful whether the order of the Subordinate Judge was not one granting or refusing the certificate prayed for and, therefore, open to appeal to the District Court, I now feel satisfied that the Assistant Judge, F. P., was right in following *Bhagwani* v. *Manni Lal* (1) and holding that no appeal lay against the order of the Subordinate Judge requiring the petitioner to furnish security under s. 9 of Act VII of 1889 as a condition precedent to granting her a certificate.

I also concur with the learned Chief Justice in thinking that this Court cannot under s. 622, Civil Procedure Code, interfere with the discretion of the Subordinate Judge in making the order for security of which the applicant complains.

It may be that when the Subordinate Judge makes a final order granting or refusing the certificate, such order, if unfavourable to the applicant, and the grounds on which it is based, will be [797] appealable under s. 26, and the question as to the propriety of the order requiring security may then arise for the consideration of the District Court, but at present there is no reason for our interference.

I, therefore, concur in discharging the rule with costs.

Rule discharged.

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19 B. 797.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

THE MUNICIPALITY OF THE CITY OF POONA (*Original Plaintiffs*), *Appellants v.* VAMAN RAJARAM GHOLAP (*Original Defendant*), *Respondent.** [12th September, 1894.]

Easement—Right of way—Purchase of land adjoining purchaser's land—Way of access—Way of necessity—Sale-deed—Construction—Circumstances existing at the time of the sale.

A person purchasing a plot adjoining his own land, and having access to the plot through his land, cannot acquire a way of necessity over his vendor's land of which the plot formed a part. The fact that if the plot had been sold to a third person, he would have acquired a way of necessity, does not affect the question.

Where a portion of an estate is sold, a right of way leading to such portion may be created by the use of general words, provided that the circumstances existing at the time of the sale were such as to justify the belief that such was the intention of the parties.

Where the words used in a Marathi deed of sale were "*sarva hakk wa sambandh*" (*i.e.*, all rights and accompaniments),

Held that the words in themselves, apart from the circumstances at the time of the sale, did not include a right of way over the vendor's property as conveyed

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* Second Appeal, No. 504 of 1892.

(1) 13 A. 214.

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along with the portion of the land sold; but if there was an old path leading across the vendor's adjoining ground to the plot sold, and the purposes for which the plot was sold, and the conduct of the parties were such as to justify an inference that by the use of these words it was the intention of the parties to convey the right to use the path, it would be open to the Judge to find as a fact that such was the intention.

[N.F., 28 M. 495 : R., 16 C.P.L.R. 156.]

SECOND APPEAL from the decision of W. H. Crowe, District Judge of Poona, affirming the decree of Rao Bahadur Chunilal M., First Class Subordinate Judge.

A plot of open land at Poona, known as Anjir Bagh, belonged originally to one Khasgiwala. Part of it, which adjoined the defendant's dwelling-house, was sold by him to the defendant for **[798]** building purposes in 1872. The remaining part was sold by him to one Paranjpe, who sold it to the Municipality of Poona.

On the eastern boundary of the land so purchased, the Municipality afterwards put up a railing which blocked up a right of way across the land which the defendant claimed as a way of access to the land purchased by him. In the month of January, 1890, the defendant removed a part of the railing. The Municipality thereupon brought this suit against him to recover Rs. 5 as the price of the railing removed, and for an injunction restraining him from removing the new railing which it proposed to erect.

The Subordinate Judge found that there was a right of way through the ground in dispute as alleged by the defendant, and dismissed the suit.

On appeal by the plaintiffs the Judge confirmed the decree. The following is an extract from the Judge's judgment:—

"The defendant's deed (Ex. 102) states that the land, including all its belongings and appurtenances except treasure-trove, were sold to defendant. The words are: '*tya sambandhi bhumistha dravya kherij sarva hakk wa sambandha suddha tumhas aj mitis rupaye* 99 *yas kharedi deun rupaye ghetle ahet*', (that is, in connection with it [land] all the rights including appurtenances, excepting treasure-trove, have been sold to you this day for rupees ninety-nine and the rupees have been taken).

"I think the previous statement made by Khasgiwala and the terms of the deed of sale executed between himself and defendant when they were on good terms has a most important bearing on the case. I come now to consider the direct testimony of some of the witnesses cited in defendant's behalf. Narsopant (Ex. 53) states that he was secretary to the Municipality from 1875 to 1887 and is now a municipal commissioner. He says he has seen defendant using the road in dispute since 1875, that defendant's door has been in existence since then and that defendant used to get water from the well situated in the garden (Anjir Bagh) and there was a *belka* or piece of forked timber at the mouth of the passage across the path which was used by the people in the garden as a passage. In his opinion the Anjir Bagh was purchased subject to defendant's right of way, and his right of way has never been obstructed. The present municipal secretary, Mahadeo Keshav Kumtekar, also deposes (Ex. No. 44) that he was appointed secretary in 1887, and defendant has since then been using the land in dispute as a passage. Now, looking to this evidence, it appears to me highly probable that the right of way, though not mentioned in express terms in defendant's deed, was intended to be conveyed in the comprehensive expressions used with regard to the land

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in that document. The right of ingress to and egress from a piece of land separated from a larger piece passes by implication of law to the purchaser as an easement of necessity in the [799] absence of any stipulation to the contrary. It is a mere accident that the piece purchased by the defendant was contiguous to his dwelling-house. If he had disposed of it to a stranger, the stranger must have claimed a right of way to and from the land, and there is no reason why defendant should be put in a worse position than an outsider would have been. Looking at all the evidence in the case, I have no difficulty in agreeing with the view taken by the learned Subordinate Judge."

Inverarity (with *Mahadeo B. Chavbal*) for the appellants (plaintiffs) :—The defendant had no right of way at the place from which he removed the railing. The present suit was filed in the year 1890, and according to the Limitation Act (XV of 1877) the defendant ought to have adduced evidence of user for twenty years before suit, *i.e.*, since 1870. He has not done so. The evidence at the most shows that the defendant's user commenced in the year 1872. The right of way claimed by the defendant is not an easement of necessity. See s. 5 of the Easements Act (V of 1882). A right of way is not an apparent or continuous easement. Even if the right of way existed, the defendant had no right to remove the railing.

Lang (Advocate General), with *Mahadeo C. Apte*, for the respondent (defendant).—Both the Courts have found that the passage to our house lies over the land in dispute. It is a way of necessity. A way of necessity passes by implication. Further, there is a wall between the land which we have purchased and our house. As the wall was already in existence when we purchased the land, we are not bound to make a door in the wall or to pull it down in order to have access to the land from our house. Further, we say that the right of way passed to us under the words of the conveyance—Gale on Easements, pp. 66, 108 ; *Wheeldon* v. *Burrows*(1). A vendor cannot derogate from his own grant. The Municipality having purchased the land from our vendor stands in his shoes. The point as to whether we were justified in removing the railing, was taken for the first time at the hearing of the second appeal. It was not urged before.

Inverarity in reply.—The lower Courts have not found that there is no other access to the defendant's house. There is a door in the defendant's wall which leads to the land. The mere circumstance that the defendant's land adjoins our land cannot [800] give him the right of way over our land—Goddard on Easements, pp. 134, 324 and 328 ; s. 13 of the Easements (Act V of 1882). *Wheeldon* v. *Burrows* (1) was relied on but it is not applicable. It does not relate to a right of way.

JUDGMENT.

FULTON J.—The facts which have led to this suit are summarised by the District Judge as follows :—The ground in dispute, which is now the property of the Municipality, and the site belonging to the defendant, on which a house has been erected by him, belonged originally to one Khasgiwalla, who sold a small site to the defendant by deed of sale dated 3rd April, 1872. The remainder, known as the Anjir Bagh, was subsequently disposed of to one Paranjape, through whom it came into the possession of the Municipality.

The defendant now claims a right of way over the land purchased by the Municipality, but has not very clearly stated the grounds on which he

(1) 12 Ch. D. 31.

claims. In his written statement he merely alleged that there had been a right of way through the ground in suit since the time when the plaintiff acquired it. The learned Advocate General, who appeared for him, based his claim on two grounds: (1) that he had acquired a way of necessity on the purchase of the site which he bought from Khasgiwalla, and (2) that he had obtained a right of way under the terms of the deed of sale.

In regard to the supposed acquisition of a way of necessity, we do not think that any question arises. The plot of ground bought by the defendant was contiguous to his own property through which access to it could be gained. The District Judge pointed out that, if the site had been sold to a third party, the purchaser would have acquired a way of necessity, but this does not seem to affect the question. If a stranger had bought, he would have got what is called a landlocked tenement, to which he could only obtain access over the land of his vendor or by trespassing on other people's property. But the defendant having bought could approach his new acquisition through his own premises, and it cannot, therefore, be said that in order to enjoy it, it was necessary for him to pass over his vendor's land. The Advocate General contended that it was separated from his house [801] by a wall, and that he was not bound to pull that down or to make a door in it. No authority, however, was quoted to support this argument. As a fact, however, a door actually then existed, or was made shortly afterwards, so that if ever there was any necessity for passing over Khasgiwalla's land in order to reach the site bought by the defendant, it ceased as soon as the door was opened. Mr. Goddard in summing up the English authorities on ways of necessity states that a man cannot acquire a way of necessity if he has any other means of access to his land, however inconvenient it may be, than by passing over his neighbour's soil, p. 329. The case of *Holmes* v. *Goring* (1) shows that a way of necessity does not last longer than the necessity. Whether in this country a Court might recognize a way of necessity in case of extreme inconvenience of approach by another possible way, need not be considered, for neither Court has found that the passage through the door to the land purchased was inconvenient.

Turing next to the argument that a right of way was conveyed by the terms of the grant, we find it difficult, having regard to the facts found by the District Judge, to hold that by themselves they justify such a construction. Various English decisions may be referred to—such as *Barkshire* v. *Grubb* (2), *Kay* v. *Oxley* (3) and *Brown* v. *Alabaster* (4), in which certain general words have been held to convey certain rights of way, but so far as they turn on the use of particular words they are of little assistance towards the construction of a Marathi document in which other words are employed. They show, however, that when a portion of an estate is sold, a right of way leading to such portion may be created by the use of general words, provided that the circumstances existing at the time of the sale were such as to justify the belief that such was the intention of the parties. This principle will, we think, hold good in this country as well as in England. In each case the real test appears to be the intentions of the parties so far as they can be gathered from the language used with reference to the existing circumstances. The law on the subject seems summarised by Blackburn, J., in his judgment in [802] *Kay* v. *Oxley* (3), where in the last sentence he says: "I think in

(1) 2 Bing. 76.
(2) 18 Ch. D. 616.
(3) L.R. 10 Q. B. 360.
(4) 37 Ch. D. 490.

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considering the words we should see what they really mean, and apply them to the state of circumstances existing at the time of the conveyance." In the present case the general words used were " *sarva hakk wa sambandha* " which, in themselves, apart from the circumstances at the time of the sale, do not specify a right of way over the vendor's property as conveyed along with the portion of land sold. But if it were found that there was an old path leading across C to B (the plot sold), and that the purposes for which the plot was sold and the conduct of the parties were such as to justify the inference that by the use of the words " *hakk wa sambandha*," "rights and accompaniments," it was the intention to convey the right to use the path, it would, we think, be open to the District Judge to find as a fact that such was the intention. At present, however, we are unable to accept as sufficient his opinion that the right of way was intended to be conveyed, because he has not found what were the circumstances existing at the time of the sale, and his opinion appears to have been formed partly in the belief that the fact that the plot purchased by the defendant was contiguous to his dwelling-house did not affect the question. Before, therefore, deciding this appeal, we must request the District Judge to find on the following issue:—

" Whether, having regard to the circumstances existing at the time of the sale, the purpose for which the ground was sold, and the conduct of the parties, a right of way across the vendor's remaining property was conveyed by the deed of sale, and, if so, whether it passed through the place where the defendant pulled down the railings? "

The Subordinate Judge in his judgment expressed an opinion that, irrespective of the land purchased, the defendant had a right of way to his old house, but this was not the case put forward by him, and as pointed out by Mr. Inverarity, seems unsupported by evidence, as there is nothing to show that previous to 1872 he was in the habit of crossing the Anjir Bagh when going to and from his house. Moreover, no argument was addressed to us in support of this view, which need not further be considered.

[803] It was argued that, even if the defendant had a right of way, he was not justified in pulling down 20 feet of railings. The point was not taken in the memorandum of second appeal, nor apparently argued in the District Court, and at most would only raise a question of damages. As, however, the plaintiff only claimed nominal damages of Rs. 5, we must conclude that it was not thought worth while to raise the question in the District Court, and we cannot, therefore, entertain it in second appeal. The real question at issue is as to the defendant's right of way. If it is decided in his favour, the decrees of the Courts below are substantially correct.

The District Judge should now with reference to the above remarks record his finding on the issue referred, and return his proceedings within two months. The Court may admit further evidence if it thinks proper.

Issues sent down.

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Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

KALU VALAD VISHNA (*Original Defendant*), *Appellant v.* BARSU VALAD ZENDU (*Original Plaintiff*), *Respondent.**

[13th September, 1894.]

Hindu law—Joint family—Joint family property—Gift—Gift of undivided share by adults of family—Minor co-sharer not a party to gift—Ejectment—Defendant trespasser—Onus of proof—Plaintiff to prove his superior title.

According to Hindu law, under ordinary circumstances a gift by a co-parcener of his undivided share in the immoveable property is invalid, and a minor's share cannot be given away by a manager except in case of necessity or for certain specified purposes.

Certain land which was joint family property was given by the adult members of the family to the plaintiff as a worshipper of a deity. A minor co-parcener did not join in the gift. The plaintiff sued the occupier for possession.

Held that the plaintiff could not recover. The gift not being made from necessity, or for the performance of any pious duties obligatory on the minor or the family, was invalid, and could not be given effect to even with respect to the shares of the donors.

In an ejectment suit, the defendant, though a trespasser, is entitled to require the plaintiff who seeks to eject him to prove that he has a superior title.

[R., 10 Bom. L.R. 571 ; 12 C.P.L.R. 63.]

THIS was a second appeal from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Dhulia with [804] appellate powers, confirming the decree of Rao Saheb D. G. Medhekar, Second Class Subordinate Judge of Yaval.

Suit in ejectment. The plaintiff sued for possession of a certain field which formerly had been the property of three brothers, *viz.*, Lakshman, Mansaram and Barsu.

In 1891 Dagdu (son of Lakshman), Nathu (son of Barsu) and Anandi (widow of Mansaram) made a gift of the field to the plaintiff as the worshipper of the god Shri Sadguru, and executed a deed of gift dated 9th January, 1891, which was duly registered. Nathu's brother, Ragho, who was then a minor, was not a party to the gift.

The field was at that time in the possession of the defendant, who had held it since 1881. In 1891 the plaintiff brought this suit to eject the defendant and to obtain possession.

The defendant alleged that he had purchased the field from the owners eighteen or nineteen years before suit, and he contended that, inasmuch as one of the co-parceners (Ragho) was not a party to the gift, it was invalid, and the plaintiff had no title to the property.

The Subordinate Judge passed a decree for the plaintiff.

On appeal by the defendant the decree was confirmed.

The following is an extract from the judgment in appeal :—

"For these reasons I hold that the gift in this case, though not followed by delivery of possession, is valid. There is one further objection to the validity of the gift advanced by the defendant. It appears that Nathu, one of the plaintiff's three donors, has a minor brother, Ragho, aged ten or eleven years, who lives with him. This Ragho is not a party

* Second Appeal, No. 188 of 1893.

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to the gift, and he has an undivided interest in the land in suit. It has, therefore, been urged that the gift is invalid, because a member of an undivided family on this side of India cannot, without the consent of his co-parceners, make a gift of his share in the undivided property or dispose of it by will. As the defendant is a trespasser, whose possession has not strengthened into an indefeasible title by lapse of time, I do not think that he has a right to urge this plea. The question is one which can properly arise between the plaintiff and Ragho when Ragho becomes of age. The gift is not made to the plaintiff personally, but to him as the worshipper of the god Shri Sadguru. The gift is thus not like an ordinary gift, but it is gift to this god for a religious purpose. Where a gift is made for a religious purpose, the tendency of the Hindu law is to look upon it with greater favour than upon an ordinary gift. The share of Ragho in the land in suit is not, I think, more than $\frac{1}{6}$th, while $\frac{5}{6}$ths of the land goes to the plaintiff. I think, therefore, that the gift, though made without **[805]** Ragho being a party to it, is still valid so far as the $\frac{5}{6}$ths of the land is concerned. This suit does not debar Ragho from claiming his share when he attains majority. It seems proper, therefore, that the gift must be upheld."

The defendant preferred a second appeal.

Ghanasham N. Nadkarni for the appellant (defendant).—The gift to the plaintiff is void *ab initio*. A member of an undivided Hindu family cannot, without the consent of his co-sharers, make a gift even of his own share in the family property. A manager has no right to give away family property in which a minor member has a share. The gift being void must be set aside—*Gangubai* v. *Ramanna* (1); *Vasudeo Bhat* v. *Venkatesh* (2); *Vrandavandas* v. *Yamunabai* (3); *Baba* v. *Timma* (4); *Ponnusami* v. *Thatha* (5); *Ramanna* v. *Venkata* (6); *Virayya* v. *Hanumanta* (7); *Rambhat* v. *Lakshman* (8); *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (9): Mitakshara, Chap. I, s. 1, paras. 28 and 29. Even if the gift to the plaintiff be good, it would be so only to the extent of the shares of the donors. As to the share of the minor, it cannot stand. The lower Courts have upheld the gift of the entire property.

Daji Abaji Khare, for the respondent (plaintiff).—The gift was made for the purpose of worshipping an idol. The worship of an idol is a pious purpose, and gifts made for pious purposes are not invalid, even if the gift be of an undivided share—*Gangubai* v. *Ramanna*(1); *Vasudeo Bhat* v. *Venkatesh* (2); *Udaram* v. *Ranu*(10); West and Buhler, pp. 206 and 664, Mayne's Hindu Law, para. 393; Stoke's Hindu Law, pp. 519 and 520. The defendant himself has no right to the property, as he is a trespasser. He cannot, therefore, question the validity of the gift; and even supposing that he can do so, the gift would be invalid only with respect to the minor's share and not with respect to the shares of those who executed the deed of gift and who were not minors. We should, therefore, be allowed to turn this suit into one for partition, and the shares of the adult members should be given to us.

[806] *Ghanasham*, in reply.—The present being an ejectment suit, the plaintiff must succeed on the strength of his own title. We are in possession, and, therefore, we have a right to question his title.

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(1) 3 B.H.C. R.A.C. J. 66. (2) 10 B.H.C.R. 139. (3) 12 B. H. C. R. 229.
(4) 7 M. 357. (5) 9 M. 273. (6) 11 M. 246.
(7) 14 M. 459. (8) 5 B. 630. (9) 5 B. 48.
(10) 11 B.H.C.R. 76.

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JUDGMENT.

FULTON, J.—It was not disputed that under ordinary circumstances the gift by one co-parcener of his undivided share is invalid, or that a minor's share cannot be given away by the manager except in case of necessity or for certain specified purposes. It was contended, however, that as this gift was made to the plaintiff as worshipper of the god Shri Sadguru, its purpose rendered it binding on the minor.

The law on the subject is stated in paragraphs 28 and 29 of s. I of Chap. I of the Mitakshara as follows:—

"28. Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family and especially for pious purposes.

"29. The meaning of the text is this:—while the sons and grandsons are minors and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person who is capable may conclude a gift, hypothecation, or sale, of immoveable property if a calamity affecting the whole family require it or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable."

Now, in the present case, it has not been found, nor in argument has it been urged, that any necessity for this gift has been established, or that it was made in performance of any pious duties obligatory on the minor or the family. The learned Subordinate Judge appears himself to have felt doubtful whether the minor was bound by the gift, for he said that the result of this suit would not debar the minor from claiming his share when he attained majority. But unless not only the shares of the adult co-parceners but also the share of the minor have been duly conveyed to the plaintiff, it is impossible to see on what principle his suit to recover the property can be admitted. Mr. Khare urged that as the defendant was a trespasser it was not open to him to question the validity of the gift, but we think that a defendant in possession is entitled to require the plaintiff seeking [807] to eject him to prove that he has a superior title. This the plaintiff has failed to establish, and his suit must, therefore, be dismissed.

Mr. Khare also contended that the gift was good so far as the shares of the adult co-parceners were concerned, and that the plaintiff should be allowed to add the minor as a party and convert the suit into one for partition of the whole family property. Whether at this stage such a change in the nature of the suit could be allowed, is a question which we need not discuss, for we think the authorities establish beyond doubt that the gift of an undivided share is not allowed by Hindu law, and cannot be given effect to.

We, therefore, reverse the decrees of the Courts below and reject the claim, with costs on the plaintiff throughout.

Decree reversed and claim rejected.

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APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

NARNA AND PARAMESHVAR, SONS OF NARASINH BHATTA (*Original Applicants*), *Applicants v.* ANANT AND ANOTHER BY THEIR GUARDIAN *ad litem* (*Original Opponents*), *Opponents.**

[24th September, 1894.]

Practice—Procedure—Decree—Death of party between hearing and judgment—Judgment, date of operation of—Civil Procedure Code (Act XIV of 1882), s. 234.

An appeal having been argued on the 11th November, 1892, the case was adjourned for judgment which was delivered on the 30th November, 1892, and was in favour of the plaintiffs. In the meanwhile the defendant had died. On application for execution it was contended that the decree was null and void, as the respondent was dead when it was passed.

Held, that the judgment should be regarded as operating as if it had been delivered on the day when the arguments were closed.

[R., 33 M. 167 = 3 Ind. Cas. 739 = 6 M.L.T. 271 ; 14 C.W N. 759 = 6 Ind. Cas. 170.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order of E. H. Moscardi, Acting Judge of Kanara.

The applicants Narna and Parameshvar brought a suit (No. 76 of 1891) against one Paramabhatta in the Court of the Subordinate [808] Judge of Kumta. Their suit was dismissed, and they appealed to the District Court. The appeal was heard on the 11th November, 1892. The Judge then intimated that the decree of the lower Court should be reversed, but his judgment awarding the plaintiff's claim was not formally delivered until the 30th November. In the meanwhile (19th November) the defendant Paramabhatta died.

The applicants subsequently applied for execution. The opponents (Anant and Rambhat), sons and heirs of the deceased defendant Paramabhatta, resisted the application and contended that the decree in appeal was null and void, as the defendant was dead when it was passed.

The applicants then applied for a review of judgment, and asked that the names of the opponents should be substituted on the record for that of the deceased, and that the appeal should be reheard. The opponents contended that this application was too late, as it was made more than six months after the date of the defendant's death. The Judge rejected the application.

The following is an extract from his judgment :—

"The applicants were present in Court at the hearing, and they, therefore, knew that judgment had not been delivered on the 11th November. They also must have known that Paramabhatta's death occurred a few days after the hearing, for they are caste-fellows of Paramabhatta and lived in the same village—indeed one of the affidavits filed by the opponents goes so far as to say that one of the applicants assisted in carrying Paramabhatta's corpse to the burning ground. Thus the applicants knew that the judgment in appeal and the death of Paramabhatta must have occurred within a few days of one another, and it was, therefore, their duty to enquire which of the two occurred first."

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* Application No. 94 of 1894 under extraordinary jurisdiction.

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The applicants then applied under the extraordinary jurisdiction of the High Court, contending that the judgment of the appellate Court ought to have been dated the 11th November, on which day the defendant was alive. A rule *nisi* having been granted, calling on the opponents to show cause why the Judge's order rejecting the application should not be set aside.

Shamrao Vithal appeared for the applicants in support of the rule.—The Judge expressed his opinion on the case on the 11th November, 1892, and all the proceedings and arguments were closed on that day. The written judgment, though subsequently **[809]** delivered, ought to have been dated the 11th November—*Ramkrishna* v. *Ramabai*(1).

Ghanasham N. Nadkarni appeared for the opponents to show cause.—The present application is not one to be entertained under the extraordinary jurisdiction of the High Court. The Judge has not exercised his jurisdiction wrongly or with material irregularity—*Amir Hasan Khan* v. *Sheo Baksh Singh*(2).

JUDGMENT.

BAYLEY, C. J. (Acting):—Having regard to the long established practice of the Courts in England—see *Miles* v. *Bough*(3)—and to the decision in *Ramkrishna* v. *Ramabai* (1), we think that the Judge's judgment of 30th November, 1892, should be treated as operating as if it had been delivered on the 11th November, 1892, when the arguments were closed and the Judge took time to consider his judgment. Under these circumstances nothing further remains to be done than for the original plaintiffs to apply for execution under s. 234 of the Civil Procedure Code. There is no necessity to place the names of the opponents on the record for the purpose of re-hearing the appeal, and we, therefore, discharge the rule. The parties to bear their own costs of the rule.

Rule discharged.

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19 B. 809.

APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

MORO NARAYAN JOSHI (*Original Plaintiff*), *Appellant v.*
BALAJI RAGHUNATH AND OTHERS (*Original Defendants*), *Respondents.**
[25th September, 1894.]

Limitation Act (XV of 1877), sch. II, arts. 140, 141 and 144—Alienation by a Hindu widow—Subsequent adoption by widow—Suit by the adopted son to recover possession—Adverse possession—Adoption—Rights of adopted son.

The childless widow of a separated Hindu being in possession of his property as his heir, alienated it in the year 1868 Twenty years afterwards (13th May, 1888) she adopted a son, who in 1890 brought the present suit to recover the alienated property.

[810] *Held*, that the suit was not barred by limitation.

Per FARRAN, J.—Whether art. 140 or art. 144 of sch. II of of the Limitation Act (XV of 1877) applied to the case, the suit was not barred; for if it fell under art. 140, the possession of the defendants adverse to the widow could not affect

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* Second Appeal, No. 780 of 1892.

(1) 17 B. 29. (2) 11 C. 6. (3) 3 Dowl. and Lowndes, 105.

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the plaintiff's rights, and if it fell, as it seemed to do, under art. 144. the possession of the defendants did not become adverse to the plaintiff until he became entitled to possession of the property upon his adoption.

Srinath v. *Prosunno* (1) and *Kokilmoni Dassia* v. *Manick Chundra* (2) followed.

Per CANDY, J.—The suit was governed by art. 144, under which the period of limitation began to run from the time when the possession of the defendants became adverse to the plaintiff on his adoption in 1888. Assuming that the possession of the defendants was adverse to the widow, that fact did not affect the plaintiff, who did not derive his right to sue from or through her.

[F., 33 B. 88=10 Bom. L.R 1029 ; 2 Bom. L.R. 411 ; 25 Ind. Cas. 692=16 M.L.T. 435=27 M.L.J 569; R., 21 B. 646 ;32 C. 165; 26 M. 143=12 M.L.J. 197 ; 2 C.L. J. 87=9 C.W.N. 795; 8 C.L.J. 542.]

SECOND appeal from the decision of R. S. Tipnis, Acting Assistant Judge of Thana, confirming the decree of Rao Saheb K. S. Bodas, Second Class Subordinate Judge of Mahad.

Pandurang Raghunath and Malhar Balaji were two separated cousins. Pandurang died, leaving a son Narayan, who died childless, leaving his widow Ramabai his heir.

Malhar left him surviving two sons, Raghunath and Krishnaji.

In the year 1868, Narayan's widow, Ramabai. who was in possession of her husband's property (consisting of certain lands and a moiety of a house and a yard) alienated it to Raghunath and Krishnaji.

Twenty years afterwards, *viz.*, on the 13th May, 1888, Ramabai adopted the plaintiff Moro, one of the sons of Krishnaji. He sued (No. 200 of 1889) Krishnaji and the sons of Raghunath for redemption, alleging that the lands had only been mortgaged to them by Ramabai in the year 1868. The defendants denied the mortgage and claimed the lands as their own. The mortgage-deed being unregistered was held not proved, and the suit was dismissed.

The plaintiff thereupon in the year 1890 brought the present suit against the defendants, the sons of Raghunath, to recover joint possession of a moiety of the house and yard and separate possession of half the lands, together with mesne profits of two years. The plaint alleged that the other half of the lands, which was in Krishnaji's possession, had been restored by him to the [811] plaintiff. He contended that Ramabai had no right to alienate the property, which yielded sufficient income to provide for her maintenance.

The defendants answered (*inter alia*) that since their father's death, which took place about fifteen years before the institution of the suit, they had been in possession of the property as owners ; that they were the sole owners of a part of the house and the court-yard ; that the other part was in the joint ownership of themselves and Krishnaji, and that assuming that Ramabai had transferred the property to Krishnaji and Raghunath, the plaintiff was not entitled to succeed, they being the reversionary heirs of Ramabai's deceased husband, Narayan Pandurang.

The Subordinate Judge found (*inter alia*) that Ramabai had alienated the property in dispute, except the house and the yard, to defendants' father and Krishnaji Malhar in 1868 ; that it was not proved that the alienation was made for any of the purposes which would justify a Hindu widow in alienating her husband's property ; that Ramabai was the owner of the house and the yard in dispute ; that the claim to these was barred by the defendants' adverse possession ; that the suit to recover possession of the rest of the property was not time-barred, and that the

(1) 9 C. 934. (2) 11 C. 791.

plaintiff was not entitled to recover possession, as the property had been already alienated to reversioners before his adoption. He, therefore, rejected the claim.

The plaintiff appealed, and the defendants presented cross objections. The Judge held that the defendants' possession of the lands as well as of the house and the court-yard was adverse to Ramabai, and, therefore, the plaintiff's claim, to both sets of properties was time-barred. He, therefore, confirmed the decree.

The plaintiff preferred a second appeal.

Lang (Advocate-General) with *Vishnu K. Bhatavdekar* appeared for the appellant (plaintiff).—The defendants obtained possession by virtue of an alienation by a widow and not as trespassers as found by the Judge. The original mortgage is not registered, and is, therefore, inadmissible, but there is another mortgage in the case (Ex. 51) which contains a recital that the defendants had obtained the lands from Ramabai **[812]** under an alienation by her. The alienation was, according to the findings of both the lower Courts, not for necessary purposes, and, therefore, invalid, and the plaintiff as the adopted son is entitled to question it. Our right to question it arose on the date of our adoption in 1888 and not on the date of the alienation or the death of our adoptive mother—*Srinath* v. *Prosunno* (1) ; *Kokilmoni Dassia* v. *Manick Chandra* (2). The present suit is governed by either art. 141 or 144 of sch. II of the Limitation Act, and under neither of the articles is the suit barred. As to art. 143, Ramabai, who aliened the property, is still alive, and, therefore, there is no adverse possession. As to art. 144, time would begin to run when the defendants' possession became adverse to us. Their possession became adverse to us when our adoption took place. The fact that the alienation was made to the reversioners cannot affect our right—*Ramphal Rai* v. *Tula Kuari* (3) ; *Giriowa* v. *Bhimaji* (4) ; *Lakshman* v. *Radhabai* (5) ; *Krishnaji Janardhan* v. *Morbhat* (6).

Inverarity with *Mahadeo C. Apte* appeared for the respondents (defendants).—The recital in another mortgage-deed is not an admission that the lands were held in mortgage. Our possession is not that of an alienee of the widow.. Supposing we held possession under the mortgage-deed, that deed being unregistered, we acquired no title under it. Our possession from the date of the mortgage has been under a void deed, and has been consequently adverse to the widow. Adverse possession is possession without title—*Churcher* v. *Martin* (7) ; *Madhava* v. *Narayan* (8). Adverse possession against a Hindu widow bars the remedy of a subsequently adopted son—*Krishnaji Janardhan* v. *Morbhat* (6), and also that of a reversioner —*Babu* v. *Bhikaji* (9).

The suit is governed by art. 144 of sch. II of the Limitation Act. The adopted son is not a reversioner and cannot claim under art. 141 of the schedule—Starling on Limitation, **[813]** p. 239 (2nd Ed.) ; *Azam Bhuyan* v. *Faizuddin* (10) ; *Hashmat Begum* v. *Mazhar Husain* (11).

Supposing we came in as alienees of the widow, the plaintiff cannot question our title. A widow is competent to alienate with the consent of her next reversioners. She can also alienate to them—*Rajkristo* v. *Kishoree* (12) ; *Mohunt Kishen Geer* v. *Busgeet Roy* (13) ; *Raj Bullubh Sen* v. *Oomesh Chunder Rooz* (14); *Shama Soonduree* v. *Shurut Chunder Dal* (15).

(1) 9 C. 934. (2) 11 C. 791. (3) 6 A. 116. (4) 9 B. 58.
(5) 11 B. 609. (6) 13 B. 276. (7) L. R. 42 Ch. 312.
(8) 9 M. 244. (9) 14 B. 317. (10) 12 C. 594. (11) 10 A. 343.
(12) 8 W.R. 14. (13) 14 W.R. 379. (14) 5 C. 44. (15) 8 W.R. 500.

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At the time of the alienation, Raghunath and Krishnaji were the next reversioners, and to them Ramabai conveyed the estate—*Nobo Kishore* v. *Harinath* (1).

JUDGMENT.

FARRAN, J.—The facts which give rise to this appeal are accurately stated in the judgment of my learned colleague. The Assistant Judge has found that the defendant's possession of the lands, as well as of the house and yard, has been adverse to the widow, and that the suit of the adopted son to recover possession is barred as to both classes of property. Though it may be open to question whether his decision as to the defendants' possession of the lands being adverse to the inheritance is correct in law, I deal with the case upon the footing that there is no distinction to be taken between the two classes of property.

As the cause of action of the widow to recover possession of the property accrued in 1868, only three years before the coming into force of Act IX of 1871, the case must be considered with reference to the provisions of that Act and of the Act (XV of 1877) at present in force. The rulings under Act XIV of 1859 cannot now be relied on. This is pointed out in *Hurrinath* v. *Mohunt Mothoor* (2), and indeed there is a marked difference between the wording of the old and of the new enactments. The case of *Krishnaji* v. *Morbhat* (3), in which the dates show that the cause of action had accrued more than twelve years before the coming into operation of Act IX of 1871, and which at first sight appears to be a ruling on the question of limitation raised in this case, is not for that reason an authority to guide us. The [814] possession of the defendant there had ripened into ownership before the Act of 1871 came into force, and the passing of that Act did not affect his title or revive the plaintiff's right to sue—s. 2, and see *Appasami* v. *Subramanya* (4). This consideration must, I think, have been present to the minds of the Judges who decided *Krishnaji* v. *Morbat*, as they do not advert to the altered wording of the new Acts.

We have first to consider what article in the schedule is to be applied. Article 141 of the Act of 1877 is not applicable, as the plaintiff became entitled to possession of the property on his adoption, and not on the death of Ramabai, who is still living. That, I think, is perfectly clear. As to art. 140, the plaintiff may perhaps in one sense be called a reversioner, the particular estate of the widow, on the failure of which he succeeds, being carved out of the fee-simple by operation of law and not by the grant of Narayan Pandurang. If he ought so to be regarded, he would fall within art. 140; but as that article is certainly applicable to reversioners of a different class, which (rather than the case of an adopted son) may be presumed to have been within the contemplation of the Legislature, it would be an unnecessary extension of the ordinary legal meaning of the term reversioner to apply it to an adopted son. Moreover, the full heir succeeding after the widow's death is treated in the Act not as a reversioner but as falling into a separate category.

The case of an adopted son superseding the widow's estate on his adoption is, I am inclined to think, a *casus omissus* in arts. 140 and 141, and must, therefore, fall under the provisions of art. 144. It is not, however, necessary actually to decide this, for it does not, I think, make any

(1) 10 C. 1102. (2) 20 I.A. 183. (2) 13 B. 276. (4) 15 I.A. 167 (169).

practical difference whether art. 144 or art. 140 is applied to the case. Under art. 144 limitation does not run, as under the old law, from the time when the cause of action arose, but from the date when the possession of the defendant becomes adverse to the plaintiff or (s. 3) to those from or through whom the plaintiff claims. Now an adopted son claims from and through his adoptive father. His adoption, however, does not relate back to the death of his adoptive father—*Bamundoss* v. *Mussamut* **[815]** *Tarinee* (1). He comes in bound by such acts of the widow as would bind the natural heirs of the husband after her, and entitled to set aside (in the absence at all events of stipulations to the contrary) such unauthorised alienations of the widow as they succeeding upon her death would be entitled to set aside: Mayne's Hindu Law, para. 181 (5th Ed.). The only difference between him and other full heirs of the husband for the purpose I am considering seems to be that his rights spring into existence the moment of his adoption and displace the rights of the widow, while the rights of other reversioners await the determination of the widow's estate by her death. This view of the position of the adopted son and the exact wording of art. 144 already referred to, appear to me to show that the considerations applicable to possession adverse to a Hindu widow barring or not barring under art. 141 the person entitled to possession on her death, are also applicable to an adopted son superseding a Hindu widow. The reasoning, I mean in the cases decided under art. 141, is applicable to the case of an adopted son. It would be a strange anomaly if the right of a defendant to retain the property of a Hindu husband wrongfully wrested from his widow should depend upon whether the husband is eventually succeeded after the widow by an adopted son or by a collateral heir.

Now the Full Bench at Calcutta has decided that under the present law possession adverse to a Hindu widow for twelve years, where she has obtained possession and lost it, is not a bar to a suit for possession on the part of the heir succeeding upon her death—*Srinath* v. *Prosunno* (2). *Kokilmoni* v. *Manick Chandra* (3) is to the same effect. The High Court at Allahabad has, however, ruled that where (at all events) the possession of the adverse holder is founded upon a title destructive alike of the estate of the widow and of the person entitled to succeed upon her death, the possession which is adverse to the widow, if continued for the requisite period, bars the heir who succeeds her: *Ghandarap* v. *Lachman Singh* (4); *Adi Deo* v. *Dukharan* (5). In the Madras cases **[816]** cited by Mr. Starling in his work on Limitation (p. 244) the change in the law is not discussed. I think that we should follow the Calcutta decisions to the extent above indicated, which is sufficient for the determination of the present case. It is unnecessary now to consider what would be the result if the widow had not been in possession. These decisions are, I think, tacitly approved by the Privy Council in *Hurrinath* v. *Mohunt Mothoor* (*supra*). They are in accordance with the literal wording of the article under which they are decided, which can only be escaped from by a rather strained process of judicial reasoning such as that adopted in *Saroda* v. *Doyamoyee* (6). Moreover, this interpretation removes the anomaly in the previous law that a defendant in possession of land by the unauthorised grant of a Hindu widow could be displaced by the next full heir on the death of a widow though he had held possession as owner for

(1) 7 M.I.A. 169.
(2) 9 C. 934.
(3) 11 C. 791.
(4) 10 A. 485.
(5) 5 A. 532 (537).
(6) 5 C. 938.

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more than twelve years, while he could not be so displaced if he had gained possession by force or fraud from the widow, or if, as in this case, (if the Assistant Judge is right) he entered under a grant from the widow and omitted to register it. The suit, therefore, is not barred if the case falls within art. 140 of the Act. If, as I think it does, it falls within art. 144, it is also not barred, as the possession of the defendant did not become adverse to the plaintiff until the plaintiff became entitled to possession of the property upon his adoption.

In coming to this conclusion I have fully considered the judgment in the Full Bench case of *Radhabai* v. *Anantrav* (1), but I do not think that this judgment in any way conflicts with it or with the decision in that case.

The alternative defence of the defendants as to the lands also fails, as they do not in fact allege, and cannot prove, an alienation in favour of the reversionary heirs. They have succeeded by their defence in the former suit in having made *res judicata* against them the only alienation which could have been presumed in their favour. I think, therefore, that it is not necessary for me to consider the effect of an alienation by a Hindu widow in favour of reversionary heirs as against the rights of a [817] subsequently adopted son. I would reverse the decrees of the Courts below and award the plaintiff possession of the lands and premises claimed in the plaint, with costs. The mesne profits, if insisted on, can be ascertained in execution, being calculated during the three years before suit and until possession is given to the plaintiff.

CANDY, J.—The facts of this case are these.

Ramabai, the childless widow of a separated Hindu, was in possession, in 1868, of certain property which had belonged to her deceased husband, *viz* : (*a*) share in a house and a yard ; (*b*) certain divided lands.

In 1868 that property passed into possession of her husband's divided cousins, Raghunath and Krishnaji.

In May, 1888, Ramabai adopted the plaintiff, the son of Krishnaji. Raghunath in the meanwhile had died.

In 1889 plaintiff in virtue of his adoption sued Krishnaji and the sons of Raghunath to recover the lands, alleging a mortgage of them by Ramabai to Raghunath and Krishnaji in 1868, and offering to redeem the same.

The sons of Raghunath pleaded (*inter alia*) that they had been in possession as owners for many years. One of the issues framed by the Subordinate Judge was—

Whether the lands in suit are proved to have been given in mortgage to Raghunath and Krishnaji by Ramabai ? On this he found in the negative.

A copy of an unregistered mortgage deed in Raghunath's handwriting was sought to be put in ; but this was rejected, it being admitted that registration of the original deed was compulsory. There being no such evidence unconnected with the alleged mortgage deed as could afford basis for the conclusion that defendants held as mortgagees, the claim was rejected with costs (31st January, 1890).

Plaintiff then filed the present suit (No. 294 of 1890) against the sons of Raghunath for possession of the share of the house and yard and of half the lands, alleging that Krishnaji had given up the half of the lands which had been in his possession [818] and that as Ramabai had no right

(1) 9 B. 198.

to alienate the property, he as adopted son was entitled to recover possession.

The Subordinate Judge found (*inter alia*) that the lands had been alienated in 1868 by Ramabai, but not for any purposes which would justify alienation by a Hindu widow, that the claim thereto was not barred by limitation, but must be dismissed, the alienees at the time being the next reversioners, and that the claim to the house and yard was barred by limitation.

Plaintiff appealed to the District Court. The Assistant Judge found that the claim to both items of property was barred by defendants' adverse possession, there being in his opinion no alienation by the widow.

Plaintiff has now made a second appeal to this Court; and the only points argued before us were the question of limitation, and the question whether defendants being in 1868 the reversionary heirs could on the ground resist the plaintiff's claim.

On the question of limitation I understood the learned Advocate General for plaintiff to rely on two points :—

(*a*) The statement of the Assistant Judge that "defendants entered into possession (of the lands) by virtue of an alleged mortgage-deed."

(*b*) Article 141 of the Limitation Act is applicable.

Neither point is, in my opinion, in favour of plaintiff.

The Assistant Judge could not mean that defendants are mortgagees of the lands. As he pointed out, it is *res judicata* that they are not mortgagees. Article 141 of Act XV of 1877 is certainly not in express terms applicable; for it refers to a particular class of suit brought by a person entitled to possession of property on *the death of a female*. Here plaintiff sues as the adopted son of Narayan, Ramabai's husband. He is entitled to possession, if at all, now, not at the death of any female.

I agree with Mr. Apte, who appeared for defendants, that the article of the Limitation Act to be applied is art. 144, and according to that article the claim is not barred. For in the case of suits under that article the period of limitation begins to run from the time when the possession of the defendants becomes adverse to **[819]** the plaintiff. Here the possession of defendants could not have been adverse to plaintiff till his status as adopted son of Narayan commenced in May, 1888. Assuming that the possession, held by the sons of Raghunath, both of the lands as well as of the house and yard, was adverse to Ramabai, that fact does not affect plaintiff. He does not derive his right to sue from or through Ramabai (s. 3, Act XV of 1877). She was merely the performer of a certain ceremonial which gave validity to his adoption. No doubt the position may be anomalous (the Calcutta High Court pointed out as startling an anomaly in the case of a widow and reversioners, see *Hurrinath* v. *Mohunt Mothoor*(1)); and there is a reported case which at first sight seems directly opposed to the view now proposed of art. 144. It is *Krishnaji* v. *Morbhat* (2). But in that case, though art. 144 of Act XV of 1877 was applied, no authorities were quoted, and it was expressly taken for granted that if the defendant had held adversely to the widow for twelve years, the suit would not be maintainable. Whether this would be true, supposing the property had never reached the widow's hands, and she thus had never been dispossessed, need not now be considered. But in the present case, and in the case just quoted, possession had passed from the widow to the defendant; and it is clear that if the possession adverse to

(1) 20 I.A. 183 (187).

(2) 13 B 276.

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the widow is not necessarily a bar to the subsequently adopted son, then there is no objection to the claim of the latter on the score of limitation. It is unnecessary to consider the numerous cognate cases which have arisen in reference to arts. 140, 141 of the Limitation Act. As said before, the present suit cannot be brought within the terms of those articles. An adopted son, as such, suing for present possession of his father's estate, is not a remainder man, or reversioner, or devisee, nor is he one who is entitled to possession of that estate on the death of a female.

No doubt the widow may be regarded as having committed suicide, (so to speak) by adopting a son to her husband, and thus destroying her widow's estate; and in this view the adopted son holds an analogous position to that of a claimant who is entitled to possession on the death of a female (art. 141). By **[820]** that analogy he would not be barred in the present case, notwithstanding that Ramabai's right of action may be barred by twelve years' adverse possession. That was the question referred to the Full Bench in *Srinath* v. *Prosunno* (1), and decided in favour of the claimant. But as already remarked, I think that we are not entitled to apply art. 141. We must, therefore, fall back on art. 144. In such a claim made by an adopted son to recover his father's estate, if that estate has come into the hands of his father's widow, and has subsequently gone out of her possession, and if there has been no final judgment against her in a suit brought by her to recover the property, then *prima facie* the only plea which the defendant in possession can raise, (supposing the son is suing within twelve years of his adoption) is that the widow parted with the property for necessary purposes. That plea cannot be raised in the present case by the sons of Raghunath. They deny any alienation by the widow at all.

But it is contended on the authority of *Rajkristo* v. *Kishoree* (2), that as Raghunath and Krishnaji were in 1868 the next reversioners, any act or omission of the widow in 1868 by which the prorerty passed to Raghunath and Krishnaji cannot be questioned by the subsequently adopted son. Reference was also made to the case of *Nobokishore* v. *Harinath* (3). But in the former case what was decided was that a sale by a widow with the consent of all legal heirs at the time existing, ratified by solemn decrees of legal tribunals, delivered in cases wholly contested up to the highest Court of appeal, was binding upon the son adopted by the widow after thirty years. That is not the case here. In the latter case it was held that the relinquishment by a Hindu widow of her estate to the next male heir of her husband is valid, and that she can alienate it merely with his consent without any legal necessity. But here defendants, the sons of Raghunath, do not plead relinquishment or sale by the widow.

From the remarks of the Subordinate Judge in his judgment in the suit of 1889 between the same parties it would seem that if defendants had pleaded a conveyance by the widow, nominally **[821]** a mortgage, but really intended to convey the whole estate to the next heirs, there would have been some ground for holding that this is what was intended in 1868. But that is just what the defendants cannot now plead. They assert that they are trespassers. As such they must give way to the superior claims of the adopted son. Under this view the decision of the lower Courts must be reversed, and the plaintiff's claim to possession decreed, the claim as to profits being determined in execution.

Decree reversed.

(1) 9 C. 934. (2) 3 W.R. 14. (3) 10 C. 1102.

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Before Mr. Justice Ranade and Mr. Justice Fulton.

MANCHHARAM (*Original Opponent*), *Appellant v.* KALIDAS AND ANOTHER (*Original Applicants*), *Respondents.** [25th September, 1894.]

19 B. 821.

Res judicata—*Estoppel—Fraud—Judgment obtained by fraud—Not conclusive* inter partes—*Succession Certificate Act (VII of* 1889*)*, s. 18, *cls. (b) and (c)—Revocation of certificate.*

One Punja died in 1889, leaving behind him his daughter Mahali. Punja, it was alleged, had made a will appointing Kalidas and Kasandas as his executors. The executors applied for a certificate under the Succession Certificate Act VII of 1889 to recover a debt due to the deceased's estate from one Motiram. Mahali opposed this application, and claimed the certificate for herself by a separate application. The District Judge rejected Mahali's application, and issued a certificate to the executors on 14th September, 1892.

In the meantime, one Manchharam obtained a decree against Mahali as legal representative of Punja, and in execution bought Punja's right, title and interest in the debt due from Motiram. On 12th September, 1892, Manchharam applied for a certificate under Act VII of 1889 to recover this debt. The District Judge rejected this application. Manchharam appealed to the High Court. To this appeal the executors were made parties at their own request. The High Court reversed the District Judge's order and remanded the case for disposal on the merits. Upon the remand the executors did not appear before the District Judge to contest Manchharam's application, and the District Judge granted him a certificate. Thereupon he applied for revocation of the certificate previously granted to the executors; and the executors in their turn applied for a revocation of the certificate granted to him. The District Judge revoked Manchharam's certificate on the ground that he had fraudulently concealed from the Court the previous grant of a certificate to the executors.

[822] Against this order Manchharam appealed to the High Court, contending (*inter alia*) that the executors not having resisted his application for a certificate after the case had been remanded by the High Court, were estopped, on the principle of *res judicata*, from applying for a revocation of the certificate granted to him.

Held, that the executors were not estopped. The executors having applied to be made parties to the appeal proceedings, were bound to appear in the Court below, and their failure to do so disabled them from pleading objections, such as the collusive character of the decree and Mahali's want of title, but it did not operate as *res judicata*, especially when there was reason to suspect fraud on the part of Manchharam. The order obtained by him could not have the effect of *res judicata*, unless the executors being called on to dispute it, had failed to do so.

A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.

Held, also, that the District Judge had a right, under s. 18, cls. (*b*) or (*e*), of Act VII of 1889, to revoke the certificate he had granted under mistake of fact to Manchharam.

[Appr., 27 C. 11=3 C.W.N. 660.]

APPEAL from the orders of J. B. Alcock, District Judge of Surat, in miscellaneous applications Nos. 24 and 27 of 1893 under Act VII of 1889.

The facts of the case are fully stated in the judgment of Ranade, J., and also in the head-note.

Goverdhan M. Tripathi, for appellant Manchharam. The executors of Punja's will are estopped from applying to revoke Manchharam's certificate under Act VII of 1889. They were parties to the proceedings

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which he had instituted to obtain a certificate. When the High Court remanded the case to the District Judge for disposal on the merits, it was their duty to appear, and resist the grant to him on every ground that was open to them. Not having done that, it is not open to them to take any objections now. The matter is *res judicata*—*Kishan Sahai* v. *Aladad Khan* (1); *Ahmedbhoy Hubibbhoy* v. *Vulleebhoy Casumbhoy* (2); *Ramlal* v. *Chhab Nath* (3); *Ram Kirpal* v. *Rup Kuari* (4).

Motilal M. Munshi, for respondent.—The principle of *res judicata* does not apply to this case. And even if it did, it is always open to a party to a judicial proceeding to show that a judgment or order passed against him was obtained by fraud—*Ahmedbhoy* [823] *Hubibbhoy* v. *Vulleebhoy*; *Sheik Budan* v. *Ramchandra* (5). In the present case we contend that the appellant fraudulently concealed the fact of a previous grant of a certificate under Act VII of 1889 to the executors from the Court. If this fact had been brought to the notice of the Court, no certificate would have been issued to him.

JUDGMENT.

RANADE, J.—The certificate proceedings, in respect of which these appeals were preferred, have already come four times before this Court, and there have been three remands to the lower Court for final decision on the merits. The facts of the case are simple, though they have been somewhat complicated by reason of the various stages through which this litigation has passed since its first commencement in 1890.

One Punja Jagjiwan died on 15th November, 1889, leaving behind him his daughter, Mahali, as his heir. He, it is alleged, made a will on 4th November, 1889, appointing Kalidas and Kasandas as his executors. These executors applied for a certificate under Act VII of 1889 to recover a debt of more than 1,000 Rs. due from one Motiram to Punja's estate. Mahali opposed this application, and claimed the certificate for herself in a separate application. The District Judge refused both applications. Thereupon the executors and Mahali both appealed to the High Court, which Court reversed the order of the District Judge, and remanded the case back for inquiry on the merits—*Bai Mahali* v. *Kalidas Fakirchand* (6).

The District Judge, in this remand inquiry again, rejected the executors' application, on the ground that they were bound to take out probate of the will. Bai Mahali thereupon withdrew her separate application. The executors again appealed, and the High Court reversed the order of the District Judge in January, 1892, and held that the executors were not bound to take out probate—*Kalidas Fakirchand* v. *Bai Mahali* (7). The case was accordingly again remanded to the District Court.

In the third inquiry, the District Judge granted the executors' application for a certificate on 14th September, 1892, and at the [824] same time rejected Bai Mahali's application, which apparently had been renewed after the second remand. Bai Mahali appealed to the High Court, but her appeal was dismissed.

On 12th September, 1892, Manchharam, claiming to be auction-purchaser of the right, title, and interest of Punja in the debt due from Motiram, applied in his own name for a certificate under Act VII of 1889.

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(1) 14 A. 64. (2) 6 B. 703. (3) 12 A. 578. (4) 6 A. 269.
(5) 11 B. 537 (540). (6) P. J. (1891), p. 13. (7) 16 B. 712.

Manchharam had bought Punja's right, title, and interest on 23rd August 1892, in execution of a Small Cause Court decree obtained on 1st March, 1892, in suit No. 163 of 1892 against Punja's estate represented by Bai Mahali. The executors were not parties to these proceedings, and their application to have the judgment-creditor's attachment raised was disallowed. Manchharam's application to be made a party to the certificate proceedings, commenced by the executors in 1890, was also rejected by the District Judge, and Manchharam did not appeal from that order of rejection.

The District Judge also refused Manchharam's separate application of 12th September, 1892. Manchharam thereupon appealed, and this Court reversed the District Judge's order, and remanded the case back a third time for disposal on the merits on 11th April, 1893—*Manchharam* v. *Bai Mahali* (1). In these appeal proceedings the executors were made parties at their own request.

When the case went back to the lower Court, Manchharam's application was granted by the District Judge, and a certificate was ordered to be issued to Manchharam for the recovery of the self-same debt for which the executors had obtained their own certificate on 14th September 1892. The executors did not appear, and were not made parties in this Manchharam's application in the District Court.

Finally, the executors applied to the District Judge for a revocation of Manchharam's certificate and Manchharam made a separate application for a revocation of the executors' certificate. Both these applications were disposed of together by the District Judge who revoked Manchharam's certificate, on the ground [825] that Manchharam had concealed from the Court the fact of the previous grant of the certificate to the executors.

The present appeals have been preferred by Manchharam from the order granting the executors' application for the revocation of his certificate, and the order rejecting his application for the revocation of the executors' certificate.

Mr. Motilal, for the executors, urged a preliminary objection that no appeal lay from an order refusing to revoke a certificate. He contended that s. 19 only contemplated appeals from orders granting, or refusing, or revoking a certificate. We do not think there is much force in this objection. Manchharam had clearly a right to appeal against the order revoking his certificate, and the order refusing to revoke the executors' certificate was in fact the same order with a different application. Moreover, the section clearly reserves the revisional powers of this Court as supplementing its appellate jurisdiction.

Mr. Goverdhanram, pleader for Manchharam, urged that as the executors had not, after asking to be made parties in the appeal proceedings in the High Court, taken care to appear as parties in the District Court after the third remand, they had no right to apply for a revocation of his certificate. He also contended that the principle of *res judicata* applied in such a case. He relied upon the ruling in *Kishan Sahai* v. *Aladad Khan* (2) in support of his first contention, and in respect of the extension of the principle of *res judicata*, he cited *Ahmedbhoy Hubibbhoy* v. *Vulleebhoy Casumbhoy* (3), *Ram Lal* v. *Chhab Nath* (4), *Ram Kirpal* v. *Rup Kuari* (5). There can be no doubt that the executors, having applied

(1) P. J. (1893), p. 174.
(2) 14 A. 64.
(3) 6 B. 703.
(4) 12 A. 578.
(5) 6 A. 269.

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of their own accord to be made parties in the appeal proceedings, were bound to appear in the Court below, and that their failure to do so certainly shuts them out from pleading objections such as the collusive character of the decree. and Mahali's want of title to represent the estate, which might have been urged by them in the previous proceedings. While it is absolutely certain that if the executors had appeared in the District Court, that Court would not have granted the certificate [826] to Manchharam, their failure to do so did not operate as a *res judicata*, especially where, as in this case, there was reason to suspect fraud on the part of Manchharam. Section 13 is no doubt not exhaustive of the effects of the principle of *res judicata*, but under s. 44 of the Evidence Act, as stated by Latham, J., a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud—*Ahmedbhoy Hubibbhoy* v. *Vulleebhoy Casumbhoy* (1). To the same effect is the qualification noticed by West, J., in *Sheik Budan* v. *Ramchandra* (2). The order obtained by Manchharam could not possibly have the effect of *res judicata*, unless the executors, being called on to dispute its validity, had failed to do so. The two Allahabad decisions are clearly distinguished from the present case in that there was no allegation of fraud or intentional concealment. The Certificate Act in s. 18 expressly empowers the District Court to revoke a certificate obtained fraudulently, or by the concealment of some material fact, or where, as in this case, an order had been previously made by a competent Court with respect to the same debts. The District Judge, therefore, had a right under these cls. (*b*) or (*c*) to revoke the certificate he had granted under a mistake of fact to Manchharam. Such revocations of the Court's own motion have to be made in certain cases where a minor obtains a certificate on a representation that he is of full age, or an executor obtains probate of the will of a living person. As a general rule, however, the Court must be moved by the parties interested in the revocation to exercise its authority.

Quite apart from the complications introduced by the previous proceedings, there can be no doubt that when both Manchharam and the executors sought to revoke each other's certificate, the lower Court exercised a wise discretion in revoking Manchharam's certificate. It was granted long after the executors' certificate was granted. In fact, it was applied for only two days before the order granting the executors' certificate had been passed, and after Mahali had disputed their right for two years. Manchharam knew the fact, for he applied to be made a party to [827] those proceedings. His application was rejected on 12th September, 1892, and he did not appeal from that order. Manchharam claims only under an auction sale held in execution of an *ex parte* decree against Mahali, whose contention in respect of the validity of her father's will had been negatived in both Courts. The judgment-creditor should, under the circumstances, have made the executors parties, as they, and not Mahali, represented the estate of the testator—*Shaik Musa* v. *Shaik Essa* (3); *Subbanna* v. *Venkatakrishnan* (4); *Baswantapa* v. *Ranu* (5). The record of the case shows that the executors, though they have not proved the will, have entered upon the charge of the estate, and have paid the funeral expenses of Punjabhai. Under all these circumstances, there can be no comparison between the title of the executors under the will, and of the auction-purchaser at a sale held under a decree against Mahali, who had failed to

(1) 6 B. 703 (715). (2) 11 B. 537 (540). (3) 8 B. 241.
(4) 11 M. 408. (5) 9 B. 86.

impeach the title of the executors. We accordingly confirm the orders of the District Judge; and reject both appeals. The appellant must bear his own costs and pay the costs of the executors.

FULTON, J.—I fully concur with my learned colleague in thinking that these appeals must be dismissed. No sufficient reason was shown for the revocation of the certificate granted to the executors, as in the application made by Manchbaram it was not alleged that the will on which the executors based their title was invalid. As regards the revocation of Manchbaram's certificate, I think it was justified, because the certificate had been granted by the Court in ignorance of the fact that a previous one had been issued to the executors in respect of the same debt.

Order confirmed.

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19 B. 828.

[828] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

TULJARAM (*Original Plaintiff*), *Appellant v.* BAMANJI KHARSEDJI (*Original Defendant*), *Respondent.** [26th September, 1894.]

Indian Succession Act (X of 1865), 1903—Letters of administration to the estate of a deceased Parsi—Right of suit—Mamlatdar's order—Suit to set aside the order—Bom. Act III of 1876, s. 18.

No suit will lie to set aside an order validly passed by a Mamlatdar under Bombay Act III of 1876, though such an order may be superseded by a decree of a Civil Court.

The land in dispute belonged originally to a Parsi named Dadabhai, who died intestate. After his death, one of his brothers without taking out letters of administration sold the land to the plaintiff. The defendant claimed a right of way over this land, alleging that it was public land. He obtained an injunction from the Mamlatdar's Court, restraining the plaintiff from obstructing his alleged right of way. Thereupon the plaintiff filed a suit to set aside the Mamlatdar's order, and for a declaration that he was owner of the land, and that defendant had no right of way over it. Both the lower Courts rejected the plaintiff's claim on the ground that under s. 190 of the Succession Act (X of 1865) plaintiff could not establish his right to the land in the absence of letters of administration to the estate of Dadabhai, the original owner.

Held, reversing the decrees, that s. 190 of Act X of 1865 did not apply. Neither the plaintiff nor the defendant relied as the basis of his right on the previous title of Dadabhai. There was no question of administration.

Held, also, that a person sued as a trespasser cannot, without proof of his own right, oust an apparent owner by pointing out some defect in the title of the latter.

SECOND appeal from the decision of J. B. Alcock, District Judge of Surat, in appeal No. 60 of 1892.

A Parsi named Dadabhai Pestonji died intestate, leaving a brother named Dosabhai and other near relations.

No letters of administration were taken out to the deceased's estate by any of his heirs.

Certain land which had belonged to the deceased was subsequently sold by Dosabhai to the plaintiff.

The defendant asserted a right of way over it and obtained an injunction in the Mamlatdar's Court, restraining the plaintiff from obstructing him in the enjoyment of his alleged right.

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* S. A. No. 941 of 1893.

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[829] Thereupon the plaintiff filed the present suit to have the Mamlatdar's order set aside, and for a declaration that the land belonged to him and that the defendant had no right of way over it.

The defendant denied the ownership of the plaintiff and of his vendor. He alleged that the land was public land; and that he had acquired a right of way over it by more than forty years' user.

The Subordinate Judge dismissed the suit on the preliminary point that the plaintiff could not establish his right to the land in the absence of letters of administration to the estate of the deceased Dadabhai Pestonji, to whom the land originally belonged.

The decision was upheld, on appeal, by the District Judge, whose judgment was as follows.

Section 190 of the Indian Succession Act (X of 1865) provides that no right to any part of the property of a deceased intestate can be established in any Court of justice unless letters of administration have been granted by a Court of competent jurisdiction. The fact that plaintiff does not claim any right over the land as the deceased owner's heir, but only by purchase from a person who claims to be the heir, makes no difference. If Dosabhai cannot establish his claim, no more can the person to whom Dosabhai sells it."

Against this decision the plaintiff preferred a second appeal to the High Court.

Goverdhan M. Tripathi, for appellant (plaintiff) :—Section 190 of the Indian Succession Act does not apply. The plaintiff derives his title not from the deceased Dadabhai, but from his brother Dosabhai, who sold the land. The plaintiff was in possession until ousted by the defendant, who is a mere trespasser. Section 190 was intended to give protection to heirs and debtors of a deceased person.

Ganpat Sadashiv Rao, for respondent.—Section 190 of Act X of 1865 is wide enough to cover a case like this. If the plaintiff's vendor Dosabhai could not sue to establish his title to the land in suit without taking out letters of administration to Dadabhai's estate, much less can the plaintiff sue. Refers to *Haji Mahomed* **[830]** *Mitha* v. *Musaji Esaji* (1); *Framji Dorabji Ghaswalla* v. *Adarji* (2); *Sukh Nandan* v. *Rennick* (3).

JUDGMENT.

JARDINE, J.—In a suit brought by the defendant in the Court of the Mamlatdar he obtained against the plaintiff an order affirming his right to the user of the land which the plaintiff now claims as his own.

Among other reliefs in this suit the plaintiff prayed that the order of the Mamlatdar be set aside. We are of opinion that this prayer was rightly refused. A suit for that purpose is not contemplated by s. 18 of Bombay Act III of 1876. The order of the Mamlatdar, properly made, is good and valid, and is not to be set aside, though it may be superseded by a decree of a Civil Court.

The Courts below have found that the land in suit once belonged to one Dadabhai, whose brother Dosabhai, after Dadabhai died intestate, sold it in 1889 to the plaintiff. The District Court has recorded no finding as to Dosabhai's title. The Subordinate Judge remarks: "While Dosabhai's brothers are alive, they might yet come forward and dispute Dosabhai's title and right to sell the land. His story of the oral devise or gift to him (it is not clear which it was) might be true: but in proof of it there is the

(1) 15 B. 657 (669). (2) 18 B. 337. (3) 4 A. 192.

evidence only of the plaintiff's vendor." This is not a definite finding of fact; and the Subordinate Judge has, like the District Judge, based his rejection of the whole claim on the legal ground that as the vendor Dosabhai could not establish his right without taking out letters of administration to Dadabhai (s. 190 of Act X of 1865 being cited as an authority) his vendee cannot establish his right as against the defendant.

This inference cannot, however, be drawn in the absence of a finding of fact as to whether the property had vested in Dosabhai under a gift before the death of Dadabhai. It is only after a finding in the negative that s. 190 can have any application to this case.

[831] The more important question is, whether a person sued as a trespasser can without proof of his own right oust an apparent owner by pointing out some defect in the title of the latter, *viz.*, that the property once belonged to a person who died intestate and was sold to the apparent owner by a relation who administered the estate without getting letters of administration. No case interpreting s. 190 in this fashion has been cited. Some reliance was placed on *Haji Mahomed* v. *Musaji* (1). But the question there was, whether the plaintiff had failed to show the defendant a good title, and the judgment only deals with s. 187, which along with s. 179 is treated by Sir C. Sargent in *Shaik Moosa* v. *Shaik Essa* (2) as merely stating the rules of English law. In the absence of any authority we see no reason for upholding the very extended view of s. 190 taken by the Courts below. It appears to be the negative complement of what rights are declared positively in s. 242. The words of s. 190 do not apply to the present pleadings. Neither party relies as the basis of his own right on a previous title in a person who was owner when he died intestate. There is no question about administration; nor can the result of this suit prejudice the rights of any heirs who may possibly exist.

The Court, therefore, confirms so much of the decree as refuses the prayer to set aside the order of the Court of the Mamlatdar; and in other respects reverses the decrees of both the lower Courts and remands the cause to the District Court for a re-hearing of the appeal; costs of both appeals on the present respondent; costs of the suit to be allotted on passing new decree.

Decree reversed and case remanded.

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19 B. 832.

[832] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

PATHAN ALIKHAN BADLUKHAN (*Original Applicant*), *Appellant v.* BAI PANIBAI (*Original Opponent*), *Respondent.**

[26th September, 1894.]

Guardian and Wards' Act (VIII of 1890)—Certificate of guardianship—Guardian appointed under a will—Necessity of probate.

It is not incumbent on a person, who has been appointed guardian of a minor under a will, to take out probate as a condition precedent to his obtaining a certificate of guardianship under Act VIII of 1890.

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* Appeal No. 66 of 1894.

(1) 15 B. 657 (669).

(2) 8 B. 241 (253).

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APPEAL from the decision of Gilmour McCorkell, District Judge of Ahmedabad, in miscellaneous application No. 124 of 1893, under Act VIII of 1890.

The applicant prayed for a certificate of guardianship under Act VIII of 1890, alleging that he had been appointed a guardian of the person as well as of the property of the minors under the will of their deceased step-mother.

The District Judge rejected this application, holding that as there had been a special appointment of a guardian under a will, the applicant was bound to take out probate of the will, without which the certificate of guardianship could not be granted.

The applicant thereupon appealed to the High Court, contending that it was not incumbent on him to apply for probate.

Goverdhan M. Tripathi, for appellant.

Ganpat Sadashiv Rao, for respondent.

The following authorities were cited in argument:—*Lakshman* v. *Jamalbibi* (1), *Lakshman* v. *Abdul* (2), *Parvatibai* v. *Hariboa* (3), *Bhagvansang* v. *Bechardas* (4) and *Shaik Moosa* v. *Shaik Essa* (5).

JUDGMENT.

JARDINE, J.—The District Judge refused to give the appellant a certificate of guardianship, under Act VIII of 1890, holding that as he pleaded an appointment as guardian under the will of the deceased step-mother of the minors, and as he had not taken out probate, the relief should be refused.

No words of Act VIII of 1890 lay down such a rule: and we do not think the Legislature intended to alter the earlier law in this matter. See Act XX of 1864, as interpreted in *Lakshman* v. *Jamalbibi* (1), *Lakshman* v. *Abdul* (2), *Parvatibai* v. *Hariboa* (3). See also *Bhagvansang* v. *Bechardas* (4) and *Shaik Moosa* v. *Shaik Essa* (5). We are, therefore, of opinion that it was not a condition precedent of relief that the appellant should take out probate.

On this point no contention has been raised by Mr. Ganpatrav, who appears for the respondents and supports the decree on another ground, appertaining to the merits, which have not been inquired into.

The Court reverses the order of the District Judge and remands the cause for inquiry and decision according to law. Costs on the respondents.

Order reversed.

(1) P.J. (1875), p. 150.
(2) P.J. (1875), p. 151.
(3) P.J. (1888), p. 351.
(4) 6 B. 73.
(5) 8 B. 241 (254, 255).

20 B. 1.

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20 B. 1.

ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran, and Mr. Justice Starling.

SHAIK HUSAIN (*Original Defendant*), *Appellant v.* GOVARDHANDAS PARMANANDAS (*Original Plaintiff*), *Respondent.**

[26th July, 1895]

Landlord and tenant—Ejectment—Tenure—Plea by defendant that he held the land by Fazendari tenure for building purposes—Permission to build—Counterparts of leases produced by landlord—Execution of counterpart denied by defendant—Ancient documents—Claim of tenant to compensation for buildings erected by him.

In a suit for ejectment brought in 1894 the defendant contended that he held the land on permanent Fazendari tenure, and produced a document, dated 1848, by which his predecessor was given permission to build upon the land. The plaintiff (landlord), however, produced the counterparts of a subsequent lease to the same tenant (defendant's predecessor), dated 1851, which created a monthly tenancy, and of a latter one to the defendant himself, dated 1859, creating a yearly tenancy determinable on a month's notice, under which provision this suit was brought. The defendant denied that he had executed this document, and contended that it was not proved. The lower Court held that these documents were admissible as ancient documents, and relying upon them passed a decree for the plaintiff. On appeal,

Held, confirming the decree, that having regard to the circumstances, the documents must be held proved, and the plaintiff was entitled to recover possession of the land.

A tenant of land demised to him cannot on the termination of his tenancy claim compensation for buildings erected by him.

[F., 6 C.W.N. 134; R., 22 B. 1; 27 M. 211 (218)=14 M.L.J. 25; 11 Ind. Cas. 745=21 M.L.J. 891=10 M.L.T. 193; 82 P.R. 1902=110 P.L.R. 1902.]

APPEAL by the defendant against a decree passed in favour of the plaintiff by Parsons, J., dated 15th January, 1894.

Suit in ejectment. The plaintiffs were the executors of the will of one Parmanandas Jivandas.

The plaint set forth that by various assignments the said Parmanandas Jivandas became the assignee of a certain lease, dated [2] the 1st October, 1794, whereby the East India Company leased to one W. H. Blackford, his heirs, executors, administrators and assigns, a certain portion of the land known by the name of Bhandarwara Hill for a term of ninety-nine years, with a covenant of renewal; that the defendant was a yearly tenant of a part of the said demised land under a lease dated 1st January, 1859, made to him by one Canji Chatur, the predecessor in title of the said Parmanandas, at a rent of Rs. 20 per annum, which said lease contained a covenant by the defendant to quit and deliver up possession at any time on one month's notice in writing; that the plaintiffs on the 22nd September, 1891, gave the defendant notice to quit, but the defendant had not replied to the notice and had refused to give up possession.

* Suit No. 13 of 1894.

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At the hearing the plaintiff produced a counterpart (Ex. G) of a lease dated 13th October, 1851, granted by Canji Chatur to one Abdulla Shaik Ismail (defendant's uncle and predecessor). This lease created a monthly tenancy as long as the rent was paid, determinable, however, by the landlord on a month's notice. It was not assignable. The only difference between that lease and the one sued on was that the latter created a yearly, and not a monthly, tenancy.

In his written statement the defendant denied that he held as yearly tenant, and alleged that the land in question had originally been let for building purposes to his predecessor on Fazendari tenure at a small quit-rent, and he submitted that he was entitled to hold the land subject only to the payment of such rent.

The defendant in his evidence said that his uncle Abdulla got possession of the land in 1848 under the following document (No. 1) which, he contended, showed that Abdulla was a perpetual Fazendari tenant of the land :—

" *22nd May 1848.*

" This is to certify that Abdulla Shaik Ismail has our permission to build his house upon our ground, part of Bhandarwara Hill, in Mazagon No. 19, of ground rent from which he pay to us.

D. AND M. PESTONJI."

The lower Court (Parsons, J.) passed a decree for the plaintiffs, relying on the leases Exs. G and H.

[3] The defendant appealed, and in appeal alleged that he had erected buildings on the land at his own expense and with the written permission of the plaintiffs' predecessor in title, and he contended *(inter alia)* that in any case the plaintiffs were only entitled to possession of the land and not of such buildings. He further contended that he ought to be allowed reasonable compensation for the said buildings, or be allowed to remove them before delivering possession of the land.

Rudra and *Settlur*, for the appellant (defendant).—The alleged lease is not proved—*Uggrakant Chowdhry* v. *Hurro Chunder Shickdar* (1) ; *Hari Chintaman Dikshit* v. *Moro Lakshman* (2). The defendant got permission to build on the land—*Ramsden* v. *Dyson* (3) ; *Kunhammed* v. *Narayanan Mussad* (4); *Dattatraya Rayaji* v. *Shridhar Narayan* (5); *Yeshwadabai and Gopikabai* v. *Ramchandra Tukaram* (6) ; *Plimmer* v. *The Mayor, &c., of Wellington* (7) ; *Narayan bin Raghoji* v. *Bholagir Guru Mangir* (8).

Macpherson (Acting Advocate General) and *Inverarity*, for the respondents (plaintiffs).

JUDGMENT.

FARRAN, C. J.—The defendant was allowed in this case to appeal as a pauper principally to have the question of his claim to compensation upon eviction determined. The arguments have not, however, been confined to that point. The question as to whether the execution of Ex. G and Ex. H has been satisfactorily proved, has also been raised before us.

It arises thus. Canji Chatur, the ancestor and predecessor in title of the plaintiff, purchased the Bhandarwara Hill in 1851. The hill is

(1) 6 C. 209. (2) 11 B. 89 (98). (3) L. R., 1 H. L. 129.
(4) 12 M. 320. (5) 17 B. 736. (6) 18 B. 66.
(7) 9 App. Cas. 699 (712). (8) 6 B.H.C. R.A.C.J. 80.

held on a ninety-nine years' renewable lease from Government. It was conveyed to Canji Chatur on the 23rd July, 1851. At that time one Abdulla Shaik Ismail was in occupation of a plot of land upon it. The nature of his occupation is not shown, but the defendant, who claims to be his nephew and heir, produces a document, dated the 22nd May, 1848, in the following terms:—"This is to certify that Abdulla Shaik Ismail has our permission to build his house upon our ground, part of Bhandarwara [4] hill, in Mazagon, No. 19, of ground rent from which he pay to us.—(Signed) D. and M. Pestonji." It is contended by the appellant that this document shows that Abdulla was at that time a perpetual Fazendari tenant of the land which he occupied. We do not think so. Exhibit No. 1 itself is a mere permission or license to build, and does not indicate what the occupant's tenure really was. Had there been no other document in existence, and had the occupants showed an uninterrupted payment of rent ever since, the inference might fairly be drawn, as it was drawn in *Yeshwadabai* v. *Ramchandra* (1) that the land had then been let for building purposes on permanent Fazendari tenure; but if we find the tenant a few years after its date accepting a lease of a less permanent character, no such inference can fairly be drawn. The equally probable inference is that the permission was given in view of a lease upon the terms subsequently accepted, or in the form common on the estate. The existence of this document does not, therefore, throw doubt upon the genuineness of that to which we shall now refer.

There are numerous documents amongst those in plaintiff's possession which purport to be counterpart leases signed by the tenants of Canji Chattur soon after his purchase. From this it would appear that he was then engaged in taking from his tenants acknowledgments of the terms upon which they severally held. The plaintiff produces one of such counterparts which purports to be executed by Abdulla. It is written in English and bears date the 13th day of October, 1851. It purports to be attested by two witnesses, and has all the appearance of being an ancient and genuine document. The rent recoverable by it corresponds to the rent which, as appears from the books of Canji Chattur, Abdulla paid (2 annas per square yard for 125 yards, which amount to Rs. 14-6 per annum). The only doubt which suggests itself as to its authenticity arises from its terms. It creates, in effect, a monthly tenancy to continue so long as the rent is paid, but determinable by the landlord on giving a month's notice. The lease is, in terms, not assignable. It certainly does appear strange that Abdulla Shaik should have built upon the land expecting to get, or having (for there is no evidence as to whether [5] the building upon the land was erected before or after the date of this lease) such an insecure tenure; but we cannot reject as unproved an ancient document simply because it is not a prudent act for a lessee to lay out money upon the tenure which it discloses. We are fully aware of the danger of treating old documents as established, merely because they are thirty years old and come from the proper custody (see *Uggrakant* v. *Hurro Chunder* (2) and *Hari Chintaman* v. *Moro Lakshman* (3)). But here circumstances point to the likelihood of Abdulla having executed some counterpart; and this is produced with all marks of genuineness upon it and according with the tenure in the books of the estate. We consider that the Division Court was fully justified in treating it as proved and acting upon it.

(1) 18 B. 66. (2) 6 C. 290. (3) 11 B. 89.

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It appears from the books of the estate that in Samvat 1893 (1856-1857 A.D.) Abdulla is debited with Rs. 20, being the rent of 160 square yards. From this it appears that the holding was then increased. The plaintiff produces another counterpart lease (Ex. H), dated the 1st of February, 1859, which purports to be executed by the defendant himself. This is a counterpart lease for 160 square yards. It is on a printed form and duly attested. The signature upon it is not dissimilar to that to the defendant's written statement. The increase in the holding affords a reason for a new counterpart being taken from the tenant who as heir succeeded Abdulla. The rent reserved by this lease (Rs. 20) has been paid regularly by the defendant for many years, and altogether the transaction has a genuine appearance. Having regard to the existence of the counterpart lease (Ex. G) previously executed by Abdulla, there is nothing improbable in the defendant's having executed a new counterpart in similar terms. Those of the new lease only differ from the terms of the former one in creating a yearly, instead of a monthly, tenancy, but similarly terminable by a month's notice. The denial of the defendant, in cross-examination of having executed Ex. H, is half-hearted, and we think that the Judge was right in disbelieving it. We consider Ex. H to be proved. The decree is, therefore, correct in awarding possession of the land comprised in **[6]** Ex. H to the plaintiff, the notice to quit having been duly served on the defendant.

It remains to consider the defendant's claim for compensation. It was not put forward in the Court below, but it was urged in the memorandum of appeal, and counsel for the respondent offers no objection to our dealing with it on the merits. In an unreported case of *Parmanandas* v. *Ardeshir Framji*, it was held by Farran, J., in a case exactly similar to the present, arising out of a lease upon the same estate, that the evicted tenant was not entitled to compensation for the buildings upon the land, and the same ruling was made by Starling, J., in the case of *Goverdhan* v. *Rahim Rahimtulla*, also unreported. We think that these rulings were correct.

There is, as we have stated, no evidence to show whether the buildings upon the land, which are not denied to be of a substantial character, were erected before or after the date of Ex. G. We know of no authority for holding that a tenant who erects buildings on a demised land is entitled to compensation on being evicted on the termination of his tenancy. His right to remove such buildings, which appears to be established by the cases of *Narayan bin Raghoji* v. *Bholagir Guru Mangir* (1) and *Premji Jivan* v. *Haji Cassum* (2) and is enacted by the Legislature in the Transfer of Property Act (IV of 1882), s. 108, seems to us to negative his claim to compensation. The law laid down in the judgment of the Court in the last cited case is this: "It is well established law in England that if a stranger builds on the land of another although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting or standing by, so as to induce the belief that the owner intends to forego his right or to an acquiescence in his building on the land —*Ramsden* v. *Dyson* (3), *Plimmer* v. *Mayor, &c. of Wellington* (4) and see *Dattatraya* v. *Shridhar* (5). This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building." The same law, we think, is as applicable to a tenant building on his landlord's **[7]** land during his tenancy as to a stranger building on the

(1) 6 B.H.C.R. O.C.J. 80 (85). (2) P.J. (1895), 107. (3) L.R. 1 H.L. 129 (170).
(4) 9 App. Cas. 699 (710). (5) 17 B. 736.

land of another. There are no special circumstances in the present case. The tenant must be taken to have known the terms of his lease as well as his landlord. And there is nothing to show that the landlord "created or encouraged any hope or expectation" in the mind of the tenant by his words or conduct. The granting of the lease in the terms of the Ex. G and Ex. H are, we think, quite inconsistent with such an idea. Such special circumstances were found in the cases of *Kunhammed* v. *Narayanan* (1); *Dattatraya* v. *Shridhar* and *Yeshwadabai* v. *Ramchandra* (2) and the Courts gave effect to them. The authorities are very fully considered in the last mentioned case.

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The defendant cannot call in aid the provisions of Act XI of 1855, s. 4, as holding under the lease he did, he could not, nor could his predecessor in title, have *bona fide* believed that he held the land in permanent tenure.

The appellant's claim for compensation, therefore, fails. He has not asked to be allowed to remove his buildings. The appellant's counsel applied for leave to put in the municipal bills, which tend to show the nature and value of the structure erected on the land and one of two rent bills of 1855 and the following year wherein the rent paid in by the defendant Abdulla is called Fazendari rent. We have not thought it necessary to require those documents to be produced under s. 508, cl. *(b)*, of the Civil Procedure Code (Act XIV of 1882) as the fact of there being a permanent structure on the land is not disputed, and the effect of the rent notes could only be considered if the whole series were put in evidence. The whole series was put in evidence in the cause of *Parmanandas* v. *Ardeshir Framji* to which we have referred and as a whole did not support the defendant's case.

The appeal will be dismissed. The appellant must pay the fees payable on his appeal to Government, as he has been allowed to appeal as a pauper.

Appeal dismissed.

Plaintiff's Attorney :—Mr. *K. J. Mantri.*
Defendant's Attorneys :—Messrs. *Little & Co.*

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20 B. 8.

[8] ORIGINAL CIVIL.

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice Starling.

MANCHERJI BOMANJI (*Original Defendant*), *Appellant* v. NUSSERWANJI MANCHERJI AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[26th July, 1895.]

***Limitation Act** (XV of 1877), sch. II, art. 115—Agreement—Construction.*

The plaintiffs were husband and wife, and they were married on the 14th March, 1888. On the day of their marriage the defendant, who was the father of the first plaintiff, gave him a note addressed to his (the defendant's) firm as follows :—

"Do you be pleased to pay Rs. 7,000, namely, seven thousand, for ornaments in respect thereof, together with interest thereon at the rate of Re. 4, namely,

* Suit No. 179 of 1894.

(1) 12 M. 320.

(2) 18 B. 66.

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four, per one centum per one annum, within a period of 3, namely, three, years from this day."

The plaintiff took this note to the defendant's firm, and in return received the following document addressed to himself :—

"You sent one 'chithi' (note) for Rs. 7,000, namely, seven thousand, on me. The sum which your father Set Mancherji Bomanji Panthaki caused to be paid to you in respect of the ornaments appertaining to your marriage has been credited to your account, bearing interest at 4, namely, four, per cent. For the same this 'receipt' has been given in writing."

No money was actually paid by the defendant to the plaintiffs, and none was lodged with the defendant's firm by the plaintiffs, but subsequently to the above transaction an account was kept in the defendant's books, in which the first plaintiff was duly credited with interest every year. In March, 1894, the plaintiff demanded from the defendant the amount standing to his credit on this account. The defendant pleaded limitation.

Held that the purpose for which the money was to be paid, *viz.*, the purchase of ornaments for the wife, indicated that it was the intention of the parties that payment should not be made until the plaintiffs were prepared to purchase ornaments, and that until then the money should remain with defendant's firm. The intention was that the money should not be paid until the plaintiffs required it for the purpose for which it was destined, and demanded it. The contract was not broken until the plaintiffs demanded the money, which they did in March, 1894. Article 115 of sch. II of the Limitation Act (XV of 1877) applied to the case, and the suit was not barred.

APPEAL from Candy, J.

Suit for Rs. 7,000 and interest at 4 per cent. from the 14th March, 1888.

[9] The first and second plaintiffs were husband and wife and the defendant was the father of the first plaintiff. The plaint alleged as follows :—

"The first plaintiff was married in the year 1888 to the second plaintiff, and on the occasion of his marriage the defendant, in accordance with Parsi custom, agreed to present to the plaintiff and his wife ornaments of the value of Rs. 7,000; but as the defendant did not wish to expend the money in ornaments at that time, it was agreed between the first plaintiff and the defendant that the sum of Rs. 7,000 should remain as a deposit with the defendants' firm of Bomanji Maneckji, and should be paid to the plaintiffs, with interest at 4 per cent. *per annum*, when the moneys were demanded for the purpose of getting the ornaments made. The defendant in the meanwhile was to keep the said moneys as a depository and trustee for the plaintiffs and to credit the same in the first plaintiff's name in the books of the firm."

The plaintiff deposed that in pursuance of the above stated arrangement the defendant on the 14th March, 1888, gave him a note, or order, addressed to his (the defendant's) firm, which ran as follows :—

"(To) Andhiaru Maneckji Panthaki. To wit. My son Bhai Nusserwanji Mancherji Panthaki marries to-day. Do you be pleased to pay Rs. 7,000, namely, seven thousand, for ornaments in respect thereof, together with interest thereon at the rate of Rs. 4, namely, four per one centum per one annum, within a period of 3, namely, three years from this day. Bombay, the English date the 14th of March, in the year 1888 written by A (Ahdhiaru) Mancherji Bomanji Panthaki."

The plaintiff deposed that he took this note to the defendant's firm, and in return received the following document addressed to himself :—

"(To) The respected Bhai Nusserwanji Mancherji Panthaki. To wit. You sent one 'chithi' (note) for Rs. 7,000, namely, seven thousand, on me. The sum which your father Set Mancherji Bomanji Panthaki caused to

be paid to you in respect of the ornaments appertaining to your marriage has been credited to your account, bearing interest at 4, namely, four per cent. For the same this 'receipt' has been given in writing. Bombay, the English date the 14th of March, in the year 1888, written by Bomanji Maneckji Panthaki. The handwriting of Dinshaji."

It was admitted that no money was actually paid by the defendant to the plaintiffs, and none was paid to or lodged with the defendant's firm by the plaintiffs.

The plaint stated that the defendant had since kept the said money and credited the first plaintiff with interest and struck the balance every year. The plaintiff demanded these moneys from the defendant by letter on the 9th and 22nd March, 1894, [10] but the defendant had not sent any reply to these letters of demand. This suit was filed on the 12th April, 1894.

The defendant denied the agreement stated in the plaint and pleaded limitation. As to this last plea, the plaintiff contended that the case fell within art. 60 of the schedule to the Limitation Act (XV of 1877), and that time ran only from the date of demand.

The case was heard as a short cause by Candy, J., who held that art. 60 applied, and passed a decree for the plaintiff.

The defendant appealed.

Macpherson (Acting Advocate General) and *Kirkpatrik*, for the appellant.—There was no consideration for the alleged agreement. The plaintiffs had been betrothed for years, and it does not appear that the subsequent marriage took place because of the alleged promise to give Rs. 7,000. It was a voluntary promise of a gift—*Breton* v. *Woollven* (1). In any case, the suit is barred. The documents show this was not a case of deposit. If there was an agreement at all on the 14th March, 1888, it was merely an agreement to pay Rs. 7,000 within three years. On the expiration of the three years, *viz.*, on the 14th March, 1891, the plaintiff's right of action (if any) accrued, and he had three years from that date in which to sue. This suit was not filed till 12th April, 1894, and was then barred. They referred to *Ichha Dhanji* v. *Natha* (2); *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* (3); *Dorabji Jehangir Randiva* v. *Muncherji Bomanji Panthaki* (4).

Inverarity and *Russell*, for the respondent.—This was an agreement or gift in consideration of the plaintiffs' marriage. The circumstances show that this money has really been held as a deposit by the defendant, for the plaintiffs. The money was put aside as a fund to be applied in purchasing ornaments in accordance with Parsi custom whenever the plaintiffs desired to purchase them. They demanded their money for the purpose of buying these ornaments in March, 1894, and this suit was filed in this year. They referred to Story on Bailments, paras. 4 and 41; *Tidd* v. *Overell* (5); *Atkinson* v. *Bradford Equitable Society* (6).

JUDGMENT.

[11] FARRAN, C.J.—Upon the first point which has been urged upon us in this appeal, that there was no consideration for the agreement deposed to by the plaintiff in his examination, and further evinced by the exhibits, we do not entertain doubt, but as it is desirable to have a clear

(1) 17 Ch. D. 416. (2) 13 B. 338. (3) 16 C. 25.
(4) 19 B. 852 (858). (5) L.R. (1893) 3 Ch. 154. (6) 25 Q.B.D. 377.

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view of the facts before us when considering the second and more important question, we state them as they present themselves to our minds.

The plaintiff Nusserwanji, who is the son of the defendant, was in the year 1888 about to marry the second plaintiff, Meherbai. It is customary amongst Parsis for the father of the bridegroom, on the occasion of the marriage of his sons, to give ornaments, or money for the purchase of ornaments, to the bride. Such ornaments are considered to be the joint property of the husband and wife. Previous to the marriage, the defendant promised to give Rs. 7,000 to his son Nusserwanji to purchase such ornaments, and Nusserwanji agreed to that amount. The marriage subsequently took place. Upon the occasion of the marriage the defendant, not finding it convenient to pay the Rs. 7,000 in cash, handed Nusserwanji, or his wife, an order addressed to his place of business, which was carried on in the name of Bomanji Mancherji Panthaki, and which, for brevity (though inaccurately) we shall refer to as " the defendant's firm." The order is dated the 14th March, 1888, and is to the following effect :— "My son Nusserwanji marries to-day. Do you be pleased to pay Rs. 7,000 for ornaments, together with interest thereon at the rate of 4 per cent. per annum within a period of three years from this day." Our interpreter informs us that the exact literal translation of the direction for payment is " Do you be pleased to pay Rs. 7,000 in three years from this day's time." The meaning is the same. It is, we think, a direction to pay the Rs. 7,000 with interest, but giving three years within which the firm could not be called on to pay.

This document the plaintiff Nusserwanji took or sent to the defendant's firm, and was given a receipt signed in the name of the firm. It runs thus—" To Bhai Nusserwanji Mancherji **[12]** Panthaki. You sent one 'chithi ' for Rs. 7,000 on me. This sum, which your father Mancherji Bomanji Panthaki caused to be paid to you in respect of the ornaments appertaining to your marriage, has been carried to your account, bearing interest at 4 per cent. For the same this receipt is given."

An account was thereupon opened in the books of the defendant's firm, which has ever since been carried on, but no interest nor any part of the principal sum has ever been paid to the plaintiff.

The above two documents must, we think, be read together. The receipt, when read in connection with the order, is, we think, a receipt by the defendant's firm for Rs. 7,000, payable with interest at 4 per cent., but not to be demanded as of right within three years. Being given in the plaintiff Nusserwanji's name, it is a receipt in his favour. The result of the transaction appears thus to be that the plaintiff Nusserwanji, in lieu of the Rs. 7,000 which his father had promised to give on his marriage, accepted the undertaking of the letter in the name of his firm, and the father in the name of his firm undertook to pay the plaintiff Rs, 7,000 with interest, but not before the expiration of three years.

Now, on the question of consideration, we should feel no difficulty in holding that the marriage took place at the father's request, and upon the understanding that the father should make the customary presents for ornaments, which by agreement between father and son were fixed at Rs. 7,000. It is a much stronger case than that of *Shadwell* v. *Shadwell* (1), where such a request was implied by the majority of the Court. But even without implying a request, it is, we think, clear that the marriage took place upon the faith of the father's promise, and so the case falls within the

(1) 9 C.B.N.S. 159.

principle of *Hammersley* v. *De Biel* (1), and within the meaning of s. 8 of the Contract Act (IX of 1872). The plaintiff by contracting the marriage, fulfilled the condition upon which the promise was made.

Turning now to the question of limitation, it has been considered by the Divisional Court that a case of trust has been made [13] out in respect of the sum of Rs. 7,000 referred to in the exhibits, and that the defendant in some way held that sum in trust for the plaintiffs. This view was not strenuously upheld in the argument before us, and indeed in a later judgment in the case of *Dorabji Jehangir Randiva* v. *Muncherji Bomanji Panthaki* (2) the learned Judge has himself receded from it. The documents, in our opinion, do not evidence a trust, nor can we imply a trust from the surrounding circumstances so as to bring the case within the meaning of s. 10 of the Limitation Act (XV of 1877); and, unless we can do that, it is useless to speak of a trust in this connection. The Division Court has also held that, if the Rs. 7,000 were not held by the defendant in trust for the plaintiff, the case falls within art. 60 of the second schedule to the Act, so that the claim is not barred. The wording of the documents, however, shows that the Rs. 7,000 were not deposited under an agreement that they should be payable on demand, inasmuch as they were not necessarily payable for a period of three years, nor indeed can it, in fact, be said that there ever was a deposit, though a liability to pay the amount was for consideration undertaken by the defendant's firm. The case must, therefore, fall under some other provision of the law.

The provision governing it is, in our opinion, art. 115. There is no other article suggested, or that we can discover, specifically applicable to the case. Limitation under that art. (115) begins to run from the time when the contract is broken. What that time is, must depend upon the terms, express or implied, of the contract itself, whether it is an absolute contract to pay Rs. 7,000 with interest on the expiration of three years from the date of the contract, or whether it is a contract to pay that sum on demand, subject to the three years' grace allowed to the defendant. The documents, evidencing the contract, are loosely and inartificially drawn, and do not clearly specify the exact obligations which they impose on the defendant's firm, or, in other words, upon the defendant. Ordinarily it is the duty of the debtor to pay his debt when due to the creditor—Story's Contracts, 967. If he does not do so, he breaks his contract, [14] and time begins to run against the creditor. We think, however, in the present case that the documents, read in the light of the surrounding circumstances, show that such was not the nature of the obligation which the defendant undertook. The contract, though in substance a promise to pay by the defendant, is in form a direction to a third party to pay. No definite time for such payment is specified; it is left to depend upon the convenience of the parties. The purpose for which the payment was to be made, the purchase of ornaments for the wife, is set forth on the face of the document. This is an indication, we think, that it was the intention of the parties that the payment should not be made until Nusserwanji and his wife were prepared to purchase ornaments, and that until then the money should remain at interest with the defendant's firm.

These circumstances, coupled with the near relationship between the parties, lead, we think, to the conclusion that the parties intended that the money should not be paid until the plaintiffs required it for the purpose for which it was destined and until Nusserwanji demanded it. The contract

(1) 12 Cl. and F. 45.

(2) 19 B. 352 (358).

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was not, therefore, we think, broken until the plaintiffs demanded the money, which they did for the first time within the period of limitation. The appeal will be dismissed with costs.

Appeal dismissed.

Attorneys for the appellant:—Messrs. *Bicknell, Motilal and Mervanji.*
Attorneys for the defendants:—Messrs. *Crawford, Burder & Co.*

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20 B. 15.

[15] ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Starling.

RIVETT-CARNAC, ADMINISTRATOR GENERAL OF BOMBAY (*Original Plaintiff*), *Appellant v.* GOCULDAS SOBHANMULL, BHUGWANDAS MITHARAM AND LIMJI NAVROJI BANAJI (*Original Defendants*), *Respondents.** [30th July, 1895.]

Partnership—Death of partner—Subsequent recovery of asset by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—Limitation Act (XV of 1877), ss. 7 and 17—Jurisdiction.

In 1889 one Hemabai, a widow and a partner in a firm carrying on business in partnership with two persons, *viz.*, Goculdas and Bhugwandas (defendants Nos. 1 and 2), in Sind and at Behrin in the Persian Gulf, died, and the partnership was then dissolved. She had no children, but it was alleged that she had adopted one Purshotam, the brother of the second defendant. On the 13th February, 1890, the guardian of one Kissondas, a minor (her husband's nephew), applied to the High Court of Bombay for letters of administration to her estate, alleging that Kissondas was her heir and next of kin. A *caveat* was filed by her father and others, in which they denied that Kissondas was her heir, and alleged that Purshotam had performed her funeral ceremonies. The matter came on as a suit on the 19th February, 1894, when an order was made, without prejudice to any of the questions raised by the issues, dismissing the application and ordering letters of administration to Hemabai's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March, 1894.

In the meantime, however, *viz.*, on the 12th April, 1893, Bhugwandas (defendant No. 2) had filed three suits in the High Court of Bombay, in the name of himself and Goculdas (defendant No. 1), as surviving partners of Hemabai's firm, to recover certain debts due to that firm. Disputes subsequently arose between Bhugwandas and Goculdas, and by a consent order of the 22nd July, 1893, it was ordered that any moneys recovered in the said three suits should be paid over to a receiver (defendant No. 3), to be held by him until further order. On the 1st August, 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver.

On the 22nd April, 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemabai appointed as above stated. He claimed to recover the whole sum paid to the receiver, alleging that the first and second defendants as her partners were largely indebted to the firm, and that the money really belonged to her estate. He prayed that the receiver might be directed to pay over the money to him, and that, if necessary, the partnership accounts should be taken. The second defendant (*inter alia*) pleaded that the suit was one for partnership accounts, and was barred by limitation, and also that the High Court of Bombay had no jurisdiction to try it.

[16] *Held*, that the Court had jurisdiction to hear the suit. The cause of action alleged was that the second defendant was endeavouring, under cloak of

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* Suit No. 210 of 1894; Appeal No. 867.

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his position as surviving partner, to get into his hands a sum of money within the jurisdiction of the Court, with a view to deprive the representatives of his deceased partner of it, and to employ it for his own purposes. That was, at all events, part of the cause of action, and leave to sue had been obtained under cl. 12 of the Letters Patent, 1865.

Held, also, that s. 17 of the Limitation Act (XV of 1877) applied, and that under its provisions the suit was not barred.

[N. F., 8 Ind. Cas. 999=97 P.R. 1910=11 P.L.R. 1911=142 P.W.R. 1910; R., 21 B. 412; 28 M. 344; 8 C.W.N. 537.]

SUIT by the plaintiff as administrator of the estate and effects of one Hemabai to recover certain moneys in the hands of the third defendant as receiver which were claimed by the second defendant.

Hemabai died on the 1st September, 1889. She was the widow of one Hamanmull Ramdassani, who in his lifetime had carried on business in partnership with the first defendant (Goculdas) at Karachi in Sind and in the Persian Gulf. He died in 1884, and his widow and heiress, Hemabai, then carried on the business with Goculdas in the name of Hamanmull and Goculdas.

Hamanmull had left a nephew (his brother's son), named Kissondas, who was a minor. His guardian alleged that he (Kissondas) was heir to Hamanmull, and as such entitled to his property. The matter was referred to arbitration, with the result that a sum of money was paid over for the benefit of Kissondas, and a release was executed by his guardian which declared that the rest of the estate was "the sole property of Hemabai and her heirs."

On the 7th August, 1889, a new firm was constituted, and the second defendant, Bhugwandas (Hemabai's nephew), was admitted a partner. It was to be carried on in the names of Hamanmull, Goculdas and Bhugwandas. A partnership agreement was drawn up and signed in Sind by Hemabai, Goculdas and Bhugwandas (defendants Nos. 1 and 2). The first two clauses were as follows:—

"1. This partnership writing we, the undersigned three persons, have made amongst ourselves; the particulars thereof of the names are as follows:—(1) Mother Hemabai Punj Tirathdassani, *seth* of the firm; (2) Bhai Goculdas Sobhanmulani; (3) Bhai Bhugwandas Mitharamani,—in all three persons.

[17] "2. The original firm which was carried on at Behrin in the names of Punj Hamanmull Punj Ramdassani (and) Bhai Goculdas Sobhanmullani, is discontinued from this day's date, and the accounts, books (and) papers are cleared (? made up). On the other hand, now from this day's date the firm at Behrin will be carried on in the names of Punj Hamanmull Punj Ramdassani, Bhai Goculdas Sobhanmullani and Bhai Bhugwandas Mitharamani for the up-country and local (? business)."

The agreement declared the shares of the parties and provided that Hemabai was to give Rs. 2,100 to the firm as capital, &c. The firm carried on business in Sind and in the Persian Gulf.

In less than a month after this agreement was signed, *viz.*, on 1st September, 1889, Hemabai died and the partnership was dissolved.

Hemabai had no children. On the 13th February, 1890, Tulsabai, the mother of Kissondas, as his guardian applied to the High Court of Bombay for letters of administration to Hemabai's estate. She claimed that Kissondas was Hemabai's heir and next of kin.

To this application the second defendant, Bhugwandas (Hemabai's nephew) and two others (Hemabai's father and another nephew) filed a

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caveat. They denied that Kissondas was Hemabai's heir and next of kin, and alleged that her funeral ceremonies had been performed by one Purshotam Mitharam, the brother of Bhugwandas (defendant No. 2), who (it was stated at the hearing) had been adopted by her. They denied that Kissondas had any claim to the estate, and alleged that Hemabai had left a will. The matter was then duly filed as a suit, and it came on for hearing on the 19th February, 1894, before Bayley, J., who made an order "*without prejudice to any of the questions raised by the issues*" dismissing Tulsabai's application and ordering letters of administration to Hemabai's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March, 1894.

In the meantime, *viz.*, on the 12th April, 1893, Bhugwandas (defendant No. 2) had filed three suits in the High Court of Bombay (Nos. 187, 188 and 189 of 1893) in the name of himself and Goculdas (defendant No. 1) as surviving partners in the firm established under the agreement of the 7th August, 1889, **[18]** to recover debts due to that firm. Disputes having subsequently arisen between them, Goculdas on the 29th June, 1893, presented a petition, alleging that Bhugwandas excluded him from taking part in the proceedings and was endeavouring to secure for himself the sums claimed in these suits. He further alleged that the deceased partner Hemabai had the largest interest in the assets of the firm, and that on accounts being taken, Bhugwandas would be found largely indebted to the firm. By a consent order, dated the 22nd July, 1893, it was ordered that any sums which might be recovered in the said three suits should be paid over to Limji Navroji Banaji (defendant No. 3) as receiver, to be held by him until the further order of the Court.

On the 1st August, 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver (defendant No. 3).

On the 22nd April, 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemabai appointed as above stated. He claimed to recover the whole of the moneys in the hands of the receiver (defendant No. 3). The grounds of his claim are set forth in the following paragraphs of the plaint :—

"3. The said Hemabai died on or about the 1st September, 1889. At the time of her death the said first and second defendants were each indebted to the partnership, and had nothing to receive therefrom, as will be found on taking the accounts thereof if the same be found necessary. The said partnership was dissolved by the death of the said Hemabai."

"6. The plaintiff claims that inasmuch as the first and second defendants have nothing to receive, but on the contrary have to contribute to the said partnership, he (the plaintiff) is the person entitled to receive the said moneys now in the said receiver's hands. The plaintiff is apprehensive that, unless restrained, the first and second defendants may obtain possession of the said moneys from the said receiver in the said suits, and that the same may be lost to the estate of the said Hemabai."

The prayer of the plaint was as follows :—

"A. That it may be declared that the said moneys in the hands of the said receiver, the third defendant, belong to the estate of the said Hemabai, and that the plaintiff is entitled to the same, and that the third defendant may be directed to hand over the same (after making all proper deductions therefrom) to the plaintiff.

"B. That if necessary for the purposes of this suit the account of the said partnership between Hemabai and the first and second defendants may be taken by and under the directions of this Honourable Court

[19] "C. That the first and second defendants may be restrained by this Honourable Court's injunction from receiving the said moneys in the possession of the third defendant."

The first defendant did not file a written statement and did not contest the suit. The second defendant filed a written statement in which he denied the Court's jurisdiction to try the suit, inasmuch as neither he nor the first defendant resided or carried on business in Bombay. His other contentions were raised in the following paragraphs of his written statement :—

"6. This defendant denies that he has to contribute anything to the said partnership as in the 6th paragraph of the plaint alleged. This defendant says that the accounts of the said partnership have never been taken, and that the plaintiff's right to demand the account thereof is barred by limitation.

"7. This defendant further says that the plaintiff has no right to sue for the moneys claimed in the plaint after the time when the right of the said Hemabai's representatives to claim a partnership account became barred by limitation, since the moneys claimed in this suit would have been included in such account as outstandings due to the said partnership.

"8. This defendant also says that, if the plaintiff has any right of action in respect of the said moneys, he is not entitled to sue for more than $\frac{8}{17}$ths thereof as representing the share of the said Hemabai therein."

Subsequently to the filing of this suit the plaintiff recovered a sum of Rs. 5,292 from another debtor of the firm established by the agreement of the 7th August, 1889. The second defendant thereupon filed a supplemental written statement claiming to set off his share in the said sum against any sum which might be recovered by the plaintiff.

At the hearing the following issues were raised :—

1. Whether this Court has jurisdiction to try this suit ?
2. Whether, if so, this suit is not barred by limitation ?
3. Whether in any event plaintiff is entitled to recover more than $\frac{8}{17}$ths share of the moneys claimed in the plaint ?
4. Whether defendant No. 2 is not entitled to set off $\frac{3\frac{1}{4}}{17}$ths of the sums recovered by the plaintiff as stated in paragraph 1 of the supplementary written statement ?

Rivett-Carnac (with him *Lang*, Advocate General, and *Inverarity*), for plaintiff.—This Court has jurisdiction. The moneys claimed were recovered from debtors in Bombay. These assets of [20] the firm are now here and in the hands of a receiver appointed by this Court. That of itself gives this Court jurisdiction. The cause of action is the receiving by the defendants in Bombay of moneys belonging to Hemabai. Part of the cause of action has at all events arisen here, and leave has been obtained for this suit under cl. 12 of the Letters Patent, 1865.

The suit is not barred by limitation. Section 17 of the Limitation Act (XV of 1877) applies. The plaintiff only obtained letters of administration on the 30th March, 1894. Hemabai's heir, Kissondas, is a minor, and until letters were granted, there was no legal representative capable of suing. See also s. 7 of the Limitation Act ; *Lawless* v. *The Calcutta*

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Landing and Shipping Co., Ld. (1); *Atkinson* v. *Bradford Equitable Society* (2).

But we contend that even if s. 17 does not apply, the suit is not barred. The suit is not for a partnership account. It is for a share in specific assets which have been recovered. Such a suit lies, although the right to an account may be barred—*Dayal Jairaj* v. *Khatav Ladha* (3); *Merwanji Hormusji* v. *Rustomji Burjorji* (4); *Knox* v. *Gye* (5).

Kirkpatrick and *Scott*, for the second defendant.—This Court has no jurisdiction to order accounts of a firm in Sind and the Persian Gulf. The mere fact that a debt is due or is received from debtors living in Bombay does not give jurisdiction to this Court to order a partnership account—*Suganchand Shivdas* v. *Mulchand* (6); *Luckmee Chand* v. *Zorawur Mull* (7); *Kessowji Damodar* v. *Luckmidas Ladha* (8). Leave to sue under cl. 12 of the Letters Patent, 1865, is not conclusive of jurisdiction—*Nagamoney Mudaliar* v. *Janakiram Mudaliar* (9). It was by consent of the parties that the moneys due in Bombay were paid to a receiver. The receiver's possession, therefore, does not give jurisdiction in **[21]** another suit brought by a third person. For the purposes of this suit it must be assumed that the money is in the hands of the defendants —Kerr on Receivers (3rd Ed.), 135.

The suit is barred by the Limitation Act (XV of 1877), art. 106; Contract Act (IX of 1872), s. 253. Section 17 does not apply. We deny that Kissondas is Hemabai's heir. At all events, there is a dispute as to his right, and it has not been proved. Further, this section provides only for cases where the cause of action might have arisen in the lifetime of the deceased partner, but did not, in fact, arise until after his death. Here it was Hemabai's death that gave the cause of action.

The moneys received by the defendants were barred debts which Hemabai herself could not have recovered. The debtors, however, consented to pay these barred debts to the defendants. The defendants are entitled to keep them. The mere fact that they have got this money does not give Hemabai or the plaintiff as her representative a new right to recover it. The plaintiff can only sue them for a share if Hemabai's right to an account was not barred. *Knox* v. *Gye* (5) is no authority that a suit for a share in a specific asset will lie, although a suit for account is barred. It is rather an authority to the contrary. *Dayal Jairaj* v. *Khatav Ladha* (3) was a suit for contribution—Banning on Limitation (2nd Ed.), 223.

CANDY, J.—The main facts of this case are clear. There was a firm in Sind, of which the partners were Hamanmull Ramdassani and Goculdas Sobhanmull. Hamanmull having died in 1884, his widow, Hemabai, carried on the business with Goculdas in the name of Hamanmull and Goculdas. On 7th August, 1889, the said Hemabai, Goculdas and one Bhugwandas (nephew of the deceased Hamanmull) entered into a partnership agreement, according to which Hemabai was to be the *seth* of the firm, furnishing a capital of Rs. 2,100, not bearing interest, but drawing interest at 6 per cent. per annum on all her moneys employed in the firm over and above that sum, and Goculdas and Bhugwandas were to be the other partners, with the right to draw Rs. 250 and Rs. 200 per annum respectively from the firm without interest,—sums **[22]** beyond that to be drawn by them with the consent of Hemabai and to bear interest at 6 per cent. The old firm,

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(1) 7 C. 627. (2) 25 Q.B.D. 377. (3) 12 B.H.C.R. 97.
(4) 6 B. 628. (5) 5 Eng. and Ir. App. 656. (6) 12 B.H.C.R. 113 (125).
(7) 8 M.I.A. 291 (307). (8) 13 B. 404. (9) 18 M. 142.

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which had been carried on in the names of Hamanmull and Goculdas, was discontinued and the accounts closed. The new firm was to be carried on in the names of Hamanmull, Goculdas and Bhugwandas, the profits being shared in the following proportions :—One-fourth anna to charity, eight annas to Hemabai, five annas and half to Goculdas, and three and a quarter annas to Bhugwandas.

Hemabai died in Sind in September, 1889, and thus the partnership was dissolved. Hemabai was a childless Hindu widow, and the usual disputes ensued. On 13th February, 1890, Tulsabai as guardian of Kissondas, a minor nephew of Hemabai's husband, applied to the Bombay High Court for letters of administration of the estate of Hemabai, the scheduled list of property including certain property in Bombay, namely, cash and goods deposited with certain parties in Bombay. This petition was opposed by the above-mentioned Bhugwandas and two others, and the case was then filed as a suit, No. 7 of 1890, which terminated on 2nd March, 1894, by the Judge ordering letters of administration to be granted to the Administrator General of Bombay.

In the meantime, on the 12th April, 1893, Bhugwandas filed three suits in the Bombay High Court (Nos. 187, 188 and 189 of 1893) in the names of Goculdas and himself as surviving partners in the firm of Hamanmull, Goculdas and Bhugwandas, to recover certain debts due to the said firm. The debts were apparently the same as the assets in Bombay in the schedule above alluded to. In those suits Goculdas made petitions, dated 29th June, 1893, alleging that Hemabai had the largest interest in the firm of which she had been a member, and that an account being taken, Bhugwandas would be found largely indebted to the firm. I am not now taking it that these allegations were true. I am merely relating the facts of the allegations which led to the Judge appointing a receiver in those suits, which he did on 22nd July, 1893. On 8th August, 1893, consent decrees were passed in those suits; and the moneys recovered under them are now in the hands of the receiver, L. N. Banaji, who is the third defendant in the present suit.

[23] The Administrator General having taken out letters of administration of the estate of Hemabai as directed by the Judge (see above), filed the present suit on 21st April, 1894, against Goculdas and Bhugwandas and the receiver, reciting certain of the above facts, and alleging that at the time of her (Hemabai's) death, which dissolved the partnership, the first and the second defendants were each indebted to the partnership and had nothing to receive therefrom, as will be found on taking the accounts thereof, if the same be found necessary. Therefore, the plaintiff claims that inasmuch as the first and second defendants have nothing to receive, but on the contrary have to contribute to the said partnership, he (the plaintiff) is the person entitled to receive the said moneys now in the receiver's hands. He prayed as follows :—(His Lordship read the prayer of the plaint and continued.)

Goculdas does not defend this suit, and it appears that he is willing that plaintiff should recover all the moneys in question. Bhugwandas has pleaded that—

1. This Court has no jurisdiction, because neither the first nor the second defendant resides or carries on business or personally works for gain in Bombay.

2. Hemabai carried on business with both the first and second defendants in the Persian Gulf, not in Bombay.

3. He (the second defendant) has nothing to contribute to the

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partnership. and the plaintiff's right to demand an account is barred by limitation.

4. The right to an account being thus barred, the plaintiff has no right to sue for the moneys in question, since they would be included in such account.

5. If the plaintiff has any right of action in respect of the moneys, he is not entitled to more than $\frac{8}{17}$ ths as representing Hemabai's share in the profits of the firm.

6. He, the second defendant, is entitled to a set-off, namely $\frac{3\frac{1}{4}}{17}$ of a sum of Rs. 5,292, which the plaintiff has since the institution of the suit recovered from a debtor of the firm.

[24] On these pleadings the following issues were raised :—(His Lordship stated the issues and continued). Mr. Inverarity (with him the Advocate General and Mr. Rivett-Carnac) appeared for the plaintiff, and in opening his case treated the moneys in question as due to a firm of which the second defendant was not a partner. He said : "There is no question of account between us and the second defendant, because he is not a partner in these outstandings." Subsequently he was doubtful on the point and asked the Court not to take the statement as an admission either way. Subsequently the plaintiff, when appealed to, seemed doubtful as to which partnership these assets belonged. He said : "I claim the whole of the moneys in question, whether of the old or new partnership, because if they are of the old, then the second defendant has no interest in them, and if of the new, then the second defendant is indebted to Hemabai's estate more than his share of these items." In the same way, he expressed his inability to say who were the members of the firm at the time when the debt became due which he had recovered since the institution of the suit, and which formed the subject of the set-off claimed by the second defendant.

In answer to these pleas, Mr. Kirkpatrick for the defendant urged that the plaintiff must be confined strictly to the prayers of his plaint, and I am of the same opinion. It is impossible to read the 3rd and 6th paragraphs of the plaint taken with the prayers A and B without seeing that plaintiffs claim the whole of the moneys, solely because the first and second defendants are indebted to the partnership. There is not a word about the debts having been due to the firm represented by Hemabai and Goculdas only.

No application was made to amend the plaint, and, therefore, I shall confine myself solely to a consideration of the case as first stated. Indeed, if the debts covered by the decrees in suits Nos. 187, 188 and 189 of 1893 were really due to the partnership of Hamanmull and Goculdas only, then it would appear that those debtors are still liable to the person who can legally recover the debts of that firm. The sums now in the hands of the present third defendant represented debts due to the firm of Hemabai, **[25]** Goculdas and Bhugwandas. If the debtors in question should really have paid to another firm, this firm has not lost its right to recover its dues unless barred by limitation. Goculdas (defendant No. 1) in those suits treated the debts as due to the firm formed by the partnership agreement of 7th August, 1889 (see B). He is on the present plaintiff's side. There is, therefore, no reason to allow the plaintiff now in the face of the plaint to turn round, and say that he claims the whole of the sums, because they were really due to another firm in which the second defendant had no interest.

The suit is, therefore, by the administrator of a deceased partner claiming assets of the partnership which have been recovered by the surviving partners; the whole and not a share of those assets being claimed because, if an account of the partnership is taken, it will be found that the whole of these assets would fall to the estate of the deceased partner. If the suit be taken as one for a partnership account, then it is apparently barred under art. 106 of the Limitation Act (XV of 1877), Hemabai's death on 1st September, 1889, having dissolved the partnership, and the suit having been filed in April, 1894. For the plaintiff it is contended that under s. 17 of that Act the period of limitation should be computed from the time when the Administrator General was directed to take out letters to administer the estate of Hemabai, as until that happened there was no legal representative of the deceased capable of instituting a suit. But that is not so. Here it was open to Tulsabai on behalf of Kissondas, the minor nephew of Hemabai's husband, to have instituted a suit in the District Court at Karachi for an account of the partnership at any time within three years from Hemabai's death. The parties are Hindus, not affected by s. 179 of the Indian Succession Act (X of 1865). Now, after the grant of letters to the plaintiff no other person than the plaintiff can act as representative of Hemabai (s. 82 of Act V of 1881). But there was no reason why the person claiming to be Hemabai's heir should not have before 1st September, 1892, filed a suit for partnership account.

It seems doubtful whether a suit for a partnership account would, in this case, lie in the Bombay High Court. The defendants at the time of the commencement of the suit did not dwell or carry on business or personally work for gain within the [26] limits of the ordinary original jurisdiction of this Court, and it is difficult to see how the cause of action in such suit can be said to have arisen, wholly or in part, within such limits. The fact that certain assets of the partnership were and are in Bombay would not affect "the ground of origin of the right" (see remarks of Phear, J., in *Harjiban Das* v. *Bhagwan Das* (1)). Here, to adopt the language of the Privy Council in *Luckmee Chand* v. *Zorawur Mull*(2), Karachi was undoubtedly the central place of business. At Karachi the partnership books were kept; at Karachi the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them. As Mr. Justice Green said in *Suganchand* v. *Mulchand* (3), "where else could the cause of such action be said to arise, except where, by consent of the parties, the head-quarters of the partnership had been established, the moneys advanced, the accounts kept, &c."

I have not overlooked the fact that the plaint in this suit was endorsed by the admitting Judge "under cl. 12 of Letters Patent." But every plaint is admitted under that clause, and those words do not, *per se*, indicate that the leave of the Court had been first obtained, on the ground that the cause of action arose in part only within the jurisdiction. For the purpose of first obtaining leave one would expect an application with a statement of the grounds of the application. The language clearly points to something granted when asked for. Here assuming that the words above noted are meant to show that the leave of the Court had been first obtained, it would be interesting to know the grounds for supposing that the cause of action in this case had arisen in part only

(1) 7 B.L.R. 102 (110). (2) 8 M.I.A. 291 (307). (3) 12 B.H.C.R. 113 (126).

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within the limits of this Court's jurisdiction. No doubt, as was pointed out by Mr. Justice Bittleston in *Bavah Meah Saib* v. *Khajee Meah Saib* (1), the language of cl. 12 of the Letters Patent "gives rise to nice questions as to what is sufficient in any particular case to constitute a part of the cause of action."

But in the view which I take of the case it is unnecessary to pursue this point further, for the case may be put thus: a suit [27] for a general partnership account being barred by limitation, will a suit for the whole or a share of these assets lie? It is admitted that if it will be for a share, then the plaintiff's share is $\frac{8}{17}$ths. The prayer for a reference to the Commissioner is not that a limited account should be taken, enough to show that Goculdas and Bhugwandas are so heavily indebted to the firm that there can be no doubt that Hemabai's estate is entitled to the whole of these sums (I doubt whether such a reference would in any case be valid), but here the prayer is for a reference to the Commissioner that the partnership account may be taken, and what that is, is well known (see *e.g.*, sch. IV, No. 132, Civil Procedure Code, Act XIV of 1882).

The question thus assumes a double aspect. The claim for a general partnership account being barred by limitation, has plaintiff any right of action at all in regard to these assets which have been recovered by the surviving partners? If he has, then can he claim the whole of these assets? In considering the answer which should be given to these questions, counsel naturally referred to the judgments delivered in the House of Lords in the case of *Knox* v. *Gye* (2) as interpreted by the Court of appeal of this Court in *Dayal Jairaj* v. *Khatav Ladha* (3), which interpretation was followed by a Judge of this Court in *Merwanji Hormusji* v. *Rustomji Burjorji* (4).

Now it is evident, on a perusal of the report of *Dayal Jairaj* v. *Khatav Ladha* (3) that the judgment of the Appeal Court on the facts of that case cannot be directly applied to the facts of the present case. In that case the plaintiff, instead of claiming a share of partnership assets received by one partner after a dissolution, the right to an account generally being supposed to be barred, claimed to be repaid the excess of moneys borrowed on account of the partnership over the amount which the plaintiff was bound to pay as between him and the three co-partners who joined in the notes. The period of limitation began to run from the time when the properties of himself and the partner Khatav Ladha (whom he sued) were sold and applied in satisfaction of the joint decree. The defendant Khatav Ladha pleaded that the [28] accounts of the partnership were still unadjusted, that the claim was barred by Limitation Act, and that all the partners should be made parties. The plaint was accordingly amended, the other partners or their representatives being made parties, the claim being extended, including a certain sum deposited in the hands of the Accountant General, and praying that, if necessary, the partnership accounts should be taken and such sums as might be found due to the plaintiff might be ordered to be paid to him by the defendant Khatav Ladha. The other defendants did not appear or plead. The Judge of the Division Court found that the claim was not barred by the Limitation Act, and reserved his findings on the other issues till an account of the partnership dealings and transactions had been taken by the Commissioner to whom a reference was ordered. It was that decision which was confirmed by the Appeal Court on the following grounds:—(*a*) That the claim as

(1) 4 M.H.C.R. 218 (226).
(2) L.R. 5 Eng. and Ir. App. 656.
(3) 12 B.H.C.R. 97.
(4) 6 B. 628.

primarily preferred was a suit for contribution, not in regard to a partnership transaction, and, therefore, it could be made the subject of a suit without also asking for a general account—*Sedgwick* v. *Daniell* (1); (*b*) that the claim as primarily preferred was justified by the opinions of three of the learned Lords in *Knox* v. *Gye*, which were that a suit for recovery of a partnership asset received by one partner after the dissolution of the partnership may be maintainable even where the right to a general partnership amount may have been barred by the statute of limitations; (*c*) that it was the defendant Khatav Ladha who insisted on the partnership account being taken. Therefore, without deciding how the case would have stood had the suit been solely or primarily for a general partnership account, the order directing a general account of the partnership to be taken was confirmed.

In the present case, though the prayer of the plaint is that "if necessary" the partnership account should be taken, it is evident that for the recovery of the whole of the assets the taking the general partnership account must be the sole and prime reason.

Next, as to *Knox* v. *Gye*, it is unnecessary to repeat at full length the quotations from the judgments which are given by Mr. Justice **[29]** Green in his judgment in the case just noted. But stress may be laid on one or two points. It was a suit filed in October, 1864, by the representative of a deceased partner, who had died in November, 1854, against the surviving partner for a general partnership account, including an asset which had been recovered by the surviving partner and from one Hughes. Vice-Chancellor Wood held that the application of the statute of limitation was excluded by the fiduciary relation existing between the deceased and the surviving partner, and by the fact that the money recovered from Hughes was received within six years before the institution of the suit. On appeal this was reversed by the Lord Chancellor (Lord Chelmsford), who held that the claim was barred by the statute of limitations. On further appeal to the House of Lords the decision of Lord Chelmsford was upheld.

Lord Westbury noted that it was on the fact of a receipt of the sum from Hughes within six years before the institution of the suit that the plaintiff chiefly relied: but Lord Westbury pointed out that, if, as an answer to the statute, it was intended to rely upon the receipt of the debt due to the partnership, it should have been alleged and proved that the sum was received within six years from the death of the deceased partner, whereas the sum was apparently recovered in June, 1861 (the case as put in the Report, p. 661, says in 1862). Therefore, if the right to the account was taken away by the statute previously to the receipt of such item, the subsequent receipt could not remove the bar and restore the title to the account.

Applying that ruling to the present case it will be seen that the assets now in question were recovered in 1893, *i.e.*, more than three years (the statutable period) from the death of the deceased partner Hemabai.

Lord Westbury then went on to show that a Court of Equity will not after the lapse of the statutable period, without acknowledgment, decree an account between the estate of a deceased partner and a surviving partner. He said:

(1) 2 H. and N. 319.

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"It must be recollected that the representative of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner, and he is the owner thereof, both at law and in equity. The right of the deceased partner's representative consists [30] in having an account of the property, of its collections and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership. Another source of error in this matter is the looseness with which the word 'trustee' is frequently used."

The rest of the judgment of Lord Westbury is taken up with his reasons for dissenting from the opinion of Vice-Chancellor Wood that there was anything fiduciary between the surviving partner and the dead partner's representative. It is evident that according to Lord Westbury's judgment the present suit, whether simply for a share of a partnership asset or for an account of the partnership in order to obtain the whole of an asset, would be bad.

Lord Westbury was followed by Lord Colonsay. He treated the case briefly:

"The deceased partner died in November, 1854, and the bill was filed in 1864, but it is said that in the interval, *viz.*, in January, 1859, a considerable sum was received by the surviving partner as a compromise of a debt of a larger amount due to the partnership estate; and it is contended that as a period of six years had not run from that date of recovery until the filing of the bill, the statute does not apply. I cannot adopt that view. If adopted, the result would be that a new period would run from the date of every recovery of partnership debts, and that would in effect make the statute valueless in regard to partnership accounts; and I see no reason for it, because the account, if sued for within the statutory period, must have comprehended all debts and claims, whether recovered or unrecovered, and whether good, bad or doubtful."

So here the fact that a period of three years has not run from the date of the recovery of the assets until the filing of the present action, does not avoid the bar of limitation in a suit for an account. But Lord Colonsay went on to say: "I do not say that, if a sum is unexpectedly recovered after the lapse of six years, the executor of the deceased partner, though he has lost the right to sue for an account of the partnership concerns, may not in another kind of suit demand a share of the particular sum so recovered." The value of this *obiter dictum* is diminished by the fact that no illustration was given of an unexpected recovery, nor was it stated what should be the form of the other kind of suit.

Lord Colonsay was followed by the Lord Chancellor (Lord Hatherley), who as Vice-Chancellor *Wood* had given the original decision, and he devoted his judgment to a strong expression [31] of dissent from the opinion of Lord Westbury, that there is nothing fiduciary between a surviving partner and the executors of his deceased partner. He said: "It appears to me that the case we have had to consider here is this. I will assume that an account had been taken upon the death of the deceased partner or immediately after the death of the deceased partner; that everything which could be ascertained had been ascertained and adjusted, that the account was complete, and that releases were given." Then he assumed that this complete adjustment had not included a debt to the partnership "say of the amount of £20,000 which was left outstanding, and which was subsequently received by the surviving partner by right

of his survivorship as partner; then and then only would the executors of the deceased partner have a right to a moiety (assuming that the partners were partners in moieties) of that money, *viz.*, £10,000. I apprehend that it would be an extraordinary answer for that partner to make to any such a claim: True it is you were entitled to this once, but you have settled all accounts more than six years ago; the parties who were indebted to the firm were not at that time able to pay their debts, they have paid them since, the money has been collected by me, the surviving partner who alone could collect it, but having collected I say that I hold no fiduciary position towards you."

Then Lord Hatherley showed by an instance which he quoted that the case put by him was not imaginary. He says: "It is not imaginary that a large sum of money may be received long after the ordinary accounts of the partnership have been closed." And then he applied the principle laid down by him to the case before the House of Lords in the passages quoted by Mr. Justice Green and to be found at pages 109, 110 of 12 Bom. H. C. Rep. He held that the surviving partner would have a right to say to the executor of the deceased partner: "I am willing to pay you that which is your own, but further than that I will not go. . . . I will not go back to the partnership accounts which, I say, are all settled, and as to which there are no accounts between us. . . . It appears to me that Mr. Gye (the surviving partner) had only one of two courses open to him, *viz.*, that of handing over the money that he had received, or the deceased partner's share of it to the executors of the deceased partner, assuming that all accounts had been settled up to that period, or to say: 'I shall demand an account and show by an account that the whole of that money is mine.'"

[32] If I have correctly quoted the judgment of Lord Hatherley, it would appear that the whole of his case is based on the assumption that the accounts of the partnership had been taken within the statutable period after the dissolution of the partnership by the death of one of the partners. Subsequently an asset not included in that account is recovered by the surviving partner. He holds that in trust for the estate of the deceased partner; and if sued by the executors of the deceased partner, he must hand over the share belonging to the estate of the deceased partner, assuming that all accounts had been settled up to that period; or if he pleads that since that settlement there have been fresh accounts, which, if taken, would show that the asset the subject of the present suit belonged entirely to him, he has a right to have that account taken.

But here, in the case now before me, no attempt has ever before been made to settle the partnership accounts. After the statutable period the representative of the deceased partner sues the surviving partner who has recently collected some assets and says: "Give me my share, and not only so, but give me the whole, because I demand that a general partnership account be taken by which I can show that I am entitled to the whole of these assets." It is not the defendant who demands an account in order that he may retain the whole of the assets. The only case in which Lord Hatherley said the surviving partner was bound to hand over the share of the assets to the executors of the deceased partner, was when it is one in which it was assumed that all accounts had been settled up to that period. Therefore to the present plaintiff Lord Hatherley would apparently have said: "You can get neither a general partnership account nor a share of these assets."

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I must admit that the point is not clear beyond all doubt, for just before the passage quoted above Lord Hatherley said: "Now, as regards the right to an account, I cannot quite conceive that the right of the executors of a deceased partner will be barred by the statute of limitations if they do not assert their right to the account within the statutory period, and that equity will follow the law in that respect, and that it will adopt, as to a suit, the limit which the law has assigned with reference to the [33] commencement of an action." These words, if not governed by the sentence above quoted, would seem to be general. And so possibly they were taken by Lord Chelmsford, who followed Lord Hatherley. He held that the receipt of the money due from Hughes did not prevent the statute from continuing to run, and he dissented from a remark "almost incidentally made by Lord Hatherley that 'the statute of limitations would not apply to a partnership account of this description, but that the statutes are applicable to the present case, appears to me to be clear." Then after quoting cases to show the limitation to six years of actions of account applied to bills in equity for an account, he proceeded:

"The statute of limitations then being applicable, and beginning to run in November, 1854, upon what ground is it alleged that it was stopped in its course, and that although six years afterwards elapsed, it did not operate as a bar to the suit for an account? The ground taken is that the debt due from Hughes to the partnership was satisfied by the payment in discharge of his liability in the month of January, 1859, and that the bill was filed within six years of such payment. * * * The question to be determined is whether when a right to demand an account of a partnership arises, and afterwards six years elapse, the payment, before the expiration of the six years, of a debt owing to the partnership when the time of limitation began to run will take the case out of the statute."

Lord Chelmsford then went on to show that this question must be answered in the negative.

"Now in taking the accounts of a partnership all outstanding debts due to the partnership must necessarily enter into the account. * * * If the effect of the payment of Hughes's debt is to create a new right to an account, then every debt due to a partnership, which is received after a dissolution, must in like manner give a fresh right to demand an entire account of the whole of the partnership concern, and this equally whether six years have elapsed or not, after a suit for an account might have been commenced before the debt due to the partnership was received, the consequence of which would be that when a partnership is dissolved by death, and there are outstanding debts to be collected by the surviving partner, the statute of limitations could never operate as a bar to a suit for an account against him."

Then shortly afterwards is the passage quoted by Mr. Justice Green (12 Bom. H. C. Rep. at pp. 110—111):

"There may be a difficulty in determining what is the right of an executor of a deceased partner (in the case put by my noble and learned friend, *i.e.*, Lord Hatherley), where he has allowed the statute of limitations to run against his claim to an account, and a debt has been recovered by the surviving partner after the six years have elapsed. But this is a difficulty occasioned by his own laches, and I see no reason why he should not have a right to sue for his share in this sum . . . . the [34] surviving partner being at liberty to defend himself by alleging and proving that the whole of the sum received had been applied, or was applicable to the payment of partnership liabilities."

So if Lord Chelmsford's words be taken in a general sense, then though twenty years may elapse after the dissolution of a partnership by the death of a partner, and no account of the partnership is ever taken, and after the twenty years an asset is recovered by the surviving partner, he can be sued by the representative of the deceased partner for the share of the asset due to the estate of the deceased. But if the words are to be confined to the case put by Lord Hatherley, and that case assumes a general partnership account taken within the statutable period, this asset being excluded from that account, then and then only can a suit lie for a share of that asset, the surviving partner being at liberty to defend himself by showing that the asset though not included in the previous account had been applied or was applicable to the payment of partnership liabilities. It is evident that Mr. Justice Green put the general interpretation on the passage quoted. In *Dayal Jairaj* v. *Khatav Ladha* (1) he said "that a suit for a recovery of a share of a partnership asset received by one partner after the dissolution of the partnership may be maintainable even where the right to general partnership account may have been barred by the statute of limitations, is supported by the opinions of at least three of the four learned Lords who took part in the decision of *Knox* v. *Gye*;" and Mr. Justice Latham in *Merwanji* v. *Rustomji* (2) said: "I think that the opinions of the majority of the Law Lords in that case (*Knox* v. *Gye*) do establish that a suit may be brought by the representative of a deceased partner against the surviving partner to recover a share in a sum received by the surviving partner in respect of partnership transactions within the period of limitation, although a suit to take the partnership accounts generally would be barred. Such is the interpretation put on the case by Green, J., in his judgment in *Dayal Jairaj* v. *Khatav Ladha* (1)."

Were the matter *res integra* I should be inclined to doubt whether the *obiter dicta* of the learned Lords are clearly enough expressed to found on them such an important proposition. Lord [35] Colonsay's remark referred to an "unexpected recovery," which would seem to show that he contemplated a previous partnership account having been taken, from which this asset had been inadvertently excluded. Lord Hatherley founded his remarks on the assumption that a general partnership account had been taken within the statutable period, the asset in question having been excluded therefrom. Lord Chelmsford's remarks referred to the case put by Lord Hatherley. But if (to adopt Lord Chelmsford's words above quoted with a slight alteration) the effect of the payment of any debt due to the partnership to the surviving partner is to create a right to a share in that asset in favour of the representative of the deceased partner, then every debt due to a partnership which is received after a dissolution must in like manner give a fresh right to a share in each asset, and this equally, however many years have elapsed since the dissolution, and however negligent the representative of the deceased partner may have been in never asking for an account. The right to an account (amongst other things) of an outstanding debt, which must be included in the account as part of the partnership assets to be collected, cannot be affected by payment of that debt which merely converts into realized assets what was previously uncollected, and cannot stop the course of the statute of limitations which was running against the claim to an account of the partnership concerns.

(1) 12 B.H.C.R. 97 (107).

(2) 6 B. 628 (635).

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It was said that upon payment of the debt a new right accrued to the representative of the deceased partner. But the right to sue for what? The answer must be for an account. But *that* he was entitled to sue for all along, and the account must have included this very debt, the receipt of which is supposed to have created a new right to an account (per Lord Chelmsford, p. 687). And then follows the passage in which Lord Chelmsford said that he saw no reason why in the particular case put by Lord Hatherley, the executor of a deceased partner should have a right to sue for his share in an asset received by the surviving partner after the lapse of the statutable period for a claim to an account.

It must be admitted that when the remarks of the learned Lords are considered from this point of view, there does seem some difficulty in giving a general interpretation to them. But **[36]** the Court of Appeal having read those remarks in a different way, and the point being one of great nicety and doubt, I think that I am bound to follow the general interpretation which has hitherto been adopted in this Court. All the four learned Lords in *Knox* v. *Gye* would have refused the present plaintiff's prayer for an account. I feel no doubt about that.

The plaintiff, therefore, is entitled to a share. What he can recover is Hemabai's $\frac{8}{17}$ths and the $5\frac{1}{2}$ annas' share of Goculdas, who does not contend the plaintiff's claim. I have felt some doubt with regard to Goculdas' share, the plaintiff being strictly entitled only to the share due to Hemabai's estate, his claim to an account in order that he may show that he would be also entitled to the share of Goculdas and Bhugwandas being undoubtedly bad. But as Goculdas evidently wishes that plaintiff should take his share, and Bhugwandas does not raise any plea showing that he is entitled to retain Goculdas' share, I shall allow the plaintiff's case in this respect.

With regard to the set-off, it is clear from the letter of the pleader of the debtor (Ex. 2) that the debt was paid to the plaintiff as due to the firm of which the defendants Nos. 1 and 2 were partners. This also is borne out by the copy of the indemnity bond (Ex. 4). Therefore, there is an ascertained sum to which the second defendant is certainly entitled as much as plaintiff is entitled to a share in the sums recovered by the decrees Nos. 187, 188 and 189. Indeed, it is difficult to say how plaintiff has recovered the debt due from Hiranand. The representative of a deceased partner has no specific interest in, or claim upon, any particular part of the partnership estate. The whole property accrues to the surviving partner (see remarks of Lord Westbury in *Knox* v. *Gye* quoted above, p. 675). The executors of a deceased partner have an interest in those assets which the surviving partner can alone get at (per Lord Hatherley, p. 679). But it is unnecessary to consider that point further. It is enough that the second defendant is entitled to recover from the plaintiff the sum as claimed by him. I find then on the issues :—

1. As regards the claim to a share in the moneys in question, this Court has jurisdiction.

[37] 2. The claim for this share is not barred by limitation. The claim for a general account is barred.

3. Plaintiff is entitled to recover $\frac{8}{17}$ths and also Goculdas' $\frac{5\frac{1}{2}}{17}$ths.

4. Defendant No. 2 is entitled to the set-off as prayed by him.

I direct that the costs of the suit be paid out of the estate in the hands of the third defendant.

The plaintiff appealed and the second defendant filed cross-objections to the decree.

Macpherson (Acting Advocate-General) and *Inverarity*, for appellants (plaintiffs).—This is not a suit for a partnership account. We do not desire an account. This is a suit to recover property really belonging to Hemabai as the principal partner of the firm. The whole of the money really belongs to her, as both the defendants are indebted to the firm. The property is in Bombay and in the hands of a receiver appointed by this Court. There is, therefore, jurisdiction. The fact that the property is here is, at all events, part of the cause of action, and leave to sue has been obtained, and where that is the case there is no distinction between partnership suits and other suits. It is a question of discretion whether the Court will entertain the suit.

Next we contend that the suit is not barred. We claim the benefit of ss. 7 and 17 of the Limitation Act (XV of 1877). On Hemabai's death, Kissondas was the heir. He is a minor and there was no "legal representative capable of instituting a suit" until the plaintiff was appointed administrator on the 30th March, 1894. A minor cannot sue. A suit is instituted for him. The words "legal representative capable of instituting a suit" in the section mean a person who has taken out probate or letters of administration. The plaintiff now represents Hemabai and all her property vests in him. See s. 4 of Act V of 1881.

A suit by the representative of a deceased partner to recover a share in assets received by the surviving partners may be brought, although a suit for a general partnership account may be barred by limitation—*Knox* v. *Gye* (1); *Dayal Jairaj* v. *Khatav Ladha* (2); **[38]** *Merwanji Hormusji* v. *Rustomji Burjorji* (3). Reference was also made to the Contract Act (IX of 1872), s. 45; Lindley on Partnership pp. 549, 550.

Kirkpatrick and *Scott*, for respondent (defendant No. 2).—This is a suit for partnership accounts. A right to an account is the only right a partner has against his co-partner. The plaintiff cannot claim the money without an account, and we may keep it until an account is taken. See as to a partner's rights *Knox* v. *Gye* (1); *Keshav Gopal* v. *Rayapa* (4); *Kramibhai* v. *The Conservator of Forests* (5); *Ashworth* v. *Munn* (6); *Joharmal* v. *Tejram* (7). But a suit for an account is now barred by limitation. See Limitation Act (XV of 1877), art. 106; *Noyes* v. *Crawley* (8). Sections 7 and 17 do not apply. We deny that the minor Kissondas is the heir, and say that Purshotam, who is not a minor, is. The question between them has not yet been tried and is not decided. A mere unproved allegation that a minor is the heir does not give a third person (*e. g.*, the plaintiff) the benefit of ss. 7 and 17. The existence of a dispute as to heirship does not extend the period of limitation, either for the disputants or for third persons. Ignorance of his rights on the part of the heir, whoever he may be or his neglect to enforce them, does not extend the period of limitation so as to enable a third person to sue after the period has expired—Banning on Limitation (2nd Ed.), p. 117. If Kissondas proves his heirship, he may hereafter perhaps be entitled to sue under s. 7. But it is only the minor himself who can claim the benefit of that section. A third person cannot—Starling on Limitation (3rd Ed.), p. 37; *Rudra Kant* v. *Nobo Kishore* (9). Further we say the claims of Kissondas have been released. If so, then, he

(1) 5 Eng. and Ir. App. 656 (673). (2) 12 B.H.C.R. 97. (3) 6 B. 628.
(4) 12 B.H.C.R. 165. (5) 4 B. 222. (6) 15 Ch. D. 369-370.
(7) 17 B. [illegible] (8) 10 Ch. D. 31. (9) 9 C. 863.

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could not sue. Can a third person claim under s. 7 to do what the minor himself cannot do? The plaintiff here does not pretend to represent the minor and is not suing on his behalf. Why should he be allowed the benefit of s. 7, which is given only to the minor himself? This suit was barred before the plaintiff obtained letters of [39] administration. A minor can sue (Civil Procedure Code, Act XIV of 1882, s. 440), or in this case a receiver might have been appointed—*Yeshwant Bhagwant* v. *Shanker Ramchandra* (1). Among Hindus in the Mofussil there is always a legal representative capable of suing without probate or letters of administration which Hindus and Mahomedans in the Mofussil are not required to obtain—*Lalchand Ramdayal* v. *Gumtibai* (2); *Shaik Moosa* v. *Shaik Essa* (3); Mitra on Limitation (2nd Ed.), p. 221, note. Therefore s. 17 does not apply. If it is held to apply to Hindus they will be able to sue at any time after the period of limitation has expired by adopting the expedient of taking out probate or letters of administration and claiming a new period dating from the grant. Counsel also referred to *Chandmull* v. *Ranee Soondery Dossee* (4); *Badri Narain* v. *Jai Kishen Das* (5); *Janaki* v. *Dhanu Lall* (6). The arguments and authorities on the points of jurisdiction, &c., were the same as in the lower Court.

JUDGMENT.

FARRAN, C. J.—The dispute between the parties to this appeal is with reference to a sum of Rs. 28,335 now in the hands of the third defendant, L. N. Banaji, as receiver appointed by this Court in Suits Nos. 187, 188 and 189 of 1893. The Division Court has by its decree directed the money to be divided between the plaintiff as administrator of the estate of Hemabai, deceased, andthe defendant Bhugwandas in certain proportions. The plaintiff claims that he has established his title to the whole fund. Hence this appeal.

The defendant Bhugwandas has filed cross-objections, contending that the Court ought to have dismissed the suit altogether on the grounds (1) that it was barred by limitation, (2) that the Court had no jurisdiction to entertain it. The defendant Goculdas does not claim that any part of the fund should be paid to him. He has not appeared upon the appeal.

In the view which we take upon the question of limitation, it will be unnecessary to consider the law, much discussed in the judgment of the Division Court, as to the rights of the individual [40] partners on the one hand and of the representatives of a deceased partner on the other hand *inter se* in cases where assets of the firm have been recovered by the surviving partners after the right of such representatives to sue for an account of the partnership dealings and transactions has been time-barred; we advisedly refrain from giving any decided opinion upon this part of the case.

The facts which it is necessary to have before us in order to understand how the questions raised by the defendant Bhugwandas have arisen, may be concisely stated. Hamanmull Ramdassani was an inhabitant of Sind and carried on business there and in the Persian Gulf. The respondent Goculdas was his partner. Hamanmull died in 1884, leaving a widow Hemabai and no issue. This widow as his heiress and Goculdas continued to carry on the same business in partnership until 1889. Goculdas, according to the evidence of Narayanadas Assammal, was a working

(1) 17 B. 388.
(2) 8 B. H. C. R. 140.
(3) 8 B. 241.
(4) 22 C. 259 (262).
(5) 16 A. 483 (487).
(6) 14 M. 454.

partner in the firm and brought no capital into it. This may be taken, we think, as an established fact, as Goculdas has never claimed any share in the assets of the firm, and Narayandas affirms that it was so.

On the 7th August, 1889, the respondent Bhugwandas was admitted as a partner in the firm. On that day a partnership-deed was drawn up. It recited that the original firm had been closed and the books and the papers thereof had been cleared, and that from its date a new firm would be carried on, of which Hemabai was to be the *seth* or owner and in which Goculdas and Bhugwandas were to be partners. It further provided that the capital of the firm was to be Rs. 2,100 to be paid by Hemabai, and that as to the other moneys of Hemabai which might be employed in the firm, interest therein should be paid to Hemabai ½ per cent. The partners Goculdas and Bhugwandas were to draw Rs. 250 and Rs. 200 respectively per annum without interest for their household expenses and were to be at liberty to draw further sums with Hemabai's consent on auspicious occasions, paying interest thereon at ½ per cent., and as to such moneys as should remain credited to them in the firm, they were to be paid interest thereon at the like rate.

[41] Then followed the clause as to the shares. It runs thus :—

" As to whatever net profit and benefit will be made in the firm, the same will be divided, the same will be divided as per Re. 1-1-0 (seventeen annas) in this manner ; the particulars thereof are as follows :—¼ anna of Shri Govardhannathji (a charity account), 8 annas of Seth Mata Hemabai, 5½ annas for Bhai Goculdas Sobhanmalani, 3¼ annas of Bhai Bhugwandas Mitharamani."

The partnership deed was executed in Sind, probably at Tata, where the defendants Goculdas and Bhugwandas reside and Hemabai resided, and the business was to be carried on at Behrin in the Persian Gulf and its outstations. The terms of the deed as we have set them out show, we think, that the moneys with which the business was to be carried on in addition to the capital were to be supplied by Hemabai alone, though it contemplates the probability of the partners having money in the firm. Read as a whole it constitutes, we think, Hemabai the real owner of the firm, and Goculdas and Bhugwandas working partners therein.

Hemabai died on the 1st September, 1889, a little more than three weeks, consequently, after the date of the partnership, which, by operation of law, thereupon became dissolved. For reasons presently to be assigned, it must, we think, be taken for the purposes of this suit that her heir was Kissondas, her husband's brother's son. He was then and still is a minor, having been in 1890 about ten years of age.

In April, 1893, Goculdas and Bhugwandas, the surviving partners in the firm, filed three suits (Nos. 187, 188 and 189 of 1893) against debtors of the firm in Bombay. Bhugwandas in this matter acted for Goculdas, who did not then leave Tata. Subsequently, on Goculdas coming to Bombay, he presented a petition to the Court in suit No. 187 of 1893, in which he stated that Hemabai, deceased, had the largest interest in the business and assets of the firm, and that Bhugwandas on the accounts being taken would be found largely indebted to the firm. He further alleged that Bhugwandas had excluded him from the management of the suits, and that he was apprehensive that Bhugwandas would secure in his own hands the amount admitted by the defendants, and apply it to his own use. This petition resulted in a consent Judge's order of the 22nd July, 1893, under which **[42]** the sums received in the three suits

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were paid to the third defendant, the receiver, to be by him held and invested until further order of the Court.

On the 30th March, 1894, letters of administration to the estate of Hemabai were granted to Mr. Carnac, the Administrator General, who on the 22nd April following filed the present suit setting out the above facts, and alleging that Goculdas and Bhugwandas were each indebted to the partnership and had nothing to receive from it; and further alleging that he was apprehensive that Goculdas and Bhugwandas would receive the moneys in the hands of the receiver and that they would be lost to the estate of Hemabai; he prayed (1) for a declaration that the whole fund belonged to Hemabai's estate and that the receiver should be ordered to pay it to him as administrator of Hemabai, (2) if necessary for the purpose of the suit, that the accounts of the partnership should be taken, and (3) for an injunction against the defendants Goculdas and Bhugwandas receiving the fund. Goculdas, as we have stated, does not put forward any claim to it. The contention is between Bhugwandas and the plaintiff only.

It is admitted that the accounts of the firm have not been formally made up and adjusted between the estate of Hemabai and the surviving defendants. Until the Administrator-General was appointed her administrator there was, in fact, no one with whom they could be made up. By counsel for Bhugwandas it has been contended that, as surviving partners in the firm, Bhugwandas and Goculdas were entitled to this asset of the firm, and that the only right of the administrator of Hemabai was to an account against the surviving partners, and payment of the balance at foot of such account, and that as the claim of the administrator of Hemabai to such an account was barred by limitation, the right of Goculdas and Bhugwandas to hold the asset was established. In support of this proposition he relied upon the judgments delivered in the House of Lords in the celebrated case of *Knox* v. *Gye* (1) and more particularly upon the judgment of Lord Westbury in that case. We are not prepared to hold that that contention is well-founded even on the assumption that the claim of **[43]** the plaintiff to an account is time-barred. We are inclined to think that the difference between Indian and English law on this subject alluded to in the course of the argument and the peculiar nature of the partnership-deed in the present case distinguish it from the case put by Lord Westbury; but we do not pursue the question, because we are of opinion that the claim of Hemabai's administrator to an account of the partnership dealings is not time-barred.

The dates as above stated are these: Hemabai died on the 1st September, 1889. The plaintiff was appointed administrator of Hemabai's estate on the 30th March, 1894. The present suit was filed on the 22nd April, 1894.

Now s. 17 of the Limitation Act (XV of 1877) provides that when a person who would, if he were living, have a right to institute a suit, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased *capable of instituting* such suit.

Upon this the question arises whether when Hemabai died there was a legal representative of Hemabai capable of instituting a suit for an account against the partners. Soon after her death, Tulsabai as mother and guardian of Kissondas applied to this Court for letters of administration to

(1) 5 Eng. and Ir. App. 675.

her estate limited until Kissondas should come of age. The defendant Bhugwandas and Tirathdas, the father of Hemabai, entered a *caveat* to the application. They alleged that Hemabai had left a will, of which Tirathdas had been appointed executor; but no such will had ever been proved or judicially adjudicated upon, though Hemabai has been dead for four years. For the purposes of this suit the allegation has not been in any way proved, and may be disregarded. The order appointing the plaintiff administrator of Hemabai's estate inferentially negatives the existence of a will, but being made without prejudice to the questions raised by the issues it is not conclusive between the parties.

The affidavits made in support of the *caveat* did not suggest that Hemabai left a nearer heir than Kissondas, nor is it here shown that she did. We must, therefore, assume that Kissondas **[44]** is her heir. This of course will not affect the ultimate claim to the moneys in the hands of the Administrator-General if any one hereafter shall prove that he has a title to oust the *prima facie* title of Kissondas.

Now Kissondas being an infant when Hemabai died, and being her heir, there was, we are of opinion, no legal representative of Hemabai capable of suing until letters of administration were granted to the Administrator-General. The expression "capable of suing" in s. 17 is, we cannot doubt, the antithesis to "not under legal disability to sue." It cannot, we apprehend, refer to incapacity arising from want of means or absence of other physical causes. What legal disabilities incapacitate from suing, are pointed out in s. 7, amongst which infancy is foremost. If this were not so, the strange result pointed out in argument would result, *viz.*, that up to the moment of the administrator to Hemabai's estate being appointed, the claim for an account was admittedly not time-barred. By the very act of appointing an administrator to protect the estate, the claim became time-barred. Any reasonable interpretation which avoids such an anomaly should be accepted. Here the interpretation which we adopt is both reasonable and obvious. This view does not, we think, at all come into conflict with the decision in *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas* (1) which was a decision under s. 7 of the Act and was determined upon wholly different considerations.

The further question arises whether the Court has jurisdiction in this case, and we are quite unable to bring ourselves to feel any doubt upon the subject. Leave to file the suit has been given under cl. 12 of the Letters Patent. So the Court has jurisdiction if any part of the cause of action arose within the local limits of the High Court. What is the cause of action alleged? It is that the defendant Bhugwandas is endeavouring under cloak of his position as surviving partner to get into his hands a sum of money within the jurisdiction of the Court, nay in the hands of its officer, with a view to deprive the representatives of his deceased partner (who according to the case made in the plaint are solely entitled to it and all the assets of the firm) of the fund, **[45]** and to employ it for his own purposes. Is not that a cause of action arising within the jurisdiction of the Court? It may not be the whole cause of action, but is it not a most substantial part of one? Is the Court's aid to be withheld? Is its arm to be paralysed by the answer "The Court can't prevent this injustice —this positive wrong—because the accounts of the firm have not been adjusted?" Our answer is an emphatic negative. It might be a good defence to such a suit (we do not say it would be) for the defendant to

(1) 9 C. 663.

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plead thus—"I am receiving the money for the benefit of the partners at large. I shall duly account for it when the account is taken." That, if credited, might be a good answer; but this is not the case of Bhugwandas. He says the fund is his own and he is entitled to have it and spend it. No doubt it would be necessary in such a case incidentally to take the partnership account if the defendant alleges that he has a claim to the money; but that is immaterial. The Court often has to decide a collateral issue in respect of which it has not direct jurisdiction. The case of rent sued for in the Small Cause Court is an instance. Such a suit is not defeated by reason of the Court having incidentally to determine a question of title to land on which directly it has no jurisdiction—*Bapuji* v. *Kuvarji* (1). There is no reason which occurs to us why this Court should not, if necessary, take the accounts. The defendant cannot complain. It is his own wrongful act which gives the Court jurisdiction incidentally to take it. The plea to the jurisdiction, therefore, fails.

When these technical objections are brushed aside, there is really no defence to the suit upon the merits. The terms of the partnership deed and the dates are strong to show that Bhugwandas can have no interest in this fund. The books of the firm kept by Bhugwandas and Goculdas show that he is indebted to the firm, and do not contain a trace of his having brought capital into it. In one of his answers to interrogatories (put in, we cannot help thinking, rather inadvertently by the plaintiff) Bhugwandas says that he brought in some goods, but he betook himself out of Bombay when the suit was coming on, and gave no evidence at the trial. The plaintiff has made out the several allegations in **[46]** his plaint by strong *prima facie* evidence which there is nothing to rebut. It is said that the defendant's advisers had not a full opportunity of inspecting the books, and that they were taken by surprise when the books were produced and put in at the trial. They did not, however, ask for a postponement on that ground; nor have they since discovered anything in the books which has been brought to our notice which would help the defendant. In truth, on the merits this suit was undefended, and upon the merits we think it ought to have been decided.

The decree must be varied by making a decree in the terms of paragraphs (A) and (B) of the prayer of the plaint, and the defendant Bhugwandas must pay the costs of the suit throughout.

We have not referred to the set-off; it follows from our judgment that Bhugwandas has no claim under it.

Attorneys for the plaintiff:—Messrs. *Bhaishankar and Kanga.*

Attorneys for the defendant:—Messrs. *Ardesir, Hormasji and Dinha.*

(1) 15 B. 400.

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Before Mr. Justice Starling.

DINSHAW NOWROJI BODE (*Plaintiff*) *v.* NOWROJI NASARWANJI BODE AND PEROZSHAW DINSHAW BODE (*Defendants*).*

[13th August, 1895.]

Trust—Trustees—Trustees raising money by mortgage of trust property—Sanction of Court.

A testator by his will devised property in Bombay to trustees on certain religious and charitable trusts. The income of the property was more than was required for the purposes of the trust, and the trustees had a surplus of Rs.19,000 in their hands. They were obliged to pull down a certain chawl which stood upon the land for the purpose of rebuilding upon it, and they proposed, with a view to improve the property, to erect a larger and more substantial building than the former one. They expended the surplus of Rs. 19,000 which was on their hands, but found that to complete the work a further sum of Rs. 20,000 was necessary. This they proposed to raise by mortgaging the trust property. They calculated that the whole mortgage-debt would be paid off out of the surplus rents of the trust property within three years. They filed this suit, praying that the Court would sanction the proposed mortgage. The Court, however, refused its sanction, and dismissed the suit.

[47] SUIT by trustees to obtain the sanction of the Court to raise money by mortgage of trust property.

The plaintiff stated that one Hormusji Dorabji, a Parsi inhabitant of Bombay, died, in January, 1833, leaving a will whereby he devised two immoveable properties situate in Bombay to trustees upon trust to receive the rents and profits, and after defraying all expenses for taxes and repairs, or for rebuilding of the same when necessary, to pay and appropriate the balance for the performance of certain religious rites and charities.

The material parts of the will are as follows :—

"I give, devise and bequeath unto my cousins Dinshawbhoy Nowroji, Nasarwanji Nowroji and Darashaw Nowroji, their heirs and assigns, the two following properties or estates, *viz.*, an oart with six buildings standing thereon situate without the Fort in the city of Bombay, in Hanuman Gully, belonging to me, and one range or chawl of seven compartments situate in Jugjivan Kika Street, without the Fort of Bombay, also belonging to me, upon trust to receive the rents and profits of the same two properties, and after discharging out of the said rents all necessary charges for taxes, repairs and the like, hereby directing the said properties to be kept in thorough repairs and to be rebuilt when necessary, to pay and appropriate the balance of the moneys arising from the said rents in the performance of the following religious ceremonies and dinners :—Twelve Jasan ceremonies, one ceremony for the dead called Furvardin, one ceremony of Rapitan, one annual ceremony called Rojgar; and I hereby will and direct that my said trustees shall not have any power to sell or mortgage the said properties, or any part thereof, for any purpose whatever."

The plaint stated that the plaintiff and the defendants were then trustees of the said properties, that they had duly performed the said trusts from time to time, and that after all necessary expenses on that behalf had been defrayed, a surplus of Rs. 19,000 remained in their hands.

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The plaint then continued :—

"The plaintiff and the defendants have lately been obliged to pull down one of the chawls or buildings standing upon the Hanuman Lane property by the said will bequeathed, with a view to rebuilding the same. The said chawl formerly produced a monthly rental of Rs. 56, but the plaintiff and defendants were advised that, having regard to the advantageous position of the said property, it would be of great benefit to the said trusts to erect a larger and more substantial building on the site thereof, and the plaintiff and defendants have accordingly commenced so to do, and have already erected the ground floor and one upper storey of such building and have expended thereon the larger part of the aforesaid sum of Rs. 19,000, but a further sum of Rs. 20,000 or thereabouts will be required for the completion of the same.

"The plaintiff is now desirous of borrowing the said sum of Rs. 20,000 from one [48] Nemchand Melapchand, who has offered to lend the same at the rate of 6 per cent. per annum upon a security of the mortgage of the same building, and the defendants are willing that the sum of Rs. 20,000 should be so raised, but the plaintiff and the defendants are so advised that it is doubtful whether, having regard to the terms of the said will, they have power so to mortgage any part of the said property, and that their proper course under the circumstances hereinbefore set out is to file this suit for the purpose of obtaining the sanction of this Honourable Court thereto.

"The plaintiff submits that the mortgage now proposed by him will greatly benefit the said trust properties, inasmuch as the building now being erected will when completed yield a monthly rental of at least Rs. 400, and the plaintiff believes that it will be possible to repay the whole of the said sum of Rs. 20,000 out of the surplus rents of the said properties within a period of three years, as by the statement of estimated receipts and expenditure hereto annexed will appear."

The prayer of the plaint was as follows :—

"That it may be declared by this Honourable Court that the accumulated surplus rents and profits of the trust properties hereinbefore referred to have been or may be properly expended upon the new building in the fourth paragraph hereof mentioned.

"That for the purpose of completing the said new building the plaintiff and the defendants as trustees of the said properties may be permitted under the sanction of this Honourable Court to raise the sum of Rs. 20,000 and to secure the repayment of the same, together with interest thereon at a rate not exceeding 7 per cent. per annum by a mortgage or charge upon the said new building."

Macpherson (Acting Advocate-General), for the plaintiff.—He cited *Conway* v. *Fenton* (1) ; *Jesse* v. *Lloyd* (2); *In re Leigh's Estate* (3); *Drake* v. *Trefusis* (4) ; *In re Venour's Settled Estates* (5) ; *Vyse* v. *Foster* (6).

Lowndes, for the defendants.

JUDGMENT.

STARLING, J.—In this case the testator by his will devised property in Bombay to trustees on certain religious and charitable trusts. It is not necessary for me to give any opinion as to the validity of these trusts. I have been referred to a decree passed by the late Supreme Court on the

(1) 40 Ch. D. 512. (2) 48 L.T.N.S. 656. (3) L.R. 6 Ch. 887.
(4) L.R. 10 Ch. 364. (5) 2 Ch. D. 522. (6) L.R. 7 H.L. 318.

21st November, 1856, in which this will is mentioned. I do not find, however, that there is any declaration in that decree that the trusts are valid. They are merely recited, and one of the properties devised by the will is ordered to be sold. The validity of these trusts, therefore, remains to be determined, if at some future time the question should be raised.

[49] The trustees, however, now desire to build a chawl. This they clearly have power to do under the express terms of the will, and they may extend for that purpose the money in their hands. But they seek for something more. They ask the sanction of this Court to raise a large sum of money by mortgage of the trust property over and above the sum which has accumulated in their hands, for the purpose of erecting the new building, and the question is whether this sanction ought to be granted. The Advocate-General has cited several cases and has urged that they are authorities upon which the Court may act. I have carefully considered those cases, but I do not think they are applicable here. They are cases in which the proposed outlay would benefit the estate, and by that I mean would be for the advantage of present and future beneficiaries. In this case, however, there is no person who would be benefited by the outlay. The only result would be that the trustees would have a larger income in their hands over and above what is necessary for the trusts, because the income is now larger than is necessary for the purposes mentioned in the will. What is to be done with the surplus I do not know. The religious charities cannot be carried out more effectually, so there is no reason to require more money to be expended out of the rents for that purpose, still less for authorising a mortgage of the trust property in order that more rent may be obtained and the unnecessary surplus still further increased. A mortgage would be a burden on the property, and although no doubt at present it seems probable that it might be very rapidly paid off, the Court cannot allow the trust property to be the subject of speculation. It is impossible to foresee events. Circumstances might happen which would greatly depreciate house property generally in Bombay, or this property in particular. A mortgage might in that case become a burden too great for it, and the mortgagee would then have a right to come in and sell the property in order to realise his mortgage-debt. The Court would thus by its sanction have enabled the trustees to destroy the trusts created by the will. If I were to grant this application I would be making a precedent which might possibly be followed hereafter in other cases in which there would be greater risk to the trusts. I must **[50]** dismiss this suit without prejudice to any question as to the intended application by the trustees of the trust funds already accumulated in their hands.

Suit dismissed.

Attorneys for plaintiff and defendants :—Messrs. *Nanu and Hormasji.*

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Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

GIRDHARLAL HARGOVANDAS (*Original Plaintiff*), *Applicant v.* LALLU JAGJIVAN (*Original Defendant*), *Opponent.**

[27th September, 1894.]

Practice—Procedure—Plaint, presentation of—Return of plaint for presentation to proper Court—Jurisdiction—High Court, power of, to interfere under Reg. II of 1827, s. 5, cl. 2.†

A Second Class Subordinate Judge returned a plaint for presentation in the proper Court on the ground that the subject-matter exceeded his pecuniary jurisdiction. The First Class Subordinate Judge to whom the plaint was then presented, also returned it for presentation in the proper Court on the ground that the subject-matter was below his pecuniary jurisdiction. The plaintiff thereupon presented the plaint to the successor of the Second Class Subordinate Judge who had originally returned the plaint. That Judge held that he had no jurisdiction to review the order passed by his predecessor. The plaintiff appealed, and the Judge rejected the appeal, holding that no appeal lay against an order refusing to grant a review.

The plaintiff applied to the High Court under its extraordinary jurisdiction.

Held, that the case was one in which the High Court ought to interfere under cl. 2, s. 5 of Reg. II of 1827.

The order of the Second Class Subordinate Judge was set aside with a direction that he should admit the plaint as of the date of its original presentation.

APPLICATION under the High Court's extraordinary jurisdiction (s. 5, cl. 2, of Reg. II of 1827) against the order of Gilmour McCorkell, District Judge of Ahmedabad.

The applicant presented a plaint to the Second Class Subordinate Judge of Viramgam, who on the 31st August, 1892, returned **[51]** it for presentation in the proper Court, on the ground that the value of the subject-matter in dispute being more than Rs. 5,000, the case was beyond his pecuniary jurisdiction.

The applicant then presented the plaint to the First Class Subordinate Judge of Ahmedabad. That Judge also returned it for presentation in the proper Court, finding that the value of the subject-matter was less than Rs. 5,000, and, therefore, not within his pecuniary jurisdiction.

The applicant again presented the plaint to the Second Class Subordinate Judge of Viramgam, who declined to entertain it on the ground that he had no authority to review the decision passed by his predecessor on the 31st August, 1892.

The applicant then appealed to the District Judge, praying that either the First Class Subordinate Judge or the Second Class Subordinate Judge should be directed to accept the plaint. The Judge rejected the appeal on the ground that the order refusing a review of judgment was not appealable.

The applicant now applied to the High Court under its extraordinary jurisdiction, contending that the Judge should have heard the appeal and that he should have directed the Subordinate Judge to accept the plaint.

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* Application No. 51 of 1894 under the extraordinary jurisdiction.

† Section 5, cl. 2, of Reg. II of 1827 :—

Second.—It shall be competent to the said Court (Sudder Dewanny Adawlut) to call for the proceedings of any Subordinate Civil Court, and to issue such orders thereon as the case may require.

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A *rule nisi* was granted calling on the defendant in the suit to show cause why the order of the Judge should not be set aside.

Nagindas T. Marphatia appeared for the applicant in support of the rule:—Either the Second Class Subordinate Judge or the First Class Subordinate Judge has jurisdiction to accept the plaint. We contend that the Second Class Subordinate Judge was wrong in holding that he had no jurisdiction. What determines the jurisdiction of the Court is the value of the claim as mentioned in the plaint and not the actual value of the property.

Goverdhanram M. Tripathi appeared for the opponent to show cause.—The present application under this Court's extraordinary jurisdiction cannot be entertained, because the order of the Second Class Subordinate Judge returning the plaint for presentation in the proper Court was appealable and the applicant ought to have appealed to District Court and then come up to the High Court in second appeal. So also when the First Class [52] Subordinate Judge returned the plaint, the applicant ought to have appealed to this Court. Those orders being appealable, the applicant cannot seek redress under the extraordinary jurisdiction. This application is against the order of the District Judge, which is perfectly correct. The original orders of the Second Class Subordinate Judge was apparently wrong, but the plaintiff ought to have sought redress in a proper form.

[FULTON, J., referred to s. 5, cl. 2, of Reg. II of 1827.]

That section has been repealed by Act XII of 1873, schedule, Part VII.

[FULTON, J., referred to *Ganesh* v. *Ramchandra* (1).]

There have been several cases in which that Regulation was referred to—*Mahadaji* v. *Sonu* (2); *Shiva Nathaji* v. *Joma Kashinath* (3); *Satu* v. *Shivrambhat* (4). It seems that the repealing Act XII of 1873 was not brought to the notice of the Court in those cases.

JUDGMENT.

FULTON, J.—In this case the plaint was originally presented to the Second Class Subordinate Judge of Viramgam, who, thinking that the subject-matter exceeded Rs. 5,000, returned it for presentation in the proper Court. The plaintiff then went to the First Class Subordinate Judge, who, finding that the subject-matter was less than Rs. 5,000, again returned it for presentation to the proper Court. Thereupon the plaintiff went back to the subordinate Court at Viramgam, where there was a new Subordinate Judge, who was of opinion that he could not review his predecessor's decision. Upon this an appeal was made to the District Court against the final order of the Viramgam Court, but was rejected by the Judge, who held that no appeal lay against an order rejecting an application for review, and at the same time advised the plaintiff to apply to the High Court.

We think it would have been simpler if the District Judge had recommended the conversion of the appeal into one against the original order of the Second Class Subordinate Judge of Viramgam [53] and had excused the delay which was manifestly occasioned by a *bona fide* mistake as to the proper course to follow: but as all the proceedings are now

(1) P. J. (1881) 133.
(2) 9 B. H. C. R. 249.
(3) 7 B. 341.
(4) P. J. (1894) 52.

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before us, we are of opinion that this is a case in which we ought to interfere under cl. 2, s. 5 of Reg. II of 1827, on the principles explained in Mr. Justice Melvill's decision in *Ganesh* v. *Ramchandra* (1).

It is not disputed by Mr. Goverdhanram that the original order of the Second Class Subordinate Judge of Viramgam, which was passed without reference to the provisions of Act VII of 1887, was erroneous. We now set aside that order, and direct that the plaint be sent to the Subordinate Judge of Viramgam and be admitted by him and numbered and registered as duly presented on 27th June, 1892. All costs hitherto incurred in the Second Class Subordinate Judge's Court at Viramgam, in the First Class Subordinate Judge's Court, in the District Court, and in this Court, to be costs in the cause.

Order set aside.

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20 B. 53.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Fulton.

BAI BAIJI (*Original Plaintiff*), *Appellant v.* BAI SANTOK (*Original Defendant*), *Respondent.** [2nd October, 1894.]

Borah Mahomedans—Suni Borahs—Conversion, effect of—Hindu converts to Mahomedanism—Inheritance—Succession among such converts—Native Christians—Law applied to Native Christians prior to Indian Succession Act (X of 1865)—Custom and usage of inheritance among converts—Burden of proof—Evidence—Matter of public interest—Decrees—Evidence of custom—Practice.

The Suni Borah Mahomedan community of the Dhandhuka Taluka in Gujarat are governed by the Hindu law in matters of succession and inheritance.

Held, therefore, that in this community a widow is entitled to succeed to her husband's estate to the exclusion of a daughter or a step-daughter.

As to the law governing Hindu converts to Mahomedanism, the following principles may now be regarded as settled :—(1) Mahomedan law generally governs converts to that faith from Hinduism ; but (2) a well-established custom of such converts following the Hindu law of inheritance would override the general presumption. (3) This custom should be confined strictly to cases of succession and inheritance. (4) If any particular custom of succession be alleged which is at variance with the general law applicable to these communities, the burden of proof lies on the party alleging such special custom.

[54] If evidence is given as to general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law, the burden of proof is discharged, and it then rests with the party, disputing the particular Hindu usage in question, to show that it is excluded from the sphere of the proved general usage of the community.

Among Native Christians certain classes strictly retain the old Hindu usages, others retain these usages in a modified form, and others again wholly abandon them. Before the Indian Succession Act (X of 1865) the Christian convert could elect to attach himself to any one of these particular classes, and he would be governed by the usage of the class to which he so attached himself—*Abraham* v. *Abraham* (2). These same principles are applied to the case of Hindu converts to Mahomedanism such as Khojas and Cutchi Memons.

The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities. Such decisions form an exception to the general rule, which excludes *res inter alios actæ*.

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* Appeal No. 72 of 1892.

(1) P. J. (1881), 133.

(2) 9 M.I.A. 195.

[R., 23 B. 539 (543) ; 37 B. 71=14 Bom. L.R. 336=15 Ind. Cas. 520 ; 38 B. 449 (496) ; 9 Bom. L.R. 274 (283) ; 12 C.L.J. 459=15 C.W.N. 158=8 Ind. Cas. 41 ; 8 Ind. Cas. 214=4 S.L.R. 77.]

APPEAL from the decree of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad, in suit No. 314 of 1891.

The parties to the suit were members of the Borah community of Ranpur, in the Dhandhuka Taluka, who were Rajputs converted to Mahomedanism several centuries ago.

The plaintiff was the daughter and defendant was the widow of one Nur Bapu who died at Ranpur on 23rd December, 1889. The plaintiff was the step-daughter of the defendant.

The plaintiff sought to recover the whole of the property belonging to her deceased father, alleging that according to the custom of her caste a daughter was entitled to succeed to her father's estate to the exclusion of his widow; she also alleged that her father had made a will bequeathing to her the whole of his property. She prayed for the whole of the said property, and, in the alternative, for one-half, as a legal sharer under the Mahomedan law.

The defendant pleaded (*inter alia*) that the caste to which the parties belonged was governed by the Hindu law, and not by the Mahomedan law, in matters of succession and inheritance; that according to the Hindu law she had a widow's estate in her deceased husband's property; that the plaintiff had no such preferential title as she set up according to the custom of the caste, and that the said will was a fabrication.

[55] The Subordinate Judge found that there was a long-established custom among the Borahs of Ranpur to follow the ordinary Hindu law of succession and inheritance; that according to this custom the defendant was the heir of her deceased husband; and that the plaintiff had failed to prove either the will or the special custom on which she relied.

The Subordinate Judge, therefore, rejected the plaintiff's claim.

Against this decision the plaintiff preferred an appeal to the High Court.

Viccaji (with him *Nagindas Tulsidas*), for appellant.

Branson (with him Rao Saheb *Vasudev J. Kritikar*), for respondent.

The following authorities were cited in argument:—*Abraham* v. *Abraham* (1); *Jowala Buksh* v. *Dharum Singh* (2); *Mahomed Sidick* v. *Haji Ahmed* (3); *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (4); *Raja Bahadur* v. *Bishen Dayal* (5).

JUDGMENT.

RANADE, J.—The appellant in this case is the daughter, and the respondent is the widow, of the deceased Nur Bapu, who died in December, 1889. Nur Bapu belonged to a community of Rajputs who were converted to Mahomedanism some centuries ago, and are known as Suni Borahs in the northern part of Gujarat. The appellant sought to recover possession of the whole of her father's estate to the exclusion of his widow under her father's will, and also under a special custom, and in the alternative she claimed a half share of the property under Mahomedan law. The title based on the will and on the custom was disallowed by the lower Court, and the appellant's counsel did not press these points on our attention, but he rested his case solely on the ground that the parties were bound by Mahomedan law, and not by Hindu law or usage, as

(1) 9 M.I.A. 195. (2) 10 M.I.A. 511. (3) 1 B. 1.
(4) 18 B. 534. (5) 4 A. 343.

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the respondent contended. This latter contention was upheld by the lower Court.

[56] The only issue that is raised in appeal is, whether the strict Mahomedan law or the Hindu law and usage governs the succession to the estate of the deceased Nur Bapu as a member of the Suni Borah community of Dhandhuka Taluka in the Ahmedabad District.

The appellant's counsel very properly urged that the burden of proving that a community of people professing the Mahomedan faith were not governed by the Mahomedan law of succession, but by the usages and customs of the old Hindu faith to which their ancestors belonged, rested on the defendant. At the same time we do not think he was right in maintaining that this usage or custom should be proved in regard to the particular relationship which the parties to the present suit bear to one another. If the evidence is clear on the point of the general prevalence of the Hindu rules of succession in preference to the rules of Mahomedan law, the burden of proof will be discharged, and it will then be for the appellant to show that this particular relationship was excluded from the sphere of the proved general usage of the community.

The leading case on the subject of the succession of converted Hindus is *Abraham* v. *Abraham* (1), where it was held that though, by the fact of his conversion, Hindu law ceases to have any binding force upon the convert, yet it does not necessarily involve a complete change in the relations of the convert in the matter of his rights and interest, and his power over property. The convert, though not bound by Hindu law, may, "by his course of conduct after conversion, show by what law he intended to be governed as to these matters." This case related to Native Christians, among whom certain classes strictly retain their old Hindu usages, others retain their usages in a modified form, and others again wholly abandon those usages. The Christian convert could, before the Indian Succession Act was passed, elect to attach himself to any one of these particular classes, and he would have been governed by the usage of the class to which he so attached himself. The case of *Jowala Buksh* v. *Dharum Singh* (2) was also cited on appellant's behalf, but it has no [57] application, for it only lays down that a single family cannot make a special customary law for itself.

The same principles which govern the case of Hindu converts to Christianity have been applied to the case of Hindu converts to Mahomedanism in this Presidency, such as the Khojas and Cutchi Memons. The first case was decided by the Supreme Court so far back as 1845—*Khojas and Memons' case* (3); and it has been followed since in a succession of cases—*Gangbai* v. *Thavar Mulla* (4); *Hirbai* v. *Gorbai* (5); *Rahimatbai* v. *Hirbai* (6); *In re Haji Ismail Haji Abdula* (7); *Ashabai* v. *Haji Tyeb Haji Rahimtulla* (8); *Abdul Cadur Haji Mahomed* v. *C. A. Turner* (9); *Mahomed Sidick* v. *Haji Ahmed* (10); *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (11); *Raja Bahadur* v. *Bishen Dayal* (12).

The principles laid down in these decisions may be thus stated, (1) that, though the Mahomedan law generally governs converts to that faith from the Hindu religion, yet (2) a well-established custom of such converts following the Hindu law of inheritance would override the

(1) 9 M.I.A. 195. (2) 10 M.I.A. 511. (3) Perry's Oriental Cases, p. 110.
(4) 1 B.H.C.R. 71. (5) 12 B.H.C.R. 294. (6) 3 B. 34.
(7) 6 B. 452. (8) 9 B. 115. (9) 9 B. 158.
(10) 10 B. 1. (11) 13 B. 534. (12) 4 A. 343.

general presumption; (3) that this custom should, however, be confined strictly to cases of succession and inheritance; (4) and that if any particular usage, at variance with the General Hindu law applicable to these communities in matters of succession, be alleged to exist, the burden of proof lies on the party alleging such special custom. These principles may now be regarded as settled, and they govern the presumptions of law and the burden of proof in cases like the present, if the Borah community to which the parties belong are shown by the evidence in this case to occupy the same position and status as the Khojas and Cutchi Memons.

This is a question of fact, and on this point we feel satisfied that the lower Court has correctly appreciated the oral and written evidence adduced on both sides. The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities; and [58] such decisions form an exception to the general rule which excludes *res inter alios actæ*—*Madhub Chunder Nath Biswas* v. *Tomee Bewah* (1). Exhibits 49 and 50 are copies of two such decrees in which the cases came before this Court, and though no judgments were recorded, the decrees of the lower Courts affirming the custom alleged by the respondent in this case of succession in accordance with Hindu law, were upheld. The judgment in Ex. 50 refers to a number of other decisions of the lower Courts which have been perused by us. In one of these cases (No. 855 of 1886 of the Dhandhuka Court), the parties were Borahs, and the dispute was between the widow and the nephews of a deceased Borah in the Dhandhuka Taluka. The judgment recorded refers to a series of eleven decisions, one of them dating as far back as 1818, in which it was held that these Borahs follow Hindu customs of inheritance, and, on the strength of this custom, the widow's claim to inherit was upheld as against the separated nephews, and the decision was confirmed in appeal. The widow's claim was similarly upheld in appeal No. 91 of 1867 by the District Court of Ahmedabad, on the ground of a custom of succession admittedly not in conformity with Mahomedan law. In suit No. 1107 of 1883, the First Class Subordinate Judge's Court at Ahmedabad upheld the right of a widow to succeed to the estate of her deceased husband to the exclusion of her daughter and nephews, solely on the ground of ancient custom. It is not necessary to refer to the other decisions, copies of which were produced before us by the respondent's pleader, and which are all referred to in Ex. 50.

Looking at the oral evidence in the case, it may be of use to note that the appellant-plaintiff herself did not rest her claim solely on the Mahomedan law. She also set up a custom which she failed to prove. Her witnesses were unable to cite a single case where a daughter shared the estate of her father, either with her brothers or her mother. Plaintiff's witness No. 22 admitted that there had been no re-marriages in the community of Dhandhuka Borahs to which he and the parties belong. Witnesses Exs. 23, 25 did indeed state that a daughter took [59] her father's estate excepting the widow's $\frac{1}{8}$th share, but they cited no instances. Witness No. 25 deposed that he had given a share to his sister, but this witness admitted later on that in a former suit he might have deposed that he did not know of any case where nephews excluded the widow as heir, and that the gift to his sister was made by his and her father. Witness No. 26 did not know of any case in which sisters received a share from their brothers as heirs to their father. Witness

(1) 7 W. R. 210.

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No. 27 stated that there had been no case in which the daughter inherited her father's estate, and excluded the mother. This witness was a party with the deceased Nur Bapu in a suit which ultimately came before the High Court, which Court confirmed the decision of the lower Courts. As noticed by the lower Court, this witness's statement of the customary law was distinctly in favour of the general application of the Hindu law in matters of succession. Mere opinion-evidence is entitled to no weight in such matters, and the custom must be proved by specific instances which plaintiff's witnesses have failed to adduce—*Rahimatbai* v. *Hirbai* (1).

Defendant's witnesses, on the other hand, gave a large number of such instances where brothers had excluded sisters, and also where the mother, *i.e.*, the widow of the deceased, excluded her daughter. The Mookhi (witness Ex. 18) cited the instances of nine out of fifty families of this community at Rappur, where brothers had excluded sisters. He was unable to give specific instances of the settlement of disputed succession between daughters and mothers, excepting the case of his own wife, who succeeded to her father's property after the death of her mother. The next witness, Ex. 31, gave three instances in his own family and two in other families in which the daughter was excluded by the mother. The absence of all disputes on this point is itself strong evidence that the custom is well-established. Witness Ex. 32 gave three instances from other families and one in his own, where the mother succeeded to the exclusion of daughters. Witness Ex. 39 cited an instance within his knowledge of the exclusion of a daughter by her mother. Witness Ex. 40 gave evidence to the same effect.

[60] The oral evidence in the case thus fully corroborates the written evidence of the decrees noticed above, and shows that the customary rules of succession in this community are based on a general adherence to the Hindu law, and are not in conformity with the rules of Mahomedan succession. These customs, having been affirmed by the Civil Courts for over eighty years, must be held to have acquired the force of legal and obligatory customs. The relations between a daughter and step-mother must be governed by the same rules which are shown to regulate those of mother and daughter, as long as no special custom at variance with the general custom is proved.

For all these reasons we reject the appeal, and confirm the decree of the lower Court with costs on appellant.

FULTON, J.—The question for our consideration is, whether the Mahomedan Borahs of Ranpur in Dhandhuka, to which community the parties belong, are governed as regards the succession of widows by Hindu or by Mahomedan law. Mr. Vicaji doubted whether Hindus converted to Mahomedanism, as appears to have been the case with these Borahs several centuries ago, could retain the Hindu rules of succession, but I think it is well settled that a community may be subject to a custom of succession at variance with the ordinary law. The only point for consideration is, whether the custom set up by the defendant is satisfactorily proved.

That the parties have hitherto not believed that they were governed by Mahomedan law, seems clear. The plaint alleges a custom inconsistent with that law on which it falls back only in the event of the custom not being proved. This fact, though not sufficient to shift the burden of

(1) 3 B. 34.

proof, tends to lighten its pressure on the defendant, showing, as it does, that the plaintiff and her advisers were conscious that in matters of succession Mahomedan law was not usually followed. It still, however, rests on the defendant to prove her custom, but I agree with the Subordinate Judge that she has done so. The defendant's witnesses Nos. 28, 31 and 40 give instances in which the Hindu law of succession has been applied. On the other hand, not a single instance has been shown in which any succession at all resembling [61] that prescribed by Mahomedan law has taken place; and it is clear that the application of this law would long ago have broken up the property as could easily have been proved if it had been followed. In the cases referred to by the Subordinate Judge, suit No. 854 of 1878 and appeal No. 176 of 1887 (Ex. 50), the parties were Borahs and it was held that their custom of succession was according to Hindu and not according to Mahomedan law. The evidence of Polka Mulji (Ex. 40) seems specially significant, for it shows that the sisters of Nur Bapu did not get the shares in the family property to which they would have been entitled under Mahomedan law, and this evidence was not contradicted as might without difficulty have been done if it had been incorrect.

Looking to these circumstances I think it sufficiently proved that the succession of the Borahs of Ranpur is regulated by Hindu law, subject possibly to a special custom excluding altogether daughters and other females entitled by Hindu law to take more than a widow's interest. Whether this special custom really prevails, it is unnecessary to consider in this case, for there seems no doubt that Hindu law is applicable as between the widow of the last holder and his daughter.

On these grounds I concur in confirming the decree of the Subordinate Judge with costs.

Decree confirmed.

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20 B. 61.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

MAHARANA SHRI RANMALSINGJI (*Original Defendant*), *Appellant* v. VADILAL VAKHATCHAND (*Original Plaintiff*), *Respondent.**

[3rd October, 1894.]

Minor—Guardian and ward—Powers of guardian—Guardian not competent to bind his ward by personal covenants—Act XX of 1864, *ss.* 18 *and* 29—*Guardian's authority to contract debts for the marriage of his ward without the sanction of the Court—Debts contracted for pilgrimage expenses not binding on minor—Guardian's power to acknowledge debts—Limitation Act* (*XV of* 1877), *s.* 19—*Acknowledgment.*

A minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate.

[62] Act XX of 1864 gives no power to a guardian or administrator to bind his ward by personal covenants.

A guardian appointed under Act XX of 1864 can pledge the property of his ward for purposes beneficial to the minor, but not as a security for money previously borrowed which the minor was under no obligation to pay.

Under s. 29 of Act XX of 1864 a guardian cannot contract a debt for the marriage of his ward without the sanction of the Court.

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* Cross Appeals Nos. 161 of 1892 and 10 of 1893.

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Debts contracted by the guardian of a minor for a pilgrimage not undertaken in the discharge of an urgent spiritual duty which it was obligatory on him to perform, are not necessaries for which the minor would be held liable.

A guardian has no authority to acknowledge a debt on behalf of his ward so as to give the creditor a fresh start for the period of limitation, as he is not an agent on the part of his ward within the meaning of s. 19 of the Limitation Act (XV of 1877).

Sobhanadri Appa Rau v. *Sriramulu* (1), dissented from.

[**Overruled**, 26 B. 221 (229)=3 Bom.L.R. 817 (**F.B.**); **N.F.**, 30 A. 422 (**F.B.**)=5 A.L.J. 375=28 A.W.N. 175=4 M.L.T. 49; 4 Bom.L.R. 312; **R.**, 26 A. 598=1 A.L.J. 302=24 A.W.N. 137; 35 C. 320=12 C. W.N. 256=3 M.L.T. 156; 31 M. 47=17 M.L J. 553=3 M.L T. 95; 17 C.P.L R. 57 (58); 2 N.L.R. 25; 7 O.C. 46; **D.**, 29 C. 647=6 C.W.N. 729; 23 Ind. Cas. 877 (878).]

THESE were cross-appeals from the decision of Rao Bahadur Lalshankar Umiashankar, First-Class Subordinate Judge of Ahmedabad.

The plaintiffs sued to recover from the defendant and his estate a sum of Rs. 39,040-10-9, being the balance due for moneys lent and jewellery sold to the defendant's mother and guardian during his minority.

The defendant was the Talukdar of Sanand and Koth. His father, Bhagvantsangji, died on the 3rd November, 1869. The defendant was born on 15th January, 1870.

On the 24th July, 1872, defendant's mother, Rupaliba, obtained a certificate under Act XX of 1864 appointing her guardain of his person and administratrix of his property.

In 1883, Rupaliba, acting as guardian of her minor son, opened an account with the plaintiffs' firm which supplied her with money, jewellery and other articles from time to time.

The moneys were borrowed (1) for the purpose of a pilgrimage undertaken by Rupaliba to Benares and other sacred places in Upper India, and (2) on the occasion of the marriage of the defendant, which took place in 1888.

The plaintiffs' account was adjusted from time to time. The last adjustment was made on 5th November, 1888, when a balance **[63]** of Rs. 32,936-1-3 was found due to the plaintiffs' firm. This adjustment was signed by Rupaliba as guardian of her minor son.

In April, 1890, the plaintiffs pressed for payment, and threatened legal proceedings, when Rupaliba pledged with them ornaments worth Rs. 20,000, or thereabouts, as a security for the debt.

On 11th November, 1890, plaintiffs and defendant's guardian Rupaliba referred certain disputes as to interest, &c., to arbitration, and on the 15th November, 1890, the arbitrators made an award directing the defendant's guardian to pay the plaintiffs Rs. 36,401-9-0 within a month. The award was filed in Court and a decree passed in terms of the award.

In January, 1891, defendant attained majority, and on his application the decree on the award was set aside, and the plaintiffs were referred to a regular suit to enforce the award.

The plaintiffs thereupon filed the present suit on the 5th November, 1891, claiming Rs. 36,041-9 as principal and Rs. 2,639-1-9 as interest. They sought to recover the same from the pledged ornaments, from the defendant personally, and from his other property. They relied on the award and also stated the various previous dealings with the defendant's guardian.

(1) 17 M. 221.

The defendant pleaded (*inter alia*) that his guardian had no authority to contract debts on his behalf without the sanction of the Court; that he was not liable for the debts so contracted; that the debts were not incurred for necessary purposes; that the award was collusive and fraudulent; that the guardian was personally liable for the debts in question; that the claim was time-barred, and that the plaintiff could not be allowed to base his claim, in the alternative, on the award and on the previous dealings.

The Subordinate Judge held that the grounds relied upon by the plaintiffs not being inconsistent, there was no objection to the alternative nature of the claim; that the suit was not barred by limitation; that the debts contracted by the defendant's guardian were for legal and necessary purposes; that the pilgrimage and marriage expenses were not extravagant; that several large sums lent by the plaintiffs had gone to increase the defendant's [64] estate; that some of the ornaments purchased with the plaintiffs' money were still with the defendant and his wife; that the debts were, therefore, binding on the defendant; that though the award was collusive, the plaintiffs were entitled to fall back on their original dealings. He, therefore, passed a decree in plaintiffs' favour for Rs. 33,907-8-6, to be recovered from the ornaments pledged, as well as from other moveable property of the defendant. He rejected the rest of the plaintiffs' claim.

Against this decision the defendant appealed to the High Court. The plaintiffs also appealed in respect of the items disallowed by the Subordinate Judge.

Lang (Advocate-General) and *Inverarity* (with Messrs. *Bhaishankar and Kanga*), for appellant (defendant).

Branson (with *Manekshah Jehangirshah*), for the respondent (plaintiff).

Lang (Advocate-General).—We contend, in the first place, that there is no cause of action against the defendant. There is no privity of contract between plaintiffs and defendant. It is found as a fact that Rs. 1,25,000 or thereabouts was borrowed by the defendant's guardian for purposes of marriage and pilgrimage. This expenditure is on the face of it extravagant. It is unreasonable and unnecessary. This enormous debt was contracted by the guardian without the sanction of the Court. The defendant's mother had obtained a certificate of guardianship under the Bombay Minors' Act (XX of 1864). Under s. 29 of the Act it is expressly provided that marriage expenses shall not without the sanction of the Court involve a minor's estate in debt. That being the case, the debt contracted for defendant's marriage without the sanction of the Court is absolutely null and void. For such a debt the guardian would be personally liable—Morley's Digest, Vol. I, p. 276; *Farhall* v. *Farhall* (1); *Hooper* v. *Eyles* (2). Nor had the guardian any authority to borrow for pilgrimage purposes and make the estate liable. The debts contracted for this purpose are not binding on the minor. The plaintiffs have mistaken their remedy. They ought to have [65] proceeded against the guardian. The guardian would be entitled to be recouped out of the minor's estate for all moneys properly borrowed. As to limitation, the guardian had no authority to acknowledge a debt on behalf of the minor. She was not his agent duly authorized in this behalf within the meaning of s. 19 of Act XV of 1877—*Azuddin Hossain* v. *Lloyd* (3); *Wajibun* v. *Kadir Buksh* (4). The claim is, therefore, time-barred.

(1) 7 Ch. App. 123. (2) 2 Vern. Rep. 480. (3) 13 C. L. R. 112. (4) 13 C. 292.

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Inverarity, on the same side.—What is the position of Rupaliba apart from the Bombay Minors' Act (XX of 1864) ? As a guardian she could only contract for the benefit of the minor's estate. She had no power to contract so as to impose a personal liability on her infant ward—*Wahela Rajsangji* v. *Shekh Masludin* (1). As observed by the Privy Council, a guardian has no greater powers here than in England to bind the ward by personal covenants. That being so, the defendant is not liable to satisfy any part of the debts contracted by Rupaliba. The suit is based on the award. That award is found to be collusive and fraudulent. The suit ought, therefore, to have been dismissed. The lower Court ought not to have allowed the plaintiffs to fall back on the original transctions.

Branson (with him *Manekshah Jehangirshah*) for respondent (plaintiff).—The suit is not barred by limitation. The acknowledgments made by Rupaliba from time to time save the bar of limitation. As guardian and manager of the minor's estate, Rupaliba had authority to acknowledge the debt so as to give a fresh starting point to limitation—*Sobahanadri Appa Rau* v. *Sriramulu* (2); *Chinnaya Nayudu* v. *Gurunatham Chetti* (3), *Bhasker Tatya Shet* v. *Vijalal Nathu* (4). The debts were incurred by Rupaliba for the benefit of the minor, chiefly for the purpose of his marriage. Under the Hindu law the marriage of a minor is a legitimate cause of expense, in regard to which a guardian has power to bind him—*Juggessur Sircar* v. *Nilumbur* (5); W. and B. 872; Tagore Law Lectures for 1877, pp. 279, 338. A minor is bound by the **[66]** acts of his guardian done *bona fide* and for his interest—*Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (6); *Nathuram* v. *Shoma* (7); Mayne's Hindu law, s 196. It is found as a fact that the marriage expenses were reasonable, regard being had to the rank and position of the defendant. There are two kinds of guardians appointed under Act XX of 1864. One is a guardian of the person; the other a guardian or administrator of the estate of a minor. Section 29 of the Act does not apply where a guardian of the person of a minor is appointed. As Rupaliba was a guardian of the person of her minor son, she was not bound to obtain the sanction of the Court for the debts incurred for the purpose of the minor's marriage. The moneys she borrowed were applied for the benefit of the minor. With these moneys she purchased ornaments for the use of the minor and his wife. These ornaments are still in the defendant's possession. He cannot be allowed in equity to repudiate his guardian's transactions and at the same time retain the benefit arising from these transactions—*Sreemutty Ahfutoonissa* v. *Goluk Chunder Sen* (8); *Shurrut Chunder* v. *Rajkissen* (9); *Til Koer* v. *Roy Anund Kishore* (10); *Watson and Company* v. *Sham Lal Mitter* (11); *Girraj Bakhsh* v. *Kazi Hamid Ali* (12); *Bai Kesar* v. *Bai Ganga* (13).

JUDGMENT.

FULTON, J.—The plaintiffs sued to recover Rs. 39,040-10-9 out of certain ornaments pledged to them and from the defendant personally. They based their cause of action on an award, dated the 15th November, 1890, or, in the alternative, on an account transaction with the defendant's mother who was his guardian during his minority.

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(1) 11 B. 551 (561). (2) 17 M. 221. (3) 5 M. 169.
(4) 17 B. 512. (5) 3 W. R. 217. (6) 6 M. I. A. 393.
(7) 14 B. 562. (8) 22 W.R. 77. (9) 15 B. L. R. 350.
(10) 10 C.L.R. 547. (11) 15 C. 8. (12) 9 A. 340.
(13) 8. B.H.C.R. A.C. J. 31.

The defendant, amongst other defences, urged that the suit was time-barred; that he was not liable for debts contracted by his guardian during his minority; that the award was fraudulent, and that a claim, in the alternative, on the award and on the previous transactions would not lie.

[67] The First Class Subordinate Judge decided, in the first instance, that there was no objection to the alternative nature of the claim, and, after hearing the evidence, held that the claim was not time-barred; that the award was not properly arrived at: that Rs. 27,147-3-9 were borrowed for purposes that would bind the defendant, and that including interest the plaintiffs were entitled to recover Rs. 33,907-8-6 from the defendant's moveable estate. He thereupon gave a decree entitling the plaintiffs to recover from the pledged ornaments and other moveable property of the defendant Rs. 33,907-8-6, with simple interest thereon at 7½ per cent. per annum from the date of the decree till payment. He also awarded costs in proportion.

Against this decree the defendant has appealed on grounds similar to those urged in his written statement, and the plaintiffs have also appealed in respect of the items disallowed by the Subordinate Judge.

The appeals were argued before us by the Advocate General and Mr. Inverarity for the defendant and by Mr. Branson for the plaintiffs, with permission to the latter to argue further, if necessary, in respect of the items disallowed by the First Class Subordinate Judge.

The circumstances out of which this suit has arisen may be briefly summarised as follows:—This defendant is the Thakur of Sanad and Koth and is one of the chief talukdars in the Ahmedabad District. His position as posthumous son of his father was seriously contested and was finally established in 1874 after protracted litigation, in which his mother Rupaliba had to undergo criminal prosecution. By the will of her husband executed shortly before his death this lady was nominated guardian of the child whose birth was then expected, and on the 24th July, 1872, she obtained from the District Judge a certificate, under Act XX of 1864, appointing her guardian of his person and administratrix of his estate. About 1883 she entered into an account with the plaintiffs' firm which supplied her from time to time with money and jewellery until the account was closed on the 5th November, 1888, with a balance due to the firm of Rs. 32,936-1-3. In 1890, shortly before the majority of the [68] defendant, which occurred on the 15th January, 1891, the plaintiffs began to press Rubaliba for payment. On the 6th April, 1890, she sent them a large quantity of jewellery said to be worth Rs. 20,966, which she authorized them to sell if they were not paid the full amount of their claim by the 15th October. Subsequently, on the 11th November, the plaintiffs on the one side and Rupaliba on the other referred the question in dispute between them to arbitrators, who on the 15th idem made an award in the plaintiffs' favour entitling them to receive Rs. 36,401-9 from the defendant and to recover the amount from the pledged ornaments. An attempt was made to get this award filed in Court, but on appeal to the High Court the application was rejected. This suit was then instituted on the 5th November, 1891. The reference and award have now been made a cause of action, but the award has been held invalid, and no arguments have been addressed to us in support of it, though Mr. Branson for the plaintiffs contended that there was nothing collusive about it from which any opinion unfavourable to the honesty of the plaintiffs should be drawn. Apart from the question whether the guardian of the defendant had authority to refer the matter in dispute to arbitration,

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on which it is unnecessary to express an opinion, we think that the Subordinate Judge's reason for refusing to act on the award is amply supported by the evidence of the arbitrators themselves.

For the defendant Mr. Inverarity contended that as the award was held bad, the plaintiffs should not have been allowed to fall back on their claim based on the account, but on this point we overruled him as intimated at the hearing. The plaint contained a prayer based on alternative causes of action, and this fact was clearly understood by the defendant, as appears from the 14th paragraph of his written statement. Under these circumstances there seemed no objection to the plaintiffs relying on alternative grounds which, as pointed out by the Subordinate Judge, are not inconsistent.

Having thus dealt with certain preliminary points in this case, we now turn to the main questions, which are as follows:—

1. Whether Rupaliba could bind the defendant personally to pay the debts incurred?

[69] 2. Whether she was competent to pledge his ornaments, and did validly pledge them?

3. Whether the claim is time-barred, either as against the defendant personally, or to recover payment by the sale of the pledged ornaments?

4. Whether any, and if so, which of the items entered in the account were for necessaries and were not liable to be disallowed as forbidden by law?

5. What sum, if any, the plaintiffs are entitled to recover (*a*) from the defendant personally and (*b*) by the sale of the pledged ornaments?

On the first of these issues the decision must, we think, be in the negative. The remarks of the Privy Council in *Waghela Rajsangji* v. *Shekh Masludin* (1) are clear on this point as follows:—"Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the respondent, that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward." With these remarks before us it seems hardly necessary to discuss the matter further. Act XX of 1864 certainly gives no power to a guardian or administrator to bind the ward by personal covenants. The learned Subordinate Judge referred to s. 18 of the Act, which subject to certain restrictions gives the administrator the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, but as this section merely deals with the management of the estate it does not confer any power of rendering the **[70]** minor personally liable for debts contracted. It was suggested in argument that Rupaliba as natural guardian of her son and as appointed to the office by her husband's will had powers irrespective of the Act. But the will gave her no power to bind her son personally, and probably would have been *ultra vires* if it had purported to do so, and no rule of

(1) 11 B. 551 (561).

Hindu law was pointed out which gives a mother such power over her son. Cases in which mortgages and other dispositions of the property by a guardian have been held binding on the ward, do not affect the question, for the power of the guardian subject to certain restrictions to alienate the property for certain purposes was not disputed. The case of *Nathuram* v. *Shoma Chhagan* (1) referred to by Mr. Branson seems in no way inconsistent with the general rule, as it merely shows that the guardian of a ward according to Hindu law may impose a charge on the deceased father's estate for expenses connected with the father's funeral ceremonies. While holding, however, that a minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate, we do not think it follows that he is necessarily exempt from liability—see *Marlow* v. *Pitfield* (2). If the debts were incurred for necessaries (3), he would, we believe, be bound to pay them on the general principle embodied in s. 68 of the Contract Act (IX of 1872), as his liability would not probably be affected by the fact that the loans were advanced at the instance of the guardian—see *Juggessur* v. *Nilumbur* (4). Her contract on his behalf might be ineffectual like one entered into by himself, but the liability to discharge debts incurred for necessaries would remain: see *Walter* v. *Everard* (5). The necessity for them would determine whether or not he was bound to repay them, and not, we think, the reasonable belief of the lender that they were for necessary purposes. The case of *Hunoomanpersaud* v. *Mussumat Babooee* (6) was one in which the guardian had exercised her powers of mortgaging the estate and the ruling that in respect of such a transaction a *bona fide* creditor should not suffer when he had acted with due caution, cannot, in our opinion [71] be extended to a case in which it is sought to make the ward personally liable for the debt. To the latter case the decision of *Barnes* v. *Toye* (7) seems more applicable, in which it was held that where an infant was sued for the price of goods supplied to him on credit, he might for the purpose of showing that they were not necessaries give evidence that when the order was given he was already sufficiently supplied with goods of a similar description, and that it was immaterial whether the plaintiff did or did not know of the existing supply. See also *Johnstone* v. *Marks* (8).

On the second question we think that Rupaliba as guardian and administratrix had power to pledge the ornaments for purposes beneficial to the minor, but not as a security for money previously borrowed, which the minor was under no obligation to pay. The general rule is that a Hindu guardian can pledge the property of her ward for beneficial purposes, and in respect of moveables there is no prohibition in s. 18 of the Act. But the contracting of debt for marriage expenses without the sanction of the District Court is forbidden. However necessary, then, such expenses might be according to the standard of expenditure recognized by the class to which the defendant belongs, no obligation could be imposed on the minor's estate in respect of them, and no pledge of his property to secure debts incurred on account of such expenses would be valid. Mr. Branson contended that the prohibition in s. 29 applied only to marriage debts incurred by a guardian of the person and did not limit the discretion of the administrator of the estate, and that as Rupaliba

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(1) 14 B. 562. (2) 1 P. Wms. p. 558. (3) Simpson on Infants, p. 93.
(4) 3 W. R. 217. (5) L. R. (1891), 2 Q. B. 369.
(6) 6 M.I.A. 393. (7) 12 Q. B. D. 410. (8) 19 Q.B.D. 509.

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was administratrix as well as guardian, she could borrow for the marriage in the former capacity, if not in the latter. We do not think, however, that we should accede to this reasoning, as it would defeat the object of s. 29, which evidently is to limit marriage debts to the extent which the District Court may consider reasonable. Moreover, it seems inconsistent with the simple words of the law, which declares that marriage expenses shall in no case without the sanction of the Civil Court (*i. e.*, the District Court, *vide* s. 34) involve the minor's estate in debt. The contention that in incurring [72] these marriage debts the guardian could fall back on her powers as a Hindu mother cannot, we think, be maintained after she had thought proper to accept the position of guardian and administratrix under Act XX of 1864—*Shurrut Chunder* v. *Rajkissen Mookerjee* (1). The object of s. 29 was clearly to keep the marriage expenses within due limits. What those limits should be is no doubt a matter of opinion. The learned Subordinate Judge thinks that an expenditure of Rs. 100,000 on the marriage was reasonable. In this view possibly the opinion of Rajput Chiefs would coincide, for their extravagance on marriages is notorious; but it is doubtful whether the District Court, which alone had jurisdiction to determine the expediency of such expenditure, would have concurred. The net income of the estate is not clearly established, for it seems doubtful whether Devkaran, when estimating the income at Rs. 1,30,000 (Ex. 108) had taken into account the Government dues of about Rs. 55,000, to which he refers in the latter part of his evidence (Ex. 108). But even if the net income were Rs. 1,30,000, the expenditure would seem to have been very heavy, bearing in mind that apparently ready money was not available to meet it. Various efforts have from time to time been made to curtail such marriage expenses. The subject is referred to in the first volume of Tod's Rajasthan, p. 547, which shows that so long ago as the end of the 17th century efforts were made to limit these expenses. Under the circumstances, we doubt whether we should be justified, on the evidence before us, in treating as necessary such a large expenditure as seems to have been incurred on the defendant's marriage; but however this may be, for the purposes of this case, it must, we think, be held that whether reasonable or not, the marriage debts cannot support a pledge of the minor's ornaments, because they were not sanctioned by the District Court. Cases were referred to, such as *Sreemutty Ahfutoonnissa* v. *Goluck Chunder* (2), in which it was held that where money had been borrowed for necessary purposes and improperly charged on the immoveable property in contravention of the provisions of Act XL of 1858, which correspond with s. 18 of the Bombay Act, the ward was in equity bound to [73] pay off such charges before recovering the property. But such cases do not seem applicable, as they were decided on the ground that the object of the debts was legitimate. Here, so far as the marriage debts were concerned, it seems to us that they were forbidden by law. Consequently, we think that these marriage debts, the payment of which could not be enforced against the minor's estate, do not constitute a valid charge on the ornaments.

In regard to the pilgrimage debts, we think the objection prevails that they cannot be treated as necessaries. Doubtless, we have to determine what are necessaries according to Hindu ideas, and a pilgrimage may be looked upon as beneficial. But we think we should be extending the meaning of the term "necessaries" very much beyond the meaning

(1) 15 B. L. R. 350.

(2) 22 W. R. 77.

that has hitherto been assigned to the word if we were to sanction as a binding charge on the defendant a debt contracted for a pilgrimage not undertaken in discharge of any urgent spiritual duty, which it was obligatory on him to perform. No authority has been shown to us amongst cases decided, in which a guardian has been allowed to borrow money on his ward's behalf for such a purpose. Turning to the evidence it is difficult to find what was the necessity for a pilgrimage at such an inconvenient time (when it may be presumed the treasury was empty, as otherwise there could have been no need to borrow). Rupaliba deposes on the subject as follows:—"I had made a vow to make a pilgrimage when the case against me in connection with the Kunwar Saheb was pending. Consequently I went on that pilgrimage." There is, however, nothing to show that there was any need to carry out her vow at the particular time selected, when she went with considerable pomp, taking with her her son and 75 followers; nor does it appear that the defendant was bound by the vow. In such a matter a guardian ought to exercise ordinary prudence. Expenditure that might be proper, if money were plentiful, ceases to be so when it has to be met by borrowing. We cannot then hold that the pilgrimage expenses can be treated as necessaries so as to bind the defendant to repay them.

Besides the pilgrimage and marriage expenses there are some other items, about which we are not prepared at present to express an opinion. If it can be shown that they were actually applied to [74] necessary purposes, and were binding debts on the minor when in 1890 Rupaliba sent the ornaments to the plaintiffs, these ornaments would doubtless be pledged for them and could be sold to pay them off. But, unless it can be shown that they were binding debts when the deposit took place, it is clear, we think, that the ornaments were not legally pledged. The loans were not advanced in the first instance on their security. The cases, therefore, quoted to show that where a guardian borrows money on mortgage the lender is only bound to make reasonable enquiries as to the beneficial nature of the loans and is not bound to see to their application, do not seem relevant. Here, the money was not borrowed on mortgage or pledge. It was borrowed on personal security, and by a subsequent deposit of the ornaments to avert a suit the guardian could not charge them, unless the minor was at the time of such deposit liable to be sued for the debt. We find, therefore, that there was no valid pledge of ornaments except in so far as there may have been debts due in 1890 by the defendant personally for necessaries supplied to him or for money lent and expended on necessaries.

Having regard to the foregoing opinions the question of limitation becomes one of less importance, but as the matter was argued, and as it may still determine the defendant's liability in case any of the items are found to be on account of necessaries, it is expedient to dispose of it. It appears to us that the acknowledgment of the guardian would not bring within time items otherwise time-barred, as she was not the agent of her ward. On this point there seems to be a difference between the recent decision of the Madras High Court in *Sobhanadri Appa Rau* v. *Sriramulu*(1) and the earlier decisions of the Calcutta High Court in *Azuddin Hossain* v. *Lloyd* (2) and *Wajibun* v. *Kadir Buksh* (3), but with the utmost deference to the opinion of the learned Judge who decided the former we

(1) 17 M. 221. (2) 13 C.L.R. 112. (3) 13 C. 292.

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think that the decisions of the Calcutta High Court are more consistent with s. 19 of the Limitation Act. They do not seem at variance with *Chinnaya Nayudu* v. *Gurunatham Chetti* (1) and *Bhasker Tatya Shet* v. *Vijalal Nathu* (2), [75] in which it was held that the manager of a Hindu family could by his acknowledgment prolong the period of limitation. The manager may, for the purposes of s. 19, be the agent of his adult co-parceners, but it is difficult to see how the guardian of a minor can be treated as an agent. It was, we believe, admitted in argument that Rupaliba's power to prolong the period of limitation depended on her power to bind the minor by her contracts. The suit, therefore, seems time-barred so far as the defendant's personal liability is concerned, except in respect of the small item borrowed after 4th November, 1888. If the pledge is good in respect of any items, the suit is not time-barred to enforce payment by the sale of the ornaments, which were only deposited in 1890.

On the 4th issue it is unnecessary to say more, as the question of necessaries and the effect of s. 29 of the Minors' Act have already been sufficiently discussed. Mr. Branson referred to the defendant's evidence, from which it appears that he is in possession of ornaments obtained for him from the plaintiffs at the time of his marriage, and contended that it would be very inequitable that he should keep them without payment. It is greatly to be regretted that the defendant should retain them on these terms, but it seems impossible to give the plaintiffs relief in respect of them. Had they sued within the period of limitation to recover them on the ground that they were not meant to be given gratuitously, and that the defendant could not retain them without paying for them, they might perhaps have got a decree; but they have not done so. We have come to this conclusion with hesitation, but the reluctance with which we have arrived at it has been somewhat lessened by the consideration that the plaintiffs have on their side received ornaments admittedly valued at Rs. 20,966-0-0 which after this lapse of time it may possibly be difficult for the defendant to reclaim, denying, as he does, the validity of the contract on which they are said to have been delivered.

Subject, then, to the allowance of any items for which the ornaments may be found to have been duly pledged, the decree must be reversed, and the claim rejected, with costs throughout.

Decree reversed.

(1) 5 M. 169. (2) 17 B. 512.

20 B. 76.

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[76] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

BALKISHAN SHIWA BAKAS (*Original Plaintiff*), *Appellant v.* WAGARSING (*Original Defendant*), *Respondent.**

[6th November, 1894.]

Succession Certificate Act (VII of 1889), s. 4—Application for execution by legal representative of decree-holder without certificate—Necessity of certificate—Limitation Act (XV of 1877), art. 179, cl. 4, sch. II—Execution of decree.

An application for execution of a decree made by the legal representatives of a deceased decree-holder, without the production of a certificate under the Succession Certificate Act (VII of 1889), is nevertheless one made " in accordance with law " within the meaning of art. 179, cl. 4, of the Limitation Act (XV of 1877).

[R., 31 M. 77=17 M L J. 566; 13 Bom L.R. 22=9 Ind. Cas. 349; 9 C.L.J. 443 (449) =13 C.W.N. 533; 14 C.L.J. 55=15 C.W.N. 925=11 Ind. Cas. 187.]

SECOND appeal from the order of A. S. Moriarty, Acting District Judge of Khandesh, in appeal No. 96 of 1893.

On the 19th September, 1887, one Balkishan Shiwa Bakas obtained a decree in the Court of the Joint Second Class Subordinate Judge of Dhulia. After his death, *viz.*, on the 25th August, 1890, his heirs and legal representatives, Bankatlal and Manaklal, presented a *darkhast* for execution of the decree, which was rejected because they did not produce a succession certificate under Act VII of 1889.

The heirs then obtained a certificate under the Act, and on the 26th September, 1892, presented a fresh *darkhast* for execution. The decree was then transferred for execution to the Court of the Subordinate Judge at Nandurbar under s. 224 of the Code of Civil Procedure (Act XIV of 1882).

The learned Judge held that the first *darkhast* of 25th August, 1890, was not in accordance with law, having been presented by the heirs of the deceased decree-holder without the succession certificate as required by s. 4 of Act VII of 1889. He was, therefore, of opinion that the second *darkhast* of 26th September, 1892, was barred by limitation, having been made more than three years after the date of the decree. The second *darkast* was, therefore, dismissed and this order of dismissal was upheld on appeal by the District Judge.

The heirs of the decree-holder thereupon appealed to the High Court.

[77] *Vasudeo Gopal Bhandarkar*, for appellants.—Section 4 of Act VII of 1889 does not provide that an application for execution cannot be made without the production of a certificate. It merely provides that the Court shall not proceed upon such application except on the production of the certificate. That shows that the certificate may be produced *after* the application is presented.

In the present case the first *darkhast* of 25th August, 1890, was an application " in accordance with law " within the meaning of art. 179, cl. 4, of Act XV of 1877—*Brojo Nath* v. *Isswar* (1); *Hafizuddin* v. *Abdool* (2); *Mangal Khan* v. *Salim-ullah Khan* (3); *Mahammad* v. *Lalli* (4).

There was no appearance for the respondent.

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* Second Appeal, No. 224 of 1894.

(1) 19 C. 482. (2) 20 C. 755. (3) 16 A. 26. (4) 8 C. 422.

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JUDGMENT.

JARDINE, J.—The two lower Courts have rejected the *darkhast* as barred by limitation, holding that the earlier *darkhast* of the 25th August, 1890, although presented within three years of the date of the decree, was nugatory in reference to art. 179, cl. 4 of the second schedule of the Limitation Act (XV of 1877), because the heirs who presented it did not produce the certificate requisite under s. 4 of the Succession Certificate Act (VII of 1889).

The only case cited in the Courts below appears to have been *Kendiga Madi Chetti* v. *Soobbamma* (1), which interprets s. 20 of Act XIV of 1859.

Mr. Vasudeo Bhandarkar, who argues this appeal, relies on *Brojo Nath* v. *Isswar* (2), *Hafizuddin* v. *Abdool* (3) and *Mangal Khan* v. *Salimullah Khan* (4). where it was held that an application without the production of the certificate under the Succession Certificate Act was nevertheless one made "in accordance with law" within the meaning of art. 179, cl. 4. *Ramasami* v. *Seshayyangar* (5) and *Krishnaji* v. *Vithal* (6) appear to have been decided on the same principle, and the Privy Council case *Mahammad* v. *Lalli* (7) has also been cited.

We have considered an authority of a contrary tendency, *Manohar* v. *Gebiapa* (8), which is a construction of art. 179. [78] cl. 4, in connection with the Dekkhan Agriculturists' Relief Act, XVII of 1879. The words used in s. 47 of that Act are:—"No application shall be entertained unless the plaintiff produce the certificate." But in the Succession Certificate Act, s. 4, the words are:—"No Court shall proceed upon an application . . . . to execute . . . a decree . . except on the production, &c."

On consideration of the difference of language used, "entertain" meaning something different to "proceed," we are of opinion that the last cited decision does not conflict with those passed at Calcutta and Allahabad referred to above. We follow them as being in accordance with the tendency of the decisions on art. 179, cl. 4.

The Court, therefore, reverses the decrees of the Courts below, and directs the original Court to proceed with the execution as not barred by limitation; the respondent-defendant to pay the costs incurred in the two lower Courts.

Order reversed.

(1) 5 M.H C.R. 453. (2) 19 C. 482. (3) 20 C. 755. (4) 16 A. 26.
(5) 6 M. 181. (6) 12 B. 625. (7) 8 C. 422. (8) 6 B. 31.

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Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

SONSHET ANTUSHET TELI (*Original Defendant*), *Appellant v.* VISHNU BABAJI JOHARI (*Original Plaintiff*), *Respondent.**

[8th November, 1894.]

Khoti Settlement Act (Bom. Act I of 1880)—Landlord and tenant—Tenancy—Presumption as to nature of tenancy in absence of evidence—Payment of rent—Mortgage by tenant—Sale of tenant's interest—Rights of purchaser—Heirs of tenant cannot surrender tenancy, or affect purchaser's title—Transfer of tenancy in khoti village—Ordinary tenancy—Occupancy tenancy.

One Atmaram, who held certain land as tenant, mortgaged it to Hirshet and shortly afterwards died. There was no evidence to show the term of Atmaram's tenancy. After his death the plaintiff Vishnu, who was his brother, became tenant of the land and paid rent to the khots. Some years subsequently Hirshet (the mortgagee) sued to enforce his mortgage and made the plaintiff Vishnu and his two sisters parties. He obtained a decree and sold the mortgaged land in execution. Sonshet bought it and now claimed possession. Vishnu contended that Atmaram's interest terminated at his death, and that Sonshet was, therefore, not entitled to possession.

[79] *Held*, that Sonshet was entitled to possession. The fact that Atmaram had paid rent to the khots showed that he was their tenant. In the absence of all evidence on the subject, the presumption was that the tenancy was an ordinary tenancy from year to year continuable until legally terminated. There was nothing to show that the khots had ever terminated it. Atmaram's heir could not surrender it to the prejudice of the mortgagee. Sonshet, therefore, had purchased a tenancy which had never been legally put an end to, and was entitled to possession.

Under the Khoti Settlement Act (Bom. Act I of 1880) occupancy tenancies are not transferable except under certain circumstances, but there is no prohibition to the transfer of an ordinary tenancy.

[R., 30 B. 290=7 Bom. L.R. 941.]

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnagiri.

Suit for possession of land.

The land in question was originaly held by one Atmaram, a Khatedar, who mortgaged it to one Hirshet. Atmaram died in 1882; and after his death the plaintiff Vishnu, who was his brother, paid the rent for that year and got the khots to enter his name as khatedar.

In 1886 the mortgagee Hirshet brought a suit on his mortgage to which he made Atmaram's brother Vishnu (the plaintiff) and also his sisters Bhimabai and Jankibai parties. He obtained a decree, and in execution the land was sold in 1890 and bought by Sonshet. Subsequently Vishnu sued the mortgagee (Hirshet) and others in the Mamlatdar's Court to recover possession, but his suit was dismissed. He thereupon brought a suit in the Court of the Subordinate Judge of Devgad (No. 158 of 1890) for a declaration of his title to the land and for ejectment of defendants. The purchaser Sonshet was afterwards made a party to that suit

Vishnu obtained a decree and proceeded to take possession, but was obstructed by Babu Dnond, who claimed as tenant under the purchaser Sonshet. Plaintiff applied to the Court under s. 328 of the Civil Procedure

* Second Appeals Nos. 787 and 788 of 1892.

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Code (Act XIV of 1882), and the application was registered as a suit (No. 254 of 1891) between Vishnu as plaintiff and Babu and Sonshet as defendants.

The Subordinate Judge held that Sonshet by his purchase had become owner of the land, and he dismissed the plaintiff's [80] (Vishnu's) suit, and issued a perpetual injunction against the execution of the decree in suit No. 158 of 1890.

Vishnu appealed against this decision (No. 254 of 1891), and the defendants in suit No. 158 of 1890 appealed against the decision in that suit. The appeals in both suits were heard by the District Judge of Ratnagiri. He reversed the decision in suit No. 254 of 1891 and confirmed the decree in suit No. 158 of 1890, and awarded possession of the lands to Vishnu, the plaintiff in the latter suit. He held that, as Sonshet had not shown what title he had purchased at the sale in 1890, he could not succeed in his claim against the plaintiff Vishnu, who had had possession.

The following is an extract of the judgment of the District Judge in appeal in suit No. 158 of 1890:—

"Suit No. 158 of 1890 was a simple ejectment suit against certain defendants, ten in number, and Sonshet was afterwards added as defendant No. 11. A decree for possession was awarded against all but Sonshet (see Ex. 18), who had declared to have been unnecessarily joined. Plaintiff, on going to take possession, was resisted by Sonshet's tenant, and he, therefore, now sues Sonshet, who was then not in possession but has since taken possession and claims on his title. The papers in the former case are now before me in appeal, and that appeal and this have been heard on consecutive days. It is proved that plaintiff had possession for six or eight years prior to his dispossession by the defendants in the former suit. As Sonshet and his tenant have subsequently taken possession, plaintiff is entitled to oust them, unless Sonshet can prove that he is the real owner of the land. From Ex. 16 it is clear that he purchased Atmaram Mahadevbhat's right, title and interest in the land in dispute on the 11th January, 1890. With the papers in both cases before me, I am unable to say with certainty what right, title and interest Atmaram had. From Ex. 31 it appears that he paid various sums of money to Sundrabai kom Govind Ramchandra and other people calling themselves khots. Perhaps these are the khots of the village. Granting that they are, I do not know whether Atmaram's rights, if he be a tenant at all, were those of a dharekari, or *quasi*-dharekari, occupancy tenant or ordinary tenant, transferable or non-transferable. The khots are the persons principally interested, and they are not called as witnesses, nor are they made parties to the suit. I am of opinion that Sonshet has failed to prove his case."

Sonshet preferred a second appeal.

Manekshah J. Taleyarkhan, for the appellant.—We claim as purchaser at a Court-sale held in execution of the decree against Atmaram. We have bought Atmaram's rights. The plaintiff is Atmaram's heir. Whatever equities bound Atmaram, bind the plaintiff.

[81] *Daji Abaji Khare* with *Vasudev G. Bhandarkar*, for the respondent (plaintiff).—Atmaram's tenancy terminated at his death, and Sonshet, who purchased Atmaram's interest, has not shown any title to hold the land after that time. He has not proved the nature of Atmaram's tenancy.

[FULTON, J.—If so, Atmaram must be presumed to have been a tenant from year to year.]

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An annual tenant in a khoti village cannot mortgage his tenant right. Section 9 of the Khoti Act (Bom. Act I of 1880) enacts that even an occupancy tenant cannot mortgage his land, much less can a tenant from year to year—Bombay Gazetteer, Vol. X, p. 211; *Narayan Balvantrao* v. *Balu Vithu* (1). Moreover, a landlord is not bound to continue a tenancy from year to year after the death of his tenant—*Govind Raghunath* v. *Narayan Dikshit* (2). The khot could put an end to Atmaram's tenancy after his death by giving the land to another. Accordingly Vishnu became the khot's tenant in his own right. Atmaram's tenancy having come to an end at his death, neither his mortgagee, nor the purchaser in execution of the decree on the mortgage, can now claim any title to the land.

JUDGMENT.

FULTON, J.— Both these appeals have been heard together, the parties and the land in dispute being the same. It appears that the land originally stood in the name of Atmaram, who mortgaged it without possession to one Hirshet. Atmaram was the natural brother of the plaintiff Vishnu, and was adopted by his maternal grandfather Mahadevbhat, who was originally holder of the land. He died about 1882, and after his death the plaintiff paid the rent due for the year and got the khots to enter his name as khatedar. Some years after Atmaram's death Hirshet sued to enforce his mortgage, and made Atmaram's sisters Bhimabai and Jankibai and the plaintiff parties. He obtained a decree, and on bringing the mortgage land to sale, it was bought by the defendant Sonshet. The question now before us is, whether Sonshet by that purchase obtained a right to possession.

[82] The learned Assistant Judge has correctly pointed out in his judgment in appeal No. 556 of 1891 that by this transaction Sonshet purchased the right, title and interest of Atmaram, but when stating that he could not say for certain what right, title and interest Atmaram had, he failed to draw the usual presumption from the fact of Atmaram's paying rent to the khots that he held the land as their tenant. For what term the tenancy was to continue, is not proved; but in the absence of all evidence on the subject, the Court should have presumed that it was an ordinary tenancy from year to year continuable until legally terminated —*Govind* v. *Narayan* (2).

Mr. Vasudev Gopal contended that the entry of the plaintiff's name by the khots as tenant instead of the name of the sister or sisters of the deceased, who were the real heirs, would terminate the tenancy; but although on the assumption that the tenancy was an annual one, the khots were entitled to determine it by giving the proper notice, there is nothing to show that they have ever done so. The heirs themselves could not surrender it to the prejudice of the mortgagees' rights—*Sukru* v. *Tafazzul* (3), and their acquiescence, if they did acquiesce, in the entry of the plaintiff's name as tenant would not have the effect of terminating it.

Under these circumstances, Sonshet being purchaser of a tenancy which has never been legally put an end to, is entitled to be put into possession. No question of limitation arises, as twelve years have not elapsed since Atmaram's death.

(1) P.J. (1879) 243. (2) P.J. (1877) 182. (3) 16 A. 398 (399).

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Mr. Vasudev Gopal contended that under the Khoti Act the tenancy could not be transferred; but on reference to the Act we find that while occupancy tenancies are not transferable except under certain circumstances, there is no prohibition to the transfer of an ordinary tenancy such as in the absence of evidence on the subject we must presume Atmaram's tenancy to have been. The reason for this distinction is apparent. In case of an ordinary tenancy the khot can at any time get rid of the tenant by giving him notice; whereas, if a transfer of an occupancy tenancy could be carried out against his wishes, he might be provided with a tenant whom he did not like and could not eject.

[83] We must point out that as Sonshet was made a party to suit No. 158 of 1890 the Court should have decided as to his title. The suit was not brought within six months of the alleged dispossession, and, therefore, the plaintiff was not entitled to a decree until after adjudication on Sonshet's plea that he was not the owner. If the plaintiff was not the owner, he could not be awarded possession from defendants Nos. 1 to 10; and there was no authority for refusing to determine the issue of the title raised by defendant No. 11, and thus rendering necessary a second suit.

We now reverse the decrees of the Assistant Judge in both appeals and that of the Subordinate Judge in suit No. 158 of 1890, and we restore that of the Subordinate Judge in suit No. 254 of 1891, and direct that plaintiff do pay all Sonshet's costs in both suits throughout.

Decrees reversed.

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20 B. 83.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE GULABDAS BHAIDAS.* [14th November, 1894.]

District Municipal Act (Bombay Act VI of 1873), s. 54—"Offensive liquid"—Does not include mere waste or dirty water.

A person does not render himself liable to a penalty under s. 54 of Bombay Act VI of 1873 for allowing mere waste or dirty water to run from his premises on to a public street, unless the water is "offensive."

[D., 30 B. 558=8 Bom. L.R. 457 (465)=4 Cr. L.J. 23.]

REFERENCE by T. S. Hamilton, Sessions Judge at Surat, under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The reference was in the following terms:—

"Under the provisions of s. 438 of the Code of Criminal Procedure, I have the honour to forward, for the consideration of their Lordships, the papers and proceedings in a criminal case, wherein Gulabdas Bhaidas was convicted on the 8th August last by A. Wood, Magistrate, First Class, of this district, of an [84] offence punishable under ss. 54, 74 of the Bombay District Municipal Act VI of 1873, and sentenced to pay a fine of Rs. 25, which was paid.

"2. I am of opinion that the offence was not proved against the accused, and I beg to recommend that the conviction should be set aside for the following reasons.

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* Criminal Reference, No. 121 of 1894.

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"3. Section 54 runs thus:—'Whoever causes or allows the water of any sink or sewer or any other offensive liquid, or other matter from his premises, or from his land, to run, drain, or be thrown or put upon any road shall be liable to the penalty hereinafter provided.'

"4. In the present case the offence held proved against the accused was that of allowing foul water to run out of his drain on to a public street. The first two issues, therefore, as laid down by the Magistrate, First Class, were the following :—

"(1) Did foul water flow from the drain in question?

"(2) Did it flow on to a public road?

"These he decided in the affirmative for the reasons stated, *viz.*:—

"'The first question must be answered in the affirmative. I cannot doubt the existence of the nuisance as testified to by the Sanitary Superintendent and Inspector, and the neighbours;' and 'the mouth of the drain is under the threshold of the back door of the accused's compound. The ownership of some of the ground within that doorway is under dispute, but up to it the public unquestionably have access, for it is the only approach to the house abutting on Mr. Gulabdas 'premises.'

"5. I beg to submit that these are not sufficient reasons for finding on the two issues in the affirmative. In the first place, I can find no evidence that any nuisance was caused by the alleged flow of water. From the wording of the section, it would seem that the water must be 'offensive' or, as the Magistrate puts it, 'foul,' that is to say, it must be something more than mere dirty water, or water which is not quite clear. It must have an offensive smell, as indeed water from a sink or sewer generally has.

[83] "6. Now the witnesses for the prosecution mostly speak of the water issuing from the hole in question as being 'dirty'—nothing more. One says it was dirty like 'bathing water.' Another says it was 'clear rather than muddy.' Not a single witness says it came from a sink or a sewer, or was offensive. One witness goes into detail, and says it was water 'which ran from the body of the accused man's little son, who was being washed by a groom.' I submit, therefore, that the finding on the first issue was wrong.

"7. As to the road on to which the water was flowing, there is ample evidence that it was a private lane, and not a public road. To cite only prosecution witnesses :—

"*Sanitary Inspector*.—'The lane is open on one side only. The *gully* or lane is 5 feet broad.'

"*Rangildas Ramdas* :—'It is a blind alley. It is known as Gulabdas Vakil's lane.'

"*Wallabhdas Kalyandas*.—'It is a blind alley.'

"*Vithaldas Pranjivandas*.—'I live next door to Mr. Gulabdas. The ground is not either Government or Municipal. There is only the right of way of accused and myself over it. No one else has a right of way. It is not a public road.'

"8. I am unable, in face of this evidence for the Crown, to understand how the Magistrate could have held it to be a public street."

The reference was heard by a Division Bench (Jardine and Ranade, JJ.).

Jardine (with him *Goverdhanram M. Tripati*), for the accused.—Section 54 of Bombay Act VI of 1873 has no application to the present case. There is no evidence that the waste water which the accused allowed to run out of his drain was "offensive"; and unless it is offensive,

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the section does not apply. Besides, the waste water did not run on to a public street. It was a blind alley used by the accused and his neighbours. What is a "street" is explained in *Kalidas* v. *The Municipality of Dhandhuka* (1).

[86] There was no appearance for the complainant.

JUDGMENT.

PER CURIAM:—We concur with the Sessions Judge in holding that neither the evidence nor the findings justify a conviction under s. 54 of Bombay Act VI of 1873. The Magistrate was satisfied that the water complained of was foul. But there is no finding on evidence that it was "offensive," and the Courts may not enlarge the meaning of that word so as to include mere waste or dirty water. As regards the definition of "street" in Bombay Act II of 1884, we think the Magistrate should have considered the judgment in *Kalidas* v. *The Municipality of Dhandhuka* (1), interpreting the older definition.

The Court annuls the conviction and sentence.

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20 B. 86.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

RANCHOD MORAR (*Original Plaintiff*), *Appellant* v. BEZANJI EDULJI AND OTHERS (*Original Defendants*), *Respondents.**

[26th November, 1894]

Civil Procedure Code (Act XIV of 1882), ss. 409, 413—Application for leave to sue in forma pauperis—Refusal of such application a bar to subsequent application in the same right—Jurisdiction—Plea of jurisdiction.

The plaintiff applied for leave to sue as a pauper for the redemption of a mortgage. As he did not proceed with the application, it was rejected with costs on 29th November, 1888.

On the 4th February, 1890, plaintiff again applied for leave to sue as a pauper for the redemption of the same mortgage There being no opposition, the application was granted, and was registered as a suit.

On the 20th September, 1893, when the suit had been heard nearly to the end, the Government Pleader intervened, and applied that it should not be allowed to proceed further until the plaintiff had paid the costs incurred by Government in opposing the first application, which had been rejected. But the plaintiff refused to do so, and thereupon the Subordinate Judge dismissed the suit with costs under s. 413 of the Code of Civil Procedure (Act XIV of 1882), and ordered the plaintiff to pay the Court-fees under s. 412.

Held, on appeal, (1) that the order rejecting plaintiff's first application was an order under s. 409 of the Code of Civil Procedure; (2) that both the applications [87] were made in respect of the same right to sue; (3) that the order rejecting the first application operated as a bar under s. 413 of the Code to the entertainment of the second application, and (4) that such bar being one to the jurisdiction of the Court, the Subordinate Judge was not only competent but bound to take notice of it at any stage of the suit.

APPEAL from the decision of Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Surat, in suit No. 2 of 1890.

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* Appeal No. 161 of 1893.

(1) 6 B. 686.

Suit in *forma pauperis* for redemption. In 1888 the plaintiff applied, as heir of one of the mortgagors, for leave to sue as a pauper for redemption of certain property which had been mortgaged in 1873 for Rs. 19,500 by his father and uncles.

On 29th November, 1888, this application was rejected for want of prosecution. In rejecting the application, the Subordinate Judge passed the following order :—

"Since the applicant does not wish to proceed with the application, I reject his application to be allowed to sue in *forma pauperis* and order him to pay opponent's costs and bear his own."

On the 4th February, 1890, the plaintiff again applied for leave to sue as a pauper for redemption of the same mortgage of 1873.

The application contained the following clause :—

"All the properties in mortgage belonged to my grandfather by right of ownership. I have, therefore, as a grandson a share in my own right in the ancestral property. Therefore, under the said right, as also under my own right as one of the male survivors of a joint Hindu family, I alone have brought this suit for redeeming the mortgage."

This application, not being opposed by the defendants, was granted by the Subordinate Judge, and it was registered as suit No. 217 of 1890 under s. 410 of the Code of Civil Procedure (Act XIV of 1882).

On the 20th September, 1893, the suit being then nearly at an end, the Government Pleader applied to the Court, praying that it should not be allowed to proceed further until the plaintiff had paid the costs incurred by Government in opposing his previous application for leave to sue as a pauper.

The plaintiff having refused to do so, the Subordinate Judge dismissed the suit, holding that the order of the 29th November, 1888, rejecting the first application for leave to sue in *forma* [88] *pauperis* was made under s. 409 of the Code of Civil Procedure, and that, therefore, the second application was barred under s. 413 of the Code.

Against this order of dismissal the plaintiff appealed to the High Court.

Kalabhai Lalubhai, for appellant (plaintiff).—Section 409 of the Code of Civil Procedure clearly refers to orders passed on the merits ; it contemplates an enquiry into the question of pauperism, and it is only after holding such an inquiry that the Court can make an order under that section either allowing or refusing to allow the applicant to sue as a pauper. The order rejecting our first application was not passed after inquiry into our pauperism. It was passed merely because we did not wish to proceed with the application. The order was, therefore, not passed under s. 409 of the Code. The lower Court's order as to costs was illegal and *ultra vires*—*The Collector of Ratnagiri* v. *Janardhan Vithal* (1). The Government Pleader can only intervene under the latter part of s. 413 of the Code, if a regular suit is instituted in respect of the same right to sue. In the present case no such suit was filed, and the latter part of s. 413 does not apply. The Government Pleader was present in Court when the second application for leave to sue in *forma pauperis* was granted and registered as a suit. He did not then contend that the application was barred under the first part of s. 413. He must, therefore, be deemed to have waived the objection. It was too late for him to raise any objection after the suit had proceeded for over three years, and was nearly

(1) 6 B. 590.

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20 B. 86.

ripe for judgment; and then the only objection taken was that the suit should be stayed till the Court-fees were paid. He ought not to have been allowed to raise even this objection at the last stage of the suit—*Parkinson* v. *Hanbury* (1). Section 413. cl. 2. does not apply to a pauper suit. As regards cl. 1, it has no application to the present case, as we did not sue in respect of the same right of action. On the former occasion plaintiff sued as heir of his father, *i. e.*, in a representative capacity. On the second occasion plaintiff sued in his own right as the sole surviving member of a joint family. The second application was, therefore, [89] not barred by the first. The Subordinate Judge was not competent *suo motu* to take the objection under s. 413. He had already passed an order allowing the applicant to sue as a pauper. This order could only be set aside either on a review or on an appeal to the High Court—Refers to *Amichand* v. *The Collector of Sholapur* (2). *The Collector of Kanara* v. *Krishnappa* (3).

Manekshah Jehangirshah, for respondent No. 1.

Rao Saheb *Vasudeo J. Kirtikar*, Government Pleader, for respondent No. 9 —The order dismissing the first application for leave to sue in *forma pauperis* could only have been made under s. 409 of the Code of Civil Procedure. There is no other section under which it could be made. That being the case s. 413 applies, and the Court had no jurisdiction to entertain a subsequent application for leave to sue in *forma pauperis* in respect of the same right of action. This objection to the jurisdiction of the Court could be raised at any stage of the suit—*Muhammad Ismail* v. *Chattar Singh* (4); *Harsaram Singh* v. *Muhammad Raza* (5); *Abaji* v. *Ramchandra* (6). It is contended for the appellant that no such objection was taken either by the defendants or by the Government Pleader when the second application was granted and registered as a suit. But the consent or acquiescence of parties cannot confer on the Court a jurisdiction which it does not possess. Where there is an inherent incompetency in a Court to deal with the question before it, the omission to raise the question of its jurisdiction does not operate as a waiver—*Bibi Ladli Begam* v. *Bibi Raje Rabia* (7). Section 11 of the Code of Civil Procedure is conclusive on the point. It prevents a Court from entertaining any suit the cognizance of which is barred by any enactment for the time being in force. As to the question whether both the applications for leave to sue in *forma pauperis* were made in respect of the same right to sue, it is clear that the plaintiff sought on both occasions to redeem one and the same mortgage. The fact that on the former occasion he sued as heir of his father, and that afterwards he sued in his own right as the sole surviving member of his family, does not alter the cause of action.

JUDGMENT.

[90] JARDINE, J.—Mr. Kalabhai for the appellant has contended that the first order which was made by Mr. Modi, Subordinate Judge, "rejecting" the application, is not one made under s. 409 or 412. He was, however, unable to show us any other section under which it might have been passed. It was made in an inquiry expressly made under s. 408. We are satisfied that we can refer it to s. 409.

Section 413 then came in, creating, in my opinion, a bar to subsequent pauper suit by the following words:—"An order of refusal to allow the applicant to sue as a pauper shall be a bar to any subsequent application

(1) 22 L.J. N.S. Ch. 979. (2) 13 B. 234. (3) 15 B. 77. (4) 4 A. 69.
(5) 4 A. 91. (6) P. J. (1885), 34. (7) 13 B. 650.

of the like nature by him in respect of the *same right* to sue." Assuming for the moment that the words "same right" apply to the second application, s. 413 constituted a statutable bar to the suit under s. 11. If the result of the first application had been stated in the second, the Court would have rejected it under s. 54 (*c*) and 407 (*c*). But the Subordinate Judge, Mr. Modi, apparently *per incuriam* did not do so. After taking the evidence on the merits the bar created by s. 413 was pointed out to his successor, Mr. Nanavatti, who dismissed the plaint, but explained that he looked on the cause as an application to sue as a pauper. Mr. Modi might, after refraining, as he did, from rejecting the second application at the preliminary hearing under s. 407 (*c*), have refused it under s. 409 at the formal hearing under this last section—*Chattarpal* v. *Raja Ram* (1), as the statutable bar which I take to be an objection under s. 407 (*c*), might then have been pleaded by the opposite party or otherwise have come to the Subordinate Judge's knowledge.

Section 409 ends thus—"The Court shall then either allow or refuse to allow the applicant to sue as a pauper." A refusal to allow has been held open to review—*Adarji* v. *Manikji* (2). Mr. Kalabhai argues that, as there was no refusal, but s. 410 was applied, the leave given to sue as a pauper was final, except so far as it might be altered by review in the Court of the Subordinate Judge or by revision of the High Court. He cited *Parkinson* v. *Hanbury* (3), where Lord Justice Knight Bruce **[91]** treated three years' acquiescence in an order giving leave to sue as a pauper as waiver on the part of the defendant. The report is curt; and there is no mention of bar to jurisdiction, a question arising under our Code. I do not think that question is excluded from the present case by the last sentence of s. 409—*Chattarpal* v. *Raja Ram* (*supra*). I assent so far to Mr. Kalabhai's argument as to hold that when Mr. Modi allowed the second application under s. 409, the cause rightly proceeded as a suit under s. 410. The Subordinate Judge, Mr. Nanavatti, heard it on the merits; and at a late stage the bar created by s. 413 came to his knowledge. Unless that bar is treated as mere procedure as something that vanished under the last sentence of s. 409 as soon as the second application to sue as a pauper was allowed, the bar was one to the jurisdiction, and the Subordinate Judge, being under s 410 required to deal with the cause as a suit, was right in dismissing it. He has rightly held that the final order is under s. 412; and under that section the directions about costs and Court-fees are legal. The cause had reached its penultimate stage when the bar to jurisdiction was pointed out. The decision in *Shekh Isuf* v. *Sidi Ibrahim*(4) seems to deal with a cause that had gone no further than orders allowing and rejecting the application.

I have considered whether the first part of s. 413 deals with mere procedure or goes to the jurisdiction. The simile of a "bar" used there as in ss. 11 and 14 points to jurisdiction; the order of refusal under s. 409 prevents the applicant alleging pauperism any more in respect of the same right to sue. The two reasons for the rule of *res judicata*, the interest of the State that there should be an end of litigation and the hardship on the individual—*Lockyer* v. *Ferryman* (5), *Thakore Becharji* v. *Thakore Putaji* (6)—apply to the decision on pauperism, under s. 409. There is no reason for encouraging pauper suits; and I do not think the mere omission of the first Subordinate Judge nor the laches of the opponent take the present

(1) 7 A. 661. (2) 4 B. 414. (3) 22 L J. N.S. Ch. 979.
(4) P.J. (1876), 96. (5) L.R. 2 App.Cas. 519 (530). (6) 14 B. 31 (35).

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case out of the rule, especially as the laches of an opponent [92] may be collusive or result from a wish to get the suit tried cheaply to the injury of the public revenue. In *Naru* v. *Anpurnabai* (1) the bar is treated as one to the jurisdiction under s. 310 of the Code of 1859. Taking the bar to be such, no consent of parties can confer jurisdiction—*Spooner* v. *Juddow* (2); *The Government of Bombay* v. *Ranmalsingji* (3); *Bibi Ladli* v. *Bibi Raje* (4). The objection may like that of *res judicata* be taken at any stage of the suit or appeal—*Geeasoodin* v. *Ramchandra* (5); *Muhammad* v. *Chattar* (6); *Abaji* v. *Ramchandra* (7) —and the interests of the public revenue I think require us to hold that, as in the present case, the Court may take it when pointed out by the Government Pleader or other *amicus curiæ*.

The next question is, whether the second application is based on the "same right to sue." There has been but little argument on the meaning of this phrase: Mr. Kalabhai only cited *Naro* v. *Anpurnabai*. The phrase must, I think, mean either the same as "cause of action" or something less. If treated as tantamount to cause of action, I would hold that the phrase applies here, on the authorities I relied upon in *Thakore Becharji* v. *Thakore Putaji*. Both applications are for redemption of the same mortgaged property; thus the subject-matter and the relief prayed are the same in both. The *causa petendi* is the same; the applicant says the mortgage is paid off. There is also *eadem conditio personarum* in our opinion. What Mr. Kalabhai seeks to establish is that this part of the exception of *res judicat* does not exist; or, to put the argument in another form, that there is not *eadem quæstio*—*Chinniya* v. *Venkattachella* (8). I incline to think that the phrase "same right to sue" means this question of right or, as it is called in *Shridhar* v. *Narayan* (9), ground of right, though in conceivable cases it may mean *eadem conditio personarum*. Treating it as not commensurate with "cause of action," I am of opinion that it applies to the present case. There is no contradiction between the titles set up in the [93] two applications. In the earlier one he leaves the Court and his opponents to guess how he has a title to sue, as son and heir of his father, as if they could infer something about his status in the Hindu family from this mere description of himself. In the latter application he unfolds his status. There is no real difference between the two.

The Court confirms the decree of the Subordinate Judge with costs; and orders the appellant to pay the usual Court-fees.

RANADE, J.—The decision in this case turns entirely on the construction of ss. 409, 412 and 413 of the Civil Procedure Code. The appellant, original plaintiff, as the heir of one of the mortgagors, applied in 1888 for leave to be allowed to sue in *forma pauperis* for the redemption of a mortgage for Rs. 19 500. That application, No. 78 of 1888, was rejected on 29th November, 1888. The actual words of the order of rejection were as follow:—"Since the applicant does not wish to proceed with the application, I reject his application to be allowed to sue in *forma pauperis*, and order him to pay opponents' costs, and bear his own." Plaintiff again applied in 1889 for leave to sue in *forma pauperis* for the redemption of the same mortgage. The defendants did not either appear to oppose, or did not object, and the Government Pleader only urged that plaintiff was not a pauper. Khan Bahadur Modi granted this application, and it was

(1) P.J. (1874), 218. (2) 4 M.I.A. 353 (375). (3) 9 B. H. C. R. 242.
(4) 13 B. 650. (5) P.J. (1873), 17. (6) 4 A. 69. (7) P. J. (1885), 34.
(8) 3 M. H. C. R. 320 (327). (9) 11 B.H.C. R. 224 (229).

registered as suit No. 217 of 1890. The inquiry lasted over more than three years, and when the case was nearly ripe for judgment, the Government Pleader intervened on the 29th September, 1890, and asked that the inquiry should not proceed further until plaintiff had paid the costs due to Government in respect of his rejected application of 1888. The lower Court advised plaintiff to pay the costs due to Government and the Court-fees in the present suit, but plaintiff declined to do either, and thereupon the lower Court dismissed the plaint with costs under s. 413, and ordered plaintiff to pay Court-fees also under s. 412.

Plaintiff preferred the present appeal in *forma pauperis* from this order of the lower Court. The chief contentions of the appellant before us were—(1) that the lower Court was in error in dismissing the plaint, and in applying s. 413 to this [94] suit. Plaintiff's previous application had not been disposed of under s. 409, and s. 413 was, therefore, not applicable to the case; (2) the lower Court had no jurisdiction to dismiss a plaint which had been duly registered; (3) it was also urged that the two applications were not made in the same right within the meaning of the first clause of s. 413; (4) lastly, it was contended that the order directing plaintiff to pay Court-fees and costs was improperly made under the circumstances of the case.

The issues for consideration are :—

(1) Whether the order rejecting plaintiff's first application was passed under s. 409?

(3) Whether the lower Court was competent to dismiss the plaint under the bar created by s. 413?

(3) Whether the two applications were made in the same right?

(4) Was the order about costs and Court-fees proper under the circumstances of the case?

With regard to the first point, we are of opinion that the lower Court very properly held that the order passed on plaintiff's first application was an order under s. 409 of the Civil Procedure Code. That section no doubt requires the Court either to allow or refuse the application, while the order in question was one of rejection. An order of rejection can no doubt be made under s. 407, Ch. XXVI, but, like the order rejecting plaints (s. 54), it has to be made on preliminary grounds before notice is issued, and before any inquiry is held into the applicant's pauperism. In the present case it is admitted that such an inquiry had commenced, and any order rejecting the application at that late stage cannot be considered to have been passed under s. 407. There may also be orders dismissing the application under ss. 97, 98, and in the circumstances of this case, when the applicant's pleader declined to proceed with the inquiry, such an order might have been made. But, as a matter of fact, the Judge, who decided the application, did not dismiss it, and he did not allow the applicant to withdraw under s. 373. He rejected the application to be allowed to sue as a pauper. [95] This he could only do under s. 409. The word "refuse" is used in s. 408 as equivalent to the word "reject" used in s. 407. In *Baldeo* v. *Gula Kuar* (1), where the applicant had withdrawn his petition to be allowed to sue in *forma pauperis*, and the petition had been struck off, the High Court of Allahabad expressed its view that the application might well be regarded as rejected under s. 409. Plaintiff's first application must, therefore, be regarded as disposed of under s. 409, notwithstanding the slight ambiguity of the words used.

(1) 9 A. 129.

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The next point to be considered is, whether it was competent to the lower Court, after having registered the application as a suit, and gone on with the inquiry for three years, to set aside the order granting plaintiff's application for leave to sue as a pauper, and dismissing the same. The Judge who made the order in 1890 was not the Judge who set it aside in 1893. This circumstance, however, can make no difference, for both orders were passed by the same Court. The appellant's pleader, Mr. Kalabhai, however, contended that the Court, which ordered plaintiff's second application to be registered as a suit, could not set it aside of its own motion without any objection from the other side. It is no doubt true that the defendants did not raise any objection on this head, and even the Government Pleader, who intervened, objected only to the inquiry being allowed to proceed further until the costs due to Government were paid. He urged this objection under the latter portion of s. 413, which objection was plainly out of place, as the present suit was a pauper suit, and not a suit on which full Court-fees had been paid. The lower Court, however, took action under the first clause of s. 413, which provides that "the order of refusal under s. 409 shall be a bar to any subsequent application of the like nature made in respect of the same right to sue." The question we have to consider in this case is thus whether the Court could, of its own motion, cancel its order registering plaintiff's second application as a suit, on the ground that such an application was barred by s. 413. As a general rule, a Court cannot set aside any order passed by it of its own motion, but this rule does not apply to matters involving questions of jurisdiction, limitation, [96] *res judicata*, &c., which take away jurisdiction. Section 11 is explicit on the point, and it has been authoritatively held that when the jurisdiction of the Court is involved, the Judge cannot refuse to entertain the objection if it is patent on the face of the proceeding. In *Geeasoodin* v. *Ramchandra* (1) the objection about *res judicata* was taken notice of even in appeal. To the same effect are the rulings in *Kuppa* v. *Dorasami* (2), *Muhammad Ismail* v. *Chattar Singh* (3); *Harasran Singh* v. *Muhammad Raza* (4); *Abaji* v. *Ramchandra* (5); *Toponidhe Dhirj* v. *Sreeputty Sahanee* (6); *Triloki Nath* v. *Pertab Narain* (7). When the objections do not affect the jurisdiction of the Court, they cannot be urged in appeal if they are not urged in time in the lower Court—*Fuzul* v. *Gafar* (8); *Nawab Mahomed* v. *Moozuffur Hossein* (9); *Ex parte Manohar Bhivrav* (10). Perhaps the case most in point is that reported in *Shekh Isuf* v. *Sidi Ibrahim* (11). There, as here, the first application to sue in *forma pauperis* had been rejected, and a second Judge had admitted a second application, and registered it as a suit. His successor cancelled the order registering the second application, and in appeal this Court reversed the last two orders, and rejected the application which had been registered as a suit. To the same effect is the ruling in *Naro* v. *Anpurnabai* (12), though that case is an authority in regard to another question involved in this case, namely, the interpretation of the words "in respect of the same right to sue" used in s. 413. On the whole, therefore, we feel satisfied that the lower Court was not merely competent but bound to take notice of the bar created by the first clause of s. 413.

The third point raised by the appellant relates to the question

(1) P J. (1873), 17. (2) 6 M. 76. (3) 4 A. 69.
(4) 4 A. 91. (5) P J. (1885), 34. (6) 5 C. 832.
(7) 15 C 808. (8) 15 M. 82. (9) 5 B L R. 570.
(10) 2 B.H.C. R. 374. (11) P.J. (1876), 96. (12) P.J. (1874). 218.

whether the two applications were made in the same right to sue. The bar created by the first clause of s. 413 has no existence except where the two applications are of a like nature, and made in the same right to sue. It was contended that plaintiff's first [97] application was made in his capacity as heir to his father, and the second application was made in his own right. We have had the two plaints translated, and we feel satisfied that this objection has no substantial foundation. In his present plaint plaintiff states (paragraph 10) that the properties in mortgage belonged to his grandfather, and "I have, therefore, as a grandson, a share in my own right in the ancestral property. Therefore under the said right, as also in my right as one of the male survivors of a joint Hindu family, I have brought this suit for redemption." The claim in the first application of 1888 was made by plaintiff in his right as heir to his father, who was one of the mortgagors. The insertion of the grandfather's name, and the attempt to trace title through him, does not alter the nature of the claim. Plaintiff's grandfather was not a party to the mortgage. Plaintiff's father and his uncles were the mortgagors, and the claim in both applications was substantially to redeem this mortgage of 1873 for Rs. 19. 500. The two claims must, therefore, be regarded as having been in the same right to sue within the meaning of the first clause of s. 413. The principal authority on this part of the case is the ruling in *Naro* v. *Anpurnabai* (*supra*) in which case the second application had been allowed on the ground that it was made in a different right to sue. The High Court, however, held "that the same set of facts which the mind at once grasps as jurally integral ought not to be made the basis of repeated proceedings, and the rule obtains that all the circumstances which exist when the former of two actions is brought, and can be brought forward in support of it shall be brought forward then, and not reserved for a second action arising out of the same events. Though the forms of action differ, the cause of action is identical, and the test is whether the evidence in support of both actions is substantially the same." This was also the test laid down in *Shridhar* v. *Babaji* (1) as to what does or does not constitute a ground of right identical with the one relied upon in a previous suit. The matter is different when the grounds of right do not originate in the same transaction, and they give rise to different duties. Judged by these tests, plaintiff's applications in his own right, and as [98] heir to his father, originate in the same transaction represented by the claim to redeem the mortgage of his father. The cases cited by the appellant's pleader on this point—*Baboo Gooroo* v. *Baboo Huronath* (2) ; *Thakore Becharji* v. *Thakore Pujaji* (3)—can be distinguished, for in these cases either the subject-matter, or the ground of right, were different. We must, therefore, overrule this objection also of the appellant. We accordingly hold (1) that the order rejecting the appellant's first application was an order under s. 409, and that the refusal operated as a bar to entertainment of the second application; (2) that the lower Court was not only competent but bound to take notice of this bar to its jurisdiction ; (3) and that the two applications were made in the same right to sue, and not in different rights. The appellant was badly advised in not following the suggestion made to him by the Subordinate Judge in the Court below. His claim was rightly dismissed with costs under the circumstances of the case. Though the words used are not free from ambiguity, the lower Court has not disposed of the case as being still in the application stage. It has dismissed the plaint as in a regular

(1) P. J. (1874) 168. (2) 7 W. R. 423. (3) 14 B. 31.

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suit, and the rulings in *The Collector of Ratnagiri* v. *Janardan*(1), *Amichand* v. *The Collector of Sholapur* (2), *The Collector of Kanara* v. *Krishnappa* (3) do not apply. The order about costs and Court-fees calls, therefore, for no interference.

We accordingly reject the appeal, and confirm the order of the lower Court with costs on appellant.

Order confirmed.

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[99] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY LIMITED (*Original Defendants*), *Appellants v.* SARAT CHANDRA CHATTERJI AND ANOTHER (*Original Plaintiffs*), *Respondents.**

[1st and 15th February, 1895.]

Insurance—Life insurance—Age of assured—Proof of age—Onus of proof—Mistake in statement of age—Fraud.

A. insured his life with the defendant company. By the terms of the policy the declaration of the assured as to his age was made the basis of the contract, and the policy was issued subject to the express condition that, in case any statement contained in the declaration were untrue, the policy should be void. The assurance was also expressly made subject to the regulations and conditions contained in the prospectus of the company. The prospectus contained the following provision with regard to the age of parties insured:—"Age admitted in the company's policies in all cases where proof is given satisfactory to the directors. Proof of age can be furnished at any time; if not furnished, it will be necessary on settlement of claim;" and after stating the nature of the "evidence as to age" which the company would accept, the prospectus continued:—"The directors recommend applicants to furnish any of the above as soon as possible and get the age admitted in the policy, as it is required by all soundly conducted companies on settlement of claim if not previously produced." A. died, and his administrators claimed the amount of the policy.

Held, that the above condition contained in the prospectus, which must be read into the policy, impose on the assured, or his representatives, the obligation of giving proof of age before the company could be called upon to pay. If the evidence had been given in the lifetime of the assured, and an admission of age was attached to the policy, no further proof would be needed, and the *onus* of disputing the age would be thrown on the company; but, in the absence of such evidence and of such admission, it lay upon those claiming upon the policy by reasonable proof to satisfy the Court as to the age of the assured.

The prospectus of the company contained a further provision that "policies held by parties on their own lives are indisputable on any ground whatever except fraud."

Held, that this provision did not relieve those claiming upon the policy from the burden of giving proof of age, but it covered a misstatement as to age as well as other misstatements, provided they were not fraudulent. It relieved the assured from the legal effect which an innocent misrepresentation as to age would otherwise have had under the strict terms of the contract. The result, therefore, was that the plaintiffs should give proof of the age of the assured, but, if such proof disclosed nothing more than an innocent mistake as to age on the part of the assured, the policy would not be vitiated. Subject to the above terms of the prospectus, any untruth in the declaration as to the age of the assured would vitiate the contract. The statement [100] as to the age of the

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* Suit No. 375 of 1892; Appeal No. 835.

(1) 6 B. 590, (2) 13 B. 234. (3) 15 B. 77.

assured amounts to a warranty, and the warranty being broken the risk under the policy would not attach.

[R., 25 M. 183=11 M.L.J. 379.]

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APPEAL from Parsons, J.

The plaintiffs (respondents) as sons and administrators of the estate of Anandprasad Chatterji sued the defendant company (appellants) to recover Rs. 8,000, with interest from the 3rd September, 1889, as moneys due on certain policies of insurance, dated the 27th June, 1889, whereby the said Anandprasad Chatterji insured his life for a total sum of Rs. 8,000.

On the 31st July, 1889, the said Anandprasad Chatterji died. The plaintiffs obtained a certificate under the Succession Certificate Act (VII of 1889), and now sued to recover Rs. 8,000.

The defendants pleaded that the execution of the policies sued on was obtained by fraud and misrepresentation; that some person had personated Anandprasad Chatterji, who was at the date of the policies in a dying condition and entirely unfit to be insured; that Anandprasad was represented to be only fifty-two years of age, whereas he was over seventy years old; and they further alleged that "this proposal of insurance was accepted upon the promise contained in the proposal paper submitted to them that proof of age of the proposer would be furnished later on. No such proof was furnished to the defendants."

The case was tried by Parsons, J., who found a verdict for the plaintiffs, and passed a decree for Rs. 8,000. He held that the policies had not been obtained by fraud and misrepresentation. The third issue was "whether any proper proof of the age of the said Anandprasad had ever been forwarded to the defendants?" As to this issue His Lordship said:—

"As to the third issue, it was almost useless to give proof of age when the defendants had repudiated the policies and brought the charge of fraud. A declaration of age, however, was sent in, and I do not see why it should not have been accepted as reasonable proof. They had the report of their own medical man as to the age of the proposed insurer; they knew he thought it was probably near fifty-five than fifty-two, and they granted the policies with that knowledge. It is proved now that this is correct. Ananda was between fifty-two and fifty-five at the time. It is hardly to be expected that a native would be much more accurate than that." On issue 4 I find that the plaintiffs are entitled to the amount claimed, and I pass a decree as asked for in para. (*a*) of the prayer of the plaint."

[101] The defendants appealed.

Lang (Advocate General) and *B. Tyabji*, for the appellants (defendants).—They cited Porter on Life Insurance, p. 139; *Westropp* v. *Bruce* (1); *London Assurance* v. *Mansel* (2); *Macdonald* v. *Law Union Insurance Company* (3); *Anderson* v. *Fitzgerald* (4); *Thomson* v. *Weems* (5).

Macpherson and *Russell*, for respondents.

JUDGMENT.

The judgment of the appeal Court was delivered by

FARRAN, J. (His Lordship discussed the evidence as to fraud, misrepresentation and personation, and agreed with the findings of the lower Court. He then proceeded:—) These were the issues upon which the company substantially rested their case in the Court below. It has, however, been contended before us that the plaintiffs have not proved

(1) Batty's Reports, 155. (2) 11 Ch. D. 363 (368). (3) L.R. 9 Q.B. 328.
(4) 4 H.L. Ca. 484. (5) 9 Ap. Ca. 671.

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that the assured was under the age of fifty-two years when the policies were effected, and on that ground are not entitled to recover.

Now by the terms of the policies the declarations of the assured as to his age, as well as the other declarations in his personal statement, are made the basis of the contract, and the policies are issued subject to the express condition that, in case any statement contained in the declaration be untrue, the policies shall be void. The assurance is also expressly made subject to the regulations and conditions contained in the prospectus of the company. It cannot, we think, be doubted that, subject to the further term in the prospectus to which we shall presently refer, any untruth in the declaration as to the age of the assured would vitiate the contract. The statement as to the age of the assured amounts to a warranty, and that warranty being broken, the risk under the policies would not attach. This was so held in the case of a similarly worded policy by the House of Lords in *Thompson* v. *Weems* (1). See, too, *Macdonald* v. *Law Union Insurance Company* (2) and *London Assurance* v. *Mansel* (3). The burden of proving that the warranty had been broken was there thrown upon the insurers, and in the opinion of Lord Blackburn **[102]** rightly so (p. 684), and this no doubt is the general law in such cases. The prospectus, however, in the present case contains these provisions: "Age admitted in the company's policies in all cases where proof is given satisfactory to the directors. Proof of age can be furnished at any time. If not furnished, it will be necessary on settlement of claim." And at p. 43, after stating the nature of the "evidence as to age," which the company will accept, there follows this clause: "The directors recommend applicants to furnish any of the above as soon as possible, andget the age admitted in the policy, as it is required by all soundly conducted companies on settlement of claim if not previously produced." These conditions, which must be read into the policies, impose, we think, upon the assured, or his representatives, the obligation of giving proof of age before the company can be called upon to pay. The stipulations as to evidence of age contained in the prospectus would otherwise be meaningless, and the provision that such evidence can be given at any time shows that it was not the intention of the parties that, if not given before the issuing of the policies, it should be treated as waived by the company. If the evidence has been given in the lifetime of the assured, and an admission of age is attached to the policy, no further proof will be needed, and the *onus* of disputing the age will be thrown on the company; but, in the absence of such evidence and of such admission, it lies, we think, upon those claiming upon the policy by reasonable proof to satisfy the Court as to the age of the assured.

We have not noticed, in this connection, the answer of the assured contained in the proposal in reply to the question as to what proof of age he could furnish—"evidence of my age will follow afterwards"—because, as we intimated at the hearing, the answer appears to us to have reference to the time before the acceptance of the proposal; and we think that though the company might have called for the proof before acceptance, yet when they finally accepted the proposal, which they did on the 1st July, by their letter of that date, they waived compliance by the assured with this promise, and when the policies were issued, they were granted upon the terms and conditions upon which the company's policies are ordinarily issued.

(1) 9 Ap. Ca. 671. (2) L. R., 9 Q.B. 328. (3) 11 Ch. D. 363 (368).

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[103] The plaintiffs rely upon the further term in the prospectus, to which we have alluded, that "policies held by parties on their own lives are indisputable on any ground whatever except fraud," to which the judgment of the Court in *Wood* v. *Dwarris* (1) shows that full effect should be given as though it were a proviso contained in the policy. This term does not, however, appear to us to relieve those claiming upon the policies from the burden of giving proof of age which the assured, as we have said, undertook to do before claiming under the policies; but yet we see no reason for thinking that it does not cover a misstatement as to age as well as other misstatements, provided they are not fraudulent. It relieves the assured from the legal effect which an innocent misrepresentation as to age would otherwise have under the strict terms of the contract. The result, therefore, is that the plaintiffs must give proof of the age of the assured; but, if such proof discloses nothing more than an innocent mistake as to age on the part of the assured, the policies will not be vitiated. The plaintiffs, in proof of the age of the assured, have tendered in evidence a declaration made by their uncle Otal soon after the death of Anandprasad. We do not doubt the genuineness of this declaration, or think that it was not duly declared by Otal before the Magistrate, before whom it purports to have been affirmed; and though it may not be legal evidence of the age of the assured within the provisions of the Evidence Act, yet it is a document of the class which the parties by their contract have made proof of age. On that ground we think that it is admissible in evidence, and ought to have been received at the hearing. That it was not forwarded to the defendants at the time when the claim was made, was due, we cannot doubt, to the absolute repudiation, by the defendants, of all liability under the policies. The plaintiff Sarat swears that he gave it to his solicitors at that time, and we see no reason to doubt his statement. The parties, we think, ought to be in the same position as if the document had been sent to the defendants, and they had refused to act upon it.

We have then to consider what the age of the assured really was. The defendants have given no reliable evidence upon this point. The plaintiffs' witnesses agree in stating that he was a man **[104]** who appeared to be between fifty and fifty-five, his hair half gray half black, and his general appearance betokening that age. Dr. Ferdinand thought that he looked fifty-five. In this state of the evidence, we think that it is quite impossible for the Court to say that the age of the assured was not that given in the declaration of Otal, or that it is proved that the assured fraudulently understated it.

The Advocate General has objected to the award of interest. It should run at six per cent. from the date of the plaint. To that extent the decree will be varied. In all other respects, it will stand confirmed with costs. The defendants will be allowed in reduction of the amount of decree the premia for one year less the premium already paid.

Attorneys for the appellants:—Messrs. *Ardesir, Hormusji and Dinsha.*

Attorneys for the respondents:—Messrs. *Mulji and Raghaoji.*

(1) L.R. 11 Ex. 493.

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ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

CURSANDAS NATHA AND ANOTHER (*Plaintiffs*) *v.* LADKAVAHOO AND OTHERS (*Defendants*).* [5th April, 1895.]

Limitation—Limitation Act (XV of 1877), ss. 5 and 14—Guardian and minor—Decree against minor—Neglect of guardian to appeal—Leave to appeal granted to minor after attaining majority—Practice—Procedure.

One Kessowji Jadhowji died in 1886 and by his will directed his daughter-in-law Ladkavahoo to adopt Karamsey Madhowji, his nephew's son, and "to this lad as his inheritance" he gave the residue of his property. In a suit filed to have the will construed, a decree was passed on 1st October, 1887, declaring (*inter alia*) that until his adoption by Ladkavahoo, Karamsey Madhowji was not entitled to any part of the estate. Karamsey Madhowji was then a minor and was represented in the suit by his father and guardian. No appeal was made against the decree, but the guardian and Ladkavahoo began to negotiate with each other as to the sum of money which each should receive out of the testator's residuary estate as the price of giving and receiving the boy in adoption. These negotiations continued until 1890, when Ladkavahoo died, and the adoption directed by the will thus became impossible. In December, 1894, Karamsey Madhowji, alleging that he had only attained majority on the 14th of that month, applied for a review of judgment, but his application was rejected (1). In **[105]** March, 1895, he obtained a rule *nisi* for leave to appeal against the decree of 1st October, 1887. He submitted that the circumstances amounted to "sufficient cause" under s. 5 of the Limitation Act (XV of 1877), and that he had not unduly delayed his application after attaining full age.

Held that the special circumstances did amount to "sufficient cause" under the above section, and that leave to appeal should be granted. The guardian was desirous that the adoption ordered by the decree should take place, hoping that he would obtain a large sum of money for giving the minor in adoption. His interests were, therefore, in conflict with those of the minor, and the interests of the latter were not sufficiently consulted in deciding whether or not to appeal against the decree.

[R., 21 P.R. 1904=14 P.L.R. 1904; D., 164 P.L.R. 1906.]

RULE *nisi* obtained on the 8th March, 1895, by Karamsey Madhowji, formerly a minor defendant in the case, calling on the plaintiffs to show cause why he should not be allowed to appeal against the decree made in this suit on the 1st October, 1887.

This rule was granted upon a petition of the same date presented by Karamsey Madhowji, which set forth the following facts :—

One Kessowji Jadhowji died in 1886, leaving a will and property to the extent of ninety lakhs or thereabouts. The plaintiffs were the executors of his will.

Ladkavahoo was his daughter-in-law, being the widow of his predeceased son Liladhar Kessowji. By his will Kessowji Jadhowji directed Ladkavahoo to adopt the petitioner Karamsey Madhowji (who was his nephew's son), and then gave the residue of his property "to this lad as his inheritance."

In 1887 the executors filed this suit to have the will construed, and to ascertain the rights and interests of the petitioner in the testator's estate. The suit was heard by Farran, J., who on the 1st October, 1887, passed a decree whereby it was declared (*inter alia*) that until his adoption by

* Suit No. 185 of 1887.

(1) See 19 B. 571.

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Ladkavahoo the petitioner was not entitled to any part of the said estate. The trial of the case before Farran, J., is reported at I.L.R., 12 Bom. 185.

The petitioner was then a minor, and in the suit was represented by his father and guardian Madhowji Kutchra.

Subsequently to the decree, Ladkavahoo corresponded with the petitioner's said guardian and with the solicitors for the executors with the ostensible object of arranging for the petitioner's adoption.

[106] The petitioner, however, alleged that Ladkavahoo and his guardian were influenced in delaying the adoption by persons whose interest it was to prevent its taking place, and that they were not so anxious that the adoption should be carried out as occupied in endeavouring to obtain out of the estate of the testator large sums of money for themselves as the price of the petitioner's being adopted and given in adoption. This correspondence continued throughout the years 1887, 1888, 1889, and 1890. Ultimately Ladkavahoo went on a pilgrimage and died without making any adoption, and the adoption of the petitioner directed by the will became impossible.

The petitioner contended that his father and guardian committed a gross breach of duty in entering into such negotiations for his own benefit and in not appealing against the decree of Farran, J., which declared adoption to be necessary.

The petitioner further alleged that he only attained the age of eighteen on the 14th December, 1894, and that he had no funds of his own to enable him to take steps in the matter; that with the assistance of friends he had recently applied to Farran, J., for a review of judgment, but that a review had been refused (1). He, therefore, sought to appeal against the decree, submitting that he had had sufficient cause for not appealing before, and that he had not unduly delayed this application after attaining full age.

In support of his petition the petitioner filed an affidavit, in which he stated that Ladkavahoo had demanded four lakhs of rupees out of the residuary estate of the testator as the price of receiving, and his father one lakh as the price of giving, the petitioner in adoption, and he produced a draft agreement by which it was agreed that, in consideration of the adoption taking place, these sums should be paid out of the testator's estate.

The above rule came on for argument before Sargent, C.J., and Bayley, J.

Macpherson and *Inverarity*, for the plaintiffs showed cause.—We say the petitioner attained majority in May, 1894, while he alleges he did not come of age until December, 1894. The petitioner is barred by limitation.

[107] *Lang* (Advocate General), for the petitioner in support of the rule.—It was the duty of the guardian of the petitioner to protect his interests. The lower Court passed a decree declaring that the petitioner took no part of the estate unless he was adopted. It was for the minor's interest that he should be declared entitled under the will to the estate, even if he were not adopted. His guardian ought, therefore, to have appealed against the decree. But he hoped to make money out of the adoption, and was, therefore, content with the decree which declared adoption to be necessary. He, therefore, did not appeal, and the

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minor's interests were sacrificed. Now that Ladkavahoo is dead the effect of the decree is to exclude the petitioner from the estate altogether. His guardian wholly failed in his duty to the petitioner. The interests of the two were in conflict. Under these circumstances the petitioner ought now to be allowed to appeal. He only attained his majority in December. The circumstances show "sufficient cause" within the meaning of s. 5 of the Limitation Act (XV of 1877). He cited *In re Manchester Economic Building Society* (1); *Curtis* v. *Sheffield* (2).

JUDGMENT.

SARGENT, C.J.—The question here is whether "sufficient cause" for the delay in presenting the appeal has been shown. What circumstances will constitute "sufficient cause" within the meaning of the fifth section of the Limitation Act (XV of 1877) is a point that has often been discussed; but no rule has been laid down defining or specifying the nature of the circumstances which are to be regarded as sufficient under the section. It is impossible to lay down any such rule, and I shall not attempt it. The English case that has been cited, *In re Manchester Economic Building Society* (1), does not assist us much. The passage from the judgment of the Master of the Rolls that has been relied upon only in fact re-states the question that we have to decide.

There is no dispute here as to the facts until we come to the time at which the petitioner is said to have attained full age. Until then how does the case present itself. The suit was brought for the purpose of having the testator's will construed. **[108]** By that will the residue of the estate is bequeathed to the petitioner as adopted son. But the important question is raised as to whether under this bequest the petitioner is entitled to take the residue unless he is adopted. The Judge who tried the case has held that on that condition alone he is entitled to the property; and that unless he is adopted the property must go elsewhere. In his judgment on review (3), the Judge says that the question was a difficult one and was in his opinion one which might properly have gone to appeal. That then is the nature of the case and the point to be decided.

It appears that, after the decision of the lower Court was given, negotiations with reference to the proposed adoption began between the lady who was to adopt and the father of the petitioner who was to give him in adoption. Both were anxious to effect the adoption, and both sought to make a profit out of it, and it appears that there was some arrangement made between them, that upon the adoption taking place the adopting mother was to get four lakhs out of the estate, and the father was to get one lakh. It was thus manifestly to the advantage of the petitioner's father and guardian that the decree of the lower Court should stand, and that the adoption which it declared to be necessary should be carried out. He would naturally desire that the decree which declared adoption to be necessary should remain in force rather than that it should be upset. It was thus clearly not his interest to appeal, while for the minor it was most important, if it was possible, to obtain a declaration from the appeal Court that he was entitled to the property under the will, whether he was adopted or not. Here, then, we have the interests of the minor and of his guardian in conflict—the interest of the minor requiring an appeal, the interest of the guardian being that the decree, which directed an adoption

(1) 24 Ch. D. 488 (497). (2) 21 Ch. D. 1. (3) See 19 B. 571.

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for which he would get a lakh of rupees, should not be questioned, but should remain in force.

The negotiations with regard to the adoption continued for some time, and in 1889 Ladkavahoo left Bombay and subsequently died when on pilgrimage. The adoption directed by the will thus became impossible.

[109] Nothing more was done until December, 1894. The petitioner says he did not until then attain majority. He also says that the pecuniary circumstances of his father and himself were such that it was impossible for either of them to take steps in the matter. In that month, however, with the assistance of a friend, the petitioner applied to Farran, J., for a review of judgment, but his application was refused, and now the petitioner comes to this Court for leave to appeal.

We think that up to December, 1894, the special circumstances amount to "sufficient cause" and excuse the delay in proceeding. That being so, we think that nothing since then has occurred which should lead us to refuse the petitioner leave to appeal. If the delay until then is held excused, we ought to excuse the delay since that time.

Under the circumstances, we think the petitioner may appeal. We consider that his interests (he being then a minor) were not sufficiently consulted in deciding the question as to whether or not to appeal from the decree of the Division Court, and that he ought now to be allowed to take his case to appeal.

Rule made absolute.

Attorneys for the petitioner :—Messrs. *Little and Co.*
Attorneys for the respondent :—Messrs. *Nanu and Hormasji.*

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Before Mr. Justice B. Tyabji.

KANKUCHAND SHIVCHAND AND ANOTHER (*Plaintiffs*) *v.* RUSTOMJI HORMUSJI (*Defendant*).* [23rd July, 1895.]

Limitation Act (XV of 1877), sch. II, art. 75—Instalments—Payment of debt by instalments—Right to sue for whole debt on default of payment of any instalment—Default in payment—Waiver of right to sue—Proof of waiver—Nature of proof.

On 15th August, 1891, the defendant executed a document admitting that he was indebted to the plaintiffs in the sum of Rs. 2,125 and agreeing to pay the amount in seven instalments, the first (Rs. 401) to be paid in August, 1891, the **[110]** second on the 28th April, 1892, and the remainder at intervals of six months. The document contained the following clause :—"If any of the instalments is not duly paid, I am to pay the whole amount with interest at eight annas per cent. per annum." The defendant failed to pay the first instalment, which the plaintiffs admitted was now barred, but on the 10th June, 1895, the plaintiffs filed this suit to recover the remainder of the debt and interest. The defendant pleaded that under the above clause the whole sum became due on the failure to pay the first instalment; that the right to sue which then accrued was never waived, and that the suit was now barred by limitation.

Held, that the plaintiffs having failed to prove a waiver of the right of suit which accrued to them in August, 1891, the suit was barred by limitation.

The waiver contemplated by art. 75 of sch. II of the Limitation Act (XV of 1877) must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver.

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[R., 27 B. 16=4 Bom. L.R. 688; 31 C. 83=8 C.W.N. 66; 14 Ind. Cas. 685=8 N.L.R. 44; 7 N.L.R. 147.]

SUIT to recover Rs. 1,724 principal and Rs. 349-13-3 as interest. The plaint stated that the plaintiffs had acted as commission agents for the defendant. The accounts between them were adjusted on the 15th July, 1891, and a sum of Rs. 2,125 was found due to the plaintiffs by the defendant. On that day he signed a document admitting the debt and agreeing to pay them the amount in seven instalments, the first (Rs. 401) to be paid in August, 1891, the second (Rs. 300) on the 28th April, 1892, and the remainder (four of Rs. 300 and one of Rs. 224) at intervals of six months. In default of payment of any instalment, the plaintiff was to be at liberty to recover the whole sum then due.

The plaint further stated that the defendant had failed to pay the first instalment of Rs. 401, but the claim in respect of it was now barred, and the plaintiffs now sued for the remainder of the debt, *viz.*, Rs. 1,724 and interest Rs. 349-13-3, making a total of Rs. 2,073-13-3.

The clause relating to the plaintiffs' remedy in case of default in payment of the instalments was as follows:—

"The said instalments will be paid by me as each of them will fall due. If any of the instalments is not duly paid, I am to pay the whole amount with interest at eight annas per cent. per annum."

The suit was filed on the 10th June, 1895. At the hearing the only issue raised was whether the claim was not barred by limitation.

[111] *Inverarity*, for plaintiffs.—The second instalment became due on the 28th April, 1892. On the 28th April, 1895, the Court was closed for vacation. The plaint was lodged on the 10th June, 1895, on which day the Court re-opened after the vacation—Civil Procedure Code (Act XIV of 1882), s. 48. All the other instalments have fallen due in the three years before suit. The question is, whether the whole amount became due on failure to pay the first instalment, and were we bound to sue then for it. We say we had an option and might sue or not, and the suit now brought is not barred. Counsel referred to s. 5 of the Limitation Act (XV of 1877), Rule 48, High Court Rules.

Macpherson, Acting Advocate-General, for defendant.—The whole sum became due on the failure to pay the first instalment. The right to sue which then accrued to the plaintiff was never waived, and the suit now brought is too late—art. 75 of the Limitation Act (XV of 1877). He referred to s. 63 of the Contract Act; *Mumford* v. *Peal* (1); *In the matter of Cheni Bash Shaha* (2); *Sethu* v. *Narayana* (3); *Gopala* v. *Paramma* (4); *Hiralal Bachanji* v. *Budho Valad Bahiru* (5); *Nobodip Chunder Shaha* v. *Ram Krishna Roy Chowdhry* (6).

Inverarity in reply as to waiver cited *Selwyn* v. *Garfit* (7).

JUDGMENT.

BADRUDIN TYABJI, J.—The plaint in this suit, which was lodged on the 10th June, 1895, and was admitted as a short cause on the 11th June, 1895, states that the accounts between the plaintiffs and the defendant were finally adjusted on 15th February, 1891, when a sum of Rs. 2,125 was found due by the defendant to the plaintiffs, and that the defendant executed the Gujarati writing or bond, dated the same day,

(1) 2 A. 857. (2) 5 C. 97. (3) 7 M. 577. (4) 7 M. 583.
(5) P. J. (1883), 172, (6) 14 C. 397. (7) 38 Ch. D. 273 (284).

whereby he agreed to pay to the plaintiffs that sum by six instalments, the first being for Rs. 401, which became due on the 2nd Shravan Sud, 1947, corresponding with 6th August, 1891; and the second of Rs. 300, which became due on Vaishakh Sud 2nd, 1948, corresponding with 28th April, [112] 1892. The bond provides that, "if perchance any default be made in the payment of (one) instalment, I am duly to pay the moneys in respect of the instalments with interest thereon at the rate of eight annas." The construction put on the third paragraph of the plaint upon this proviso is, "that, if the defendant fail to pay any one of the instalments, the plaintiffs were at liberty to recover at once the whole amount then due with interest at the rate of six per cent per annum;" and it was contended by Mr. Inverarity in his argument for the plaintiffs that the proviso was optional and not absolute, and that, unless the plaintiffs elected to claim the whole amount at once, the defendant was not bound to pay anything more than the amounts of the instalments as they became due from time to time. I may at once say that that is not the construction I put upon the document, and that in my view the elements necessary to make the proviso optional are entirely absent here: see *Asmutullah* v. *Kally Churn* (1); *Nilmadhub* v. *Ramsodoy* (2); *Hanmantram* v. *A. Bowles* (3).

The question then arises whether the whole claim which under the terms of the document became due in default of the payment of the first instalment, namely, on 6th August, 1891, is not now barred under art. 75 of the Indian Limitation Act (XV of 1877). It was admitted on behalf of the plaintiffs that the first instalment of Rs. 401 was barred under any circumstances, and the plaint accordingly seeks to recover the amounts of the remaining instalments only, with interest. It was also admitted by Mr. Macpherson, on behalf of the defendant, that, by the combined operation of s. 48 of the Civil Procedure Code and Rule 48 of the High Court Rules, the second instalment was not barred, and that all the other instalments were within the time provided by the law of limitation. It was, however, argued for the defendant that as the whole sum became due in default of the payment of the first instalment,—that is, on the 6th August, 1891,—and as the suit was not brought within three years from that date, therefore, it is entirely barred. In reply to this the plaintiffs' counsel relied on the proviso of art. 75 of the Indian Limitation Act, which runs as follows:—"On a promissory note or bond payable by instalments [113] which provides that if default be made in payment of one instalment, the whole shall be due:—three years from the time when the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver." The plaintiffs claim the benefit of this proviso, and have given evidence to prove that they waived their right of claiming the whole amount when the first instalment became due, and that, therefore, their claim as to the rest of the instalments is still alive.

Before considering the evidence on this point, I must observe that no reference is made to any such waiver in the plaint, which seeks to save the suit from limitation rather on the ground of the proviso in the bond being optional than on the ground of its having been waived by the plaintiffs. Now I take it to be settled law that mere inaction or delay or even the receipt of an overdue instalment does not, *per se*, amount to a waiver (see the cases collected in Starling's Limitation Act under art. 75

(1) 7 C. 56. (2) 9 C. 857. (3) 8 B. 561.

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and also *Cheni Bash* v. *Kadum Mondul* (1); *Nobodip* v. *Ram Krishna* (2); *Sethu* v. *Narayana* (3); *Gopala* v. *Paramma* (4).) I take it, therefore, that there must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver; and I conceive that the nature of proof must be the same, whether the waiver is pleaded by the plaintiffs to avoid limitation or by the defendant to escape from the liability to pay the whole, if a suit is filed by the creditor within the proper time on the ground of default in the payment of any one of the instalments. Now Mr. Justice Straight in *Mumford* v. *Peal* (5) lays down the nature of the evidence necessary to prove the waiver in the following words:—"I think," said that learned Judge (p. 863)" that the most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach and creating new relations with the party in default."

[114] I will now proceed to examine the evidence in this case with a view to see how far it satisfies the conditions above laid down. There was no documentary evidence given, but three witnesses were examined on behalf of the plaintiffs on this point:—

The first of these, Chuuilal Nahalchand, who is the munim of the plaintiffs, said:—

"The defendant did not pay the first instalment. Subsequently to that I had an interview with defendant—about five or seven days after the first instalment became due. Defendant said he expected to get the money in a few days and would pay. He did not pay. He said he was willing to pay. What objection was there when the interest was running? I saw him on several occasions. I did not sue him for the whole debt, because he said he expected to get the money; as soon as he got money he would pay us, and that interest was running on our money. When the subsequent instalment became due, he did not pay. I did not sue him before all instalments became due, because we had promised that we would not sue him before all instalments had become due. Two persons were present—Bhikaram and Chunilal Bechardas. This conversation took place seven or eight days after the first instalment became due. I never sent him any attorney's notice; but we did make demands every time I saw him. I demanded the whole money, namely, Rs. 2,125. I demanded that when all the instalments had become due. After the first instalment became due, I demanded the whole amount. I demanded the amount of the instalments for Rs. 2,125. He said he would bring money and pay the Rs. 2,125 immediately on receiving money. We began to demand after the first instalment became due. I made the demand, both before and after my promise."

This is the whole of the munim's evidence, and it seems to me to be clear that, in spite of the great skill and ingenuity of the learned counsel for the plaintiffs and of his repeated efforts to get any definite evidence from this witness as to the alleged agreement for waiver, he has completely failed to extract it. If this evidence proves anything, it rather proves that so far from waiving the benefit of the proviso, the plaintiffs insisted on being paid the full amount of Rs. 2,125 and that they were put off by the defendant from time to time on vague promises of payment when he should get money. I may add that this witness was not cross-examined.

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(1) 5 C. 97. (2) 14 C. 397. (3) 7 M. 577. (4) 7 M. 583. (5) 2 A. 857.

The next witness was Chunilal Bechardas, whose evidence was as follows :—

"I am a mehta in plaintiffs' firm, was present at the interview between defendant and last witness. I was there after the interview had begun. Bhikaram was present also. The munim and Bhikaram demanded the instalment that had become due. [115] The defendant said, "I will pay you money by small sums. You need not be impatient. We have been friends for a long time. I am bound to pay you instalments with interest.' The munim and Bhikaram did not agree, and demanded money then and there. Still defendant went on saying that interest was running, and they should not be anxious, and, therefore, the money remained unpaid. The reason why we did not sue him was that we had dealings with him for a long time."

This witness also, I think, fails to prove any definite agreement for waiver. On the contrary he rather confirms the evidence of the munim that the plaintiffs continued to insist on the payment of the whole amount. The reason he gives for not suing the defendant earlier was not that an agreement had been come to between the parties, but simply because "they had dealings with the defendant for a long time."

The third and the last witness was Bhikaram Aditram, who was formerly in plaintiffs' service. He says :—

"I know why defendant was not sued when the first instalment became due. When we demanded money from defendant, he said he expected money and would pay, and that we had been on good terms for a long time; that he would receive money within two months. He asked me to tell the munim that he would pay the interest for all the money. The munim refused to wait. Munim told me to take the defendant to him. I did so. We all three went into the adjoining room. Defendant was told to pay the money. He said he would pay in two or three months, and asked us not to sue him. My Shet then said 'Look here, we will wait till all the instalments become due, and then we shall pay you interest.'"

In cross-examination he said: "After the interview and before this suit I used to go to defendant to demand this money. I also went to him after the first instalment became due." In answer to a question by me the witness said, "I only demanded the instalments and never demanded the whole amount." Taking this man's evidence as a whole, I do not think it proves any definite legal arrangement for a waiver of the plaintiffs' right to demand the whole amount on non-payment of the first instalment. His statement that he never demanded anything more than the instalments, is contradicted by the munim, who distinctly says that the whole sum of Rs. 2,125 was demanded. But, even if I accept it as literally true, the mere demand of an instalment has never, so far as I knew, been held to amount to a waiver of the right to demand the whole sum, although the receipt and acceptance of an instalment as such has been held to amount to a [116] waiver (see *Mumford* v. *Peal* (1), *Cheni Bash* v. *Kadum Mondul*(2), *Papamma Row* v. *Toleti Venkaiya*(3), *Nagappa* v. *Ismail* (4), *Buddhulal* v. *Rekkab Das*(5)). It is true that the defendant has not been examined as a witness to contradict the evidence given by any of the plaintiffs' witnesses, and the plaintiffs are, therefore, entitled to treat such evidence as substantially and admittedly correct ; but it is

(1) 2 A. 857. (2) 5 C. 97. (3) 5 M.H.C.R. 198.
(4) 12 M. 192. (5) 11 A. 482.

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going too far to ask the Court to hold that the inherent defect and insufficiency of the plaintiffs' evidence is cured by the mere fact that the defendant has not been called to contradict it.

On the whole, therefore, I have come to the conclusion that the waiver contemplated by art. 75 of the Limitation Act has not been proved in this case, and I am confirmed in this opinion by the fact that no such waiver is alleged in the plaint. I, therefore, find the issue "whether the plaintiffs' claim is barred by limitation" in the affirmative and for the defendant, and dismiss the suit.

I cannot, however, award any costs to the defendant, as his defence is a purely technical one, and is not only opposed to all principles of honesty and fair dealing, but is a very ungrateful return for the kindness and consideration shown to him by the plaintiffs. The parties must bear their own costs respectively.

Attorneys for plaintiffs :—Messrs. *Mathubhai and Jamietram.*
Defendant in person.

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Before the Hon. Mr. Farran, Chief Justice, and Mr. Justice Starling.

HURBAI AND ANOTHER (*Original Plaintiffs*), *Appellants v.* HIRAJI BYRAMJI SHANJA (*Original Defendant*), *Respondent.**

[3rd August, 1895.]

Mahomedan law—Minors—Mortgage by widow—Widow—Right to mortgage shares of minors.

In 1884 one Ismail Ebrahim, a Mahomedan, died intestate, leaving a widow, two sons and two daughters. At the time of his death he was the owner of a certain house in Bombay. After his death his widow and his eldest son Ebrahim (without the consent [117] of the other children who were minors) mortgaged the said house to the defendant. In 1894 a younger son and one of the daughters of Ismail filed this suit, praying that their shares in the house might be ascertained and declared ; that the house should be sold, and their shares in the proceeds handed over to them. The defendant pleaded that the plaintiff's mother and adult brother Ebrahim had mortgaged the house to him in 1991 as a security for a loan of Rs. 3,500 which they wanted to pay off debts incurred in re-building the house and to defray the marriage expenses of the said Ebrahim. He contended that the mortgage was binding on the plaintiffs, having been made for the benefit of the family, and that, if not, the plaintiffs were bound to pay him the money due to him before claiming any share in the house.

Held, that the plaintiffs were entitled to their shares in the said house free and discharged of the mortgage executed to the defendant.

The Mahomedan law makes no provision with regard to mortgages, as such transactions are, strictly speaking, unlawful, as they involve the payment of interest. As, however, mortgages do now exist among Mahomedans, they must be governed by the rules applicable to sales. To authorise a sale by the guardian of a Mahomedan minor, there must be an absolute necessity for the sale, or else it must be for the benefit of the minor. The money raised by the mortgage in question was not raised for any purpose specially authorised by Mahomedan law, and the purpose for which it was raised was not for the benefit of the minor. Consequently, the widow had no authority to mortgage their shares.

[R., 34 M. 527=8 Ind Cas. 1093=20 M.L.J. 946=9 M.L.T. 100 ; 37 M. 514 (519)=23 M.L.J. 244=12 M.L.T. 147 ; 14 Ind. Cas. 495=17 P. R. 1912=88 P.L.R. 1912=56 P. W. R. 1912 ; 19 Ind. Cas. 911=6 S.L.R. 268 ; 11 O. C. 1 ; 1 S.L.R. 221 ; 21 T. L. R. 223; D. 34 C. 36=4 C. L. J. 485=11 C. W. N. 71; 34 C. 65=4 C. L. J. 578=11 C. W. N. 160.]

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* Suit No. 69 of 1894 ; Appeal No. 853.

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THE plaintiffs were the children of one Ismail Ebrahim, a Mahomedan inhabitant of Bombay, who died intestate about the year 1884. He left a widow (Yemnabai), two sons (Ebrahim Ismail and the second plaintiff Rusul Ismail), and two daughters, *viz.*, Bibibai (since deceased) and the first plaintiff, his heirs according to Mahomedan law. The first plaintiff attained majority about the year 1890, but the second plaintiff was still a minor at the date of this suit.

The plaint, which was presented as a petition *in forma pauperis* in 1893, stated that Ismail Ibrahim at the time of his death was the owner of a certain house in Bombay, and that after his death his widow Yemnabai and his eldest son Ebrahim mortgaged it to the defendant without the knowledge or consent of the plaintiffs, and that they (the mortgagors) had attorned as tenants to the defendant who had obtained a decree in the Small Cause Court of Bombay, directing them to vacate the said house; that the defendant had enforced the decree by execution, and in doing so had removed certain property belonging to the plaintiffs, and had forcibly expelled them from the house. The plaintiffs, however, [118] re-entered it, and the defendant thereupon instituted criminal proceedings against them in the Police Court, which were pending at the date of the petition. The plaintiffs prayed that their shares in the said house might be ascertained and declared, and that the house should be sold, and their shares in the proceeds delivered to them, and that the Police proceedings might be restrained.

The defendant in his defence stated that the plaintiffs' mother and adult brother Ebrahim had mortgaged the house to him on 1st May, 1891, as security for a loan of Rs. 3,500, which they wanted (*inter alia*) to pay off debts incurred in re-building the house and to defray the marriage expenses of the said Ebrahim: that the mortgagors had attorned to him and had agreed to pay Rs. 31 per month for use and occupation. On their default in payment of the rent, he obtained a decree in the Small Cause Court against them. He further stated that on the 16th March, 1894, he had sold the house by auction to one Purshotam Virji.

He submitted that the mortgage and sale were binding on the plaintiffs, the mortgage having been made for proper and necessary purposes, and for the benefit of the family; that, if not, the plaintiffs were bound to pay to him the money due to him before claiming any share in the house.

The case was heard before Candy, J.

The plaintiffs appeared in person.

Viccaji and *Modi*, for the defendant.

CANDY, J.—I find on the first and second issues against the plaintiffs. On the third issue, that they are simply entitled to a declaration of their shares in the property in and subject to the mortgage-lien of defendant. If defendant sells the mortgage property in satisfaction of the mortgage-debt, plaintiffs are declared to be the owners of their shares in the balance (if any) of the purchase-money. But this has never been denied by the defendant. I must, therefore, under s. 412 of the Civil Procedure Code (Act XIV of 1882) order plaintiff Hurbai to pay the Court-fees which would have been paid by her if she had not been permitted to sue as a pauper. Hurbai has been [119] ill-advised in bringing this suit; I am not sure that it has not been filed at the instigation of her mother Yemnabai. However that may be, she has entirely failed to show any reason why she should avoid the mortgage-lien of the defendant. It is clear that Hurbai with her sister Bibi (since deceased) and her brother

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Rusul (still a minor and a party plaintiff in this suit) were quite young when their father Ismail died. At that time Ismail was the owner of certain leasehold Fazendari land on which stood a dilapidated chawl and two sugar-mills. Yemnabai, Ismail's widow, was the natural manager of the family. She and her adult son Ebrahim were persuaded to remove the remains of the chawl and the sugar-mills, and to erect a pucka building, which no doubt might turn out to be a most profitable property. This they purported and were entitled to do for the benefit of the family. But they had, as might naturally be expected, to borrow money to erect the building, which was mortgaged as security for the debt. Then they got into the hands of the mortgagee. Yemnabai and Ebrahim are not parties to this suit; and there is no material on which this Court can form an opinion that the debt is not owing as shown by mortgage-deeds. Certainly the assertion, that the building was erected by borrowing money on the security of ornaments pledged with a Marvadi, is entirely unsubstantiated. It follows, therefore, that the plaintiffs are simply entitled to the declaration as to their shares in the property, subject to the defendant's mortgage-lien. Plaintiffs must pay defendant's costs.

The plaintiffs appealed, and contended that their shares in the house were not subject to the defendant's mortgage, and that the mortgage was not for necessary family purposes and was not binding on them.

The appellants appeared in person.

Viccaji and *Modi*, for the defendant.

Girraj Bakhsh v. *Kazi Hamid Ali* (1), *Succaram Morarji* v. *Kalidas Kalianji* (2), and the Tagore Law Lectures, 1893, p. 127, were referred to.

JUDGMENT.

[120] STARLING, J.—One Ismail Ebrahim was possessed of a piece of Fazendari land in Khetwadi Back Lane, on which stood a chawl and two oil-mills. Ismail Ebrahim died in 1884, leaving him surviving a widow Yemnabai, a son Ebrahim, then of full age, another son Rusul, and two daughters, Bibibai (since deceased unmarried) and Hurbai, who were all minors. After the death of Ismail, Yemnabai determined to build upon the land; pulled down the chawl and oil-mills, and after obtaining a building certificate from the Municipality borrowed a sum of Rs. 1,000 from one Hormusji Maneckji Dadachanji, and on the 9th November, 1885, she (on her own behalf and that of her minor children) and Ebrahim executed a mortgage of the said piece of land. On the 4th May, 1886, she borrowed a further sum of Rs. 1,000, and on the 9th November, 1886, another sum of Rs 500, and on each occasion she (on behalf of herself and the minors) and Ebrahim executed a further charge for the amount borrowed. According to Yemnabai's account, some of the money borrowed was misappropriated by a contractor, and as far as she knows, the balance was spent in erecting a new house, but it is impossible to say how much was so spent, as all the money she received she handed over to the contractor, or an agent, to spend on the new house, and no accounts of its expenditure were produced at the trial. To make up the amount misappropriated by the contractor, Yemnabai says she sold the ornaments of her two daughters. In 1891, Hormusji tried to sell the property mortgaged to him. Notices from some of the heirs of Ismail were issued at the time of the sale, and no sufficient price being offered, the sale was stopped.

(1) 9 A. 340.

(2) 18 B. 631.

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On the 1st May, 1891, Yemnabai borrowed from the defendant the sum of Rs. 3,500, and she and Ebrahim executed a mortgage for that sum. In the mortgage all the previous deeds were recited, and it was stated that it was a mortgage with immediate possession of the hereditaments mortgaged, including the interest of the said minors, and the deed purported to convey the interest of the minors in the property mortgaged, but Yemnabai only signed the deed in her own name and not also as guardian of the minors. Out of this sum the previous mortgage and further charges were paid off, the cost of the mortgage-deed, stamps and registration were paid, and the balance handed to Yemnabai. According to a recital [121] in the deed, the mortgage was executed to raise money to pay off the previous mortgages, to repair the house, and for the marriage of Ebrahim. Subsequently to the date of the mortgage, the defendant got into possession of the house and land, and the petitioners Hurbai (she having now attained her majority) and Rusul (a minor) presented a petition to be allowed to sue in *forma pauperis* and recover their respective shares in the property free from the mortgage to the defendant. The case was tried by Candy, J., and he passed a decree declaring that the petitioners were entitled to 49/288 and 98/288 parts, respectively, of the mortgaged property, subject nevertheless to the mortgage to the defendant. Against this decree the plaintiffs have appealed, and the question we have now to determine is whether Yemnabai, as the natural guardian of her minor children, had power to charge their interest in the property under the circumstances hereinbefore set forth.

The plaintiffs are governed by Mahomedan law. According to Macnaghten, Chap. VIII, pl. 14, a guardian is not at liberty to sell the immoveable property of his ward except under seven circumstances, of which we need only mention the following:—1st, where he can obtain double its value; 2ndly, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3rdly, where the late incumbent died in debt which cannot be liquidated except by the sale of such property; 5thly, where the produce of the property is not sufficient to defray the expenses of keeping it. Nos. 1, 2 and 5 are clearly applicable to a case of sale only. No. 3 would be applicable to a case of sale or mortgage, but there is no allegation here that Ismail left any debts at the time of his death, or if he did, it is clear that the money was not borrowed for the purpose of paying them off. In the reported cases it is laid down that, to authorize a sale by the guardian of a Mahomedan minor, there must be an absolute necessity for the sale, or else it must be for the benefit of the minor. See *Mussamut Bukshun* v. *Mussamut Dookhin* (1); *Mussamut Syedun* v. *Syud Velayet* (2). The same principles have been recognized in other reported decisions, but we do not refer to them, as they turned mainly on other [122] considerations. The Mahomedan law makes no provision for mortgages, as such transactions were, strictly speaking, unlawful, as they involved the payment of interest on money borrowed. As, however, mortgages do now exist here among Mahomedans and between Mahomedans and other sects, they must be governed by the same principles as apply to sales. There is this difference, however, between them. It may be for the benefit of a minor that his guardian by selling property should have money in hand; but, in the case of a mortgage, the amount of money received will probably be less than on a sale, and although the property is not absolutely parted with, it is burdened with a charge which

(1) 12 W. R. C.R. 337.

(2) 17 W. R. C.R. 239.

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must go on increasing unless the interest payable is paid regularly, and eventually the property, if sold by the mortgagee, may not produce sufficient to pay the mortgage-debt and interest.

In the present case the land at the date of Ismail's death was worth something, out of which the minors might have got their share if it had been sold. Now, although there is a house built on it, the whole property is burdened with such a debt that it seems improbable that, the minors will ever get anything if the decree of Candy, J., is allowed to stand. Besides this a portion of the money is recited in the defendant's mortgage-deed to have been borrowed for the marriage of Ebrahim. We do not know if any portion was so applied, but such a purpose is clearly not one for which the share of the minors could be charged. We think it clear, therefore, that the money was not raised for any purpose specially authorised by Mahomedan law, and that the purposes for which it was raised were not for the benefit of the minors; consequently, Yemnabai had no authority to mortgage their shares.

The necessity for this suit has doubtless arisen from the inveterate habit people here have of looking at everything through Hindu eyes, and thus the two mortgagees treated Yemnabai as if she were the widow of a Hindu, instead of being the widow of a Mahomedan who was governed by Mahomedan law; but it must not be taken that we intend by this to determine whether the transaction could have been upheld even if Yemnabai had been a Hindu.

[123] Mr. Viccaji suggested that the plaintiffs ought only to get their share of the land in any event, and not any portion of the house, but the money was spent on the house without their consent, and it stands on their land; consequently, as the house goes with the land, they are entitled to their shares of the whole. Besides this it is possible, although the learned Judge in the Court below does not place any reliance on the evidence of Yemnabai, that the whole of the money originally borrowed may not have been spent on the house, but may have been made away with by the contractor, in consequence of which Yemnabai may have had to use the proceeds of Hurbai's ornaments to make up the deficiency, and a portion of the amount, last borrowed was certainly alleged to be wanted for Ebrahim's marriage for the repayment of which the share of the minors was in no way liable. Further, both mortgagees had all the facts of the case before them, and ought to have known the risk they were running. Consequently, there is no hardship upon the defendant in being deprived of a portion of the house as well as a portion of the land.

The decree of Candy, J., must, therefore, be varied by declaring that the plaintiff Hurbai is entitled to $\frac{49}{288}$ parts and the plaintiff Rusul Ismail to $\frac{98}{288}$ parts in the said property more fully described in the schedule to the said decree free and discharged from the mortgage executed to the defendant by Yemnabai and Ebrahim Ismail on the 1st May, 1891, and by ordering the defendant to bear his own costs in the Court below and of this appeal and to pay the Court-fees of the plaintiffs both in appeal and in the Court below.

Decree varied.

Attorney for the defendant:—Mr. *K. D. Shroff.*

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Before the Honourable Chief Justice Farran and Mr. Justice B. Tyabji.

THE MUNICIPAL CORPORATION OF BOMBAY (*Original Defendants*), *Appellants v.* CUVERJI HIRJI AND OTHERS (*Original Plaintiffs*), *Respondents.**

MOTLIBAI (*Original Defendant*), *Appellant v.* CUVERJI HIRJI AND OTHERS (*Original Plaintiffs*), *Respondents.*†

[9th, 10th and 12th August, 1895.]

Vendor and purchaser—Broker—Brokerage from vendor and vendee—Position and rights of broker—Claim of brokerage from both vendor and vendee.

A broker is entitled to his commission if the relation of buyer and seller is really brought about by him, although the actual sale has not been effected by him.

A broker is entitled to his commission where he has induced in the vendor the contracting mind, the willingness to open negotiations upon a reasonable basis even though a change or modification of the terms of the contract is made by the buyer and seller without his intervention.

A broker sued the Municipality of Bombay for brokerage in respect of land purchased by them.

Held, that, if during the time that the broker was negotiating with the vendor, the latter was induced to consent to the sale, the broker was entitled to his brokerage. It was not material to enquire what operated upon the mind of the vendor, and whether it was the advice of friends, or the knowledge that his land could be acquired compulsorily, or the persuasions of the broker. It was sufficient to support the broker's claim if the vendor's acceptance of the terms was brought about during his intervention; and the fact that the Municipal Commissioner stepped in at the last moment, and himself actually struck the bargain, did not deprive the broker of his brokerage.

Primarily a broker is merely the agent of the party by whom he is originally employed. To make the other side liable to pay him brokerage it must be shown that he has been employed by such party to act for him, or that in the contract he has agreed to pay brokerage.

[R., 9 Bom. L.R. 1232 (1262); D., 22 B. 540 (547).]

THESE two appeals were heard together. The respondents (plaintiffs) in both suits were a firm of brokers in Bombay, and in both suits they claimed to recover money alleged to be due to them as brokerage in certain transactions. They alleged that in 1891 they were instructed to purchase lands required by the Municipality for certain proposed new roads. The price was not to exceed Rs. 3 per square yard. They purchased a quantity of land at this rate, and were paid two per cent. on the purchase-money as brokerage by the Municipality. There remained three [125] plots of land still to be obtained: two of them belonged to Bai Motlibai and the third to one Muncherji Framji Cama. With much difficulty they ultimately persuaded these owners to part with the land, and the two plots were accordingly purchased from Bai Motlibai for Rs. 7,47,489, the brokerage on which at two per cent. was Rs. 14,949, and the third plot was purchased from Muncherji for Rs. 1,72,124, the brokerage on which at the same rate was Rs. 3,462.

In their suit against the Municipality (No. 402 of 1893) as purchasers the plaintiffs claimed both these sums.

The Municipality alleged that their purchase of the lands in question had not been brought about by the plaintiffs, and they denied their liability.

* Suit No. 402 of 1893; Appeal No. 857. † Suit No. 403 of 1893; Appeal No. 856.

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The second suit (No. 403 of 1893) was brought by the plaintiffs against Bai Motlibai in respect of the first of above transactions. They claimed to recover from her, *as vendor*, another sum of Rs. 14,949, being brokerage on the purchase-money of the land sold by her to the Municipality charged at the same rate as the plaintiffs charged the purchaser, *viz.*, two per cent.

Bai Motlibai in her written statement denied her liability, alleging that she had not employed the plaintiffs as brokers nor accepted their services as such.

In both suits the lower Court passed a decree for the plaintiffs for the sums respectively claimed.

The defendants in both suits appealed, and the appeals were heard together.

Macpherson (Acting Advocate-General), *Inverarity* and *Scott*, for appellants in both appeals.

Lowndes and *Jardine*, for the respondents.

The arguments of counsel were exclusively upon the facts appearing in the evidence taken by the lower Court.

JUDGMENT.

FARRAN, C.J.—The questions which we have to determine in these appeals are (1) whether the Division Court was right in awarding to the plaintiffs' firm of Cuverji Hirji and Company brokerage at the rate of two per cent. against the appellants the Municipal Corporation of Bombay in respect of the purchase by **[126]** the latter of two plots of land at Agrapada, one from the appellant Motlibai and one from Mr. Muncherji Cama, and (2) whether that Court was right in awarding to the same firm brokerage at the same rate against the appellant Motlibai in respect of the sale by her of the former plot to the Municipality. The sums awarded are large—Rs. 18,412-4-2 against the Municipality and Rs. 14,949-12-5 against the appellant Motlibai. In each case the appellants respectively contend that they are not liable to pay the plaintiffs any brokerage, and if they are liable for brokerage, they are not liable at the rate of two per cent. awarded.

Separate evidence was not recorded in the Court below in each of the two cases. Before us it was argued that the evidence presented in appeal No. 857 (suit No. 402) should be taken as the evidence upon which both appeals should be decided, with the exception of that of the witness M. H. Maju, whose evidence was only to be read in appeal No. 856 (suit No. 403).

(After dealing with preliminary matters not material to this report His Lordship continued.—) The question which we have to consider next, is upon what terms as to remuneration Hirji Hansraj was employed by the Municipality. This forms the basis of the case against that body. Hirji was really only a partner in the plaintiffs' firm; but, as the other partners were dormant, so far as the transactions in question in the suit are concerned, we shall speak of Hirji Hansraj as though he only were the broker.

The Municipality of Bombay in carrying out their operations for the well-being and improvement of the city have often to acquire lands in particular localities. Such lands are acquired sometimes by ordinary purchase and sometimes by inducing Government to put in force the provisions of the Land Acquisition Act on their behalf. In addition to the limited compulsory powers of purchase which their own Act (Bombay

Act III of 1888) confers upon them, they can always apply to Government to put in force the provisions of the General Act. They differ, therefore, from private purchasers in that they can compel unwilling owners to part with their lands; but, if they are known to be the intending purchasers, they can be forced to pay [127] for the land, which they are under the necessity of acquiring, a little more than its actual market value. Their position in this respect must be borne in mind when we come to consider the claim of their brokers against Motlibai (His Lordship reviewed the evidence as to the terms in which the brokers were employed, and found that the agreement was that brokerage should be paid at the rate of one per cent. He then continued :—)

Mr. Scott for the appellants argued that the evidence afforded signs of a special agreement between the Municipality and Hirji that the latter should be paid brokerage only in cases where the bargain had been actually struck through him. The only written evidence which he can point to (oral there is none) in support of the argument is an ambiguous phrase in Ex. No. 1. We do not consider that it affords any substantial basis for such a contention. And we think that whatever the general law may be which governs the relation between principal and brokers, such is the law to be applied between the Municipality and Hirji. Now we take that law to be as laid down by Erle, C. J., in *Green* v. *Bartlett* (1). His Lordship says: "The question whether or not an agent is entitled to commission, has repeatedly been litigated, and it has usually been decided that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him." In that case the purchaser had been introduced to the vendor by the agent. In the present case, there is no question of introduction. That is often the main office of a broker in cases where an article of commerce is sold. The bringing together of a willing vendor and a willing purchaser is virtually bringing about the bargain, and the same is often the consequence, though in a less degree, of bringing a vendor and buyer of land into communication. But, in a case like the present, the owner is usually well known to the intending purchaser; the latter has no difficulty in ascertaining the person with whom he has to deal. The initial phase of the transaction is not the making of the parties known to each other, but the inducing in the owner the contracting mind—the willingness to open negotiations upon a reasonable basis. The American authorities cited in the notes to Story on Agency [128] (9th Ed.), p. 329, show that a broker is entitled to his commission who has negotiated the contract, even though a change or modification of its terms is made between the buyer and seller; and that view is, we think, borne out by the English cases. See *Green* v. *Bartlett* (*supra*) and *Wilkinson* v. *Martin* (2); *Mansill* v. *Clements* (3); *Lara* v. *Hill* (4).

We proceed to consider how far Hirji brought about the Motlibai purchase. We shall deal with the history of the transaction in some detail, as it is necessary to have it fully before us when considering the plaintiff's claim against Motlibai. (His Lordship discussed the evidence at length and continued.—)

Now the result of this evidence appears to us to be, so far as the Municipality is concerned, that although Hirji did not succeed in obtaining a definite account in writing from Motlibai of the terms upon which

(1) 14 C. B. N. S. 681.
(2) 8 C. and P. 1.
(3) L.R. 9 C. P. 139.
(4) 15 C. B. N. S. 45.

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she would part with the land, yet during the time he was negotiating with her, her mind had been brought to the point of being willing to accept either Rs. 3 per square yard of her land or to grant it on Fazendari tenure at two annas per square yard per annum; and that when the purchase was effected upon the former terms, it had been substantially brought about while Hirji was conducting the negotiations on behalf of the Municipality. It is not, we think, material to enquire what operated upon the mind of Motlibai to bring about this condition of mind, whether it was the advice of her friend Mr. Bengali or the knowledge that her land could be acquired compulsorily, or the persuasions of Hirji. It appears to us sufficient, to support Hirji's claim against the Municipality, if it was brought about during the intervention of Hirji, and we think that the Municipal Commissioner stepping in at the last moment, and himself actually striking the bargain, does not deprive Hirji of his claim to brokerage.

We turn to a consideration of the liability of Motlibai to pay brokerage to Hirji in respect of this contract. The evidence in the case shows that the rate of commission usually demanded by, and given to, land brokers in Bombay, where there is no special agreement, is two per cent. on the purchase-money, but that this [129] rate, which is deemed exorbitant in the case of large purchases, is usually modified by special agreement in such cases. The question before us is not, however, so much as to the rate of brokerage. It is rather as to the liability of Motlibai to pay brokerage at all.

Hormusji Muncherji Cama makes the following statement:—"The practice as to brokerage on sale of land in Bombay is that, in the absence of special contract, the purchaser and the seller both pay two per cent." Subject to the above observations as to the rate, this is doubtless true in cases where a broker is engaged on each side; but as Hormusji was speaking of a case in which there had been but one broker employed on both sides, his answer must, we think, as contended for by counsel for the respondent, have reference to that case also. There was no cross-examination upon this answer. Hirji says in his re-examination: "Besides the Rs. 31,800 received as brokerage, I have also received a large amount of brokerage from the parties on the other side. In all cases of private purchase, I always received brokerage from the other side, and in every case, except Cama's, I was paid two per cent."

No evidence was given for the defendant Motlibai to contradict or modify these statements. We must, therefore, assume that where a contract for the sale of land is completed through the intervention of a common broker, the practice, subject as above stated, is that he receives two per cent. from each of the contracting parties.

The common course appears, in such cases, to be to sign the contract subject to the usual or agreed rate of brokerage being paid. This appears from the plaintiff's letters, and coincides with our experience. This affords the parties the opportunity of considering the question of their liability to brokerage and its rate before finally signing. The practice, as we have stated it, assumes the employment of a common broker. A broker is often spoken as a middleman or negotiator between two parties (Story on Agency, p. 29; *Fairlie* v. *Fenton* (1)). He frequently

(1) L.R. 5 Ex. 169.

acts as the agent of each. "The engagement of a broker is, like [130] that of a proxy, a factor or agent, but with this difference that the broker being employed by persons who have opposite interests to manage, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in the execution of what every one of them entrusts him with" (Domat, Bk. 1, tit. 17, cited in Story on Agency, p. 28, in *notis*). But primarily he is deemed merely the agent of the party by whom he is originally employed (Story, p. 31). To make the other side liable to pay him brokerage, it must, we think, be shown that he has been employed by such party to act for him, or that in the contract such party has agreed to pay the brokerage.

In the present case we think, therefore, that it lies on the plaintiffs to show that Motlibai employed Hirji as her agent to conduct the negotiation before they can recover brokerage from her. The case is peculiar. Hirji did not, as we have said, introduce the parties to each other, nor was the purchase actually completed through him. He was a special agent of the Municipality, who are a body, as we have pointed out, armed with peculiar power of purchasing land, to effect this and other purchases, and his position as such was known to Motlibai. His commission, too, was not agreed to at the time of the contract being entered to. Under those circumstances it appears to us that he cannot receive brokerage from Motlibai unless he can show that he was engaged by her to negotiate on her behalf. No special agreement between Hirji and Motlibai is alleged in the plaint, and there is no *prima facie* presumption, we think, of his having been engaged by her.

Motlibai has positively denied that she ever engaged Hirji as her broker; but this denial is not in itself entitled to much weight, as she has untruly asserted that he had no interviews with her save one. That circumstance cannot, however, we think, be pressed strongly against her. She is a very old lady, and in August, 1894, showed symptoms of senile *dementia*, with a failing memory (Ex. 44). Her examination had been taken so late as December, 1893. The same excuse cannot be made for some of the witnesses who supported her assertions. Hirji's diary shows six interviews with Motlibai between the 14th April, [131] 1892, and the 17th of October inclusive in that year. They are Exs. 22*b*, 22*f*, 22*p*, 22R, 22*h*, 22*q*; of these 22*f* and 22*p* alone support the idea that Motlibai employed Hirji, or suggested that he should obtain favourable terms for her. The rest of the several interviews which he had with Bengali and Nowroji point to him as urging upon her acceptance terms which, he thought, would be acceptable to the Municipal Corporation. The oral evidence of Hirji Hansraj does not advance the case any further upon this point. Nor we think does the fact of Motlibai not having answered Hirji's letters (Exs. Z and A1). Notwithstanding the terms in which these letters are couched, Motlibai had all along taken up the position that she would not make an offer to the Municipality, but would consider offers made to her by that body. Hirji, we think, when ignoring this he pressed the lady to make an offer to the Municipal Corporation, cannot complain that his letter was not distinctly replied to, nor can it be inferred from Motlibai's not replying that she recognised his right to brokerage. Her not replying to his subsequent letters (Exs. A7 and A12) is as consistent with her having considered them to be begging letters as with her having recognized the claim made upon her as just.

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The plaintiff's whole case against Motlibai rests, we think, upon Ex. 22*p* (1). Assuming the last two paragraphs of that entry [132] to be genuine and torepresent correctly what took place (and for this we have to rely wholly upon the truthfulness and accuracy of Hirji), we do not consider that they establish an agreement on the part of Motlibai to pay brokerage to the plaintiff. Taking the penultimate clause at the highest, it only shows that Motiibai contemplated the possibility of paying Hirji brokerage on a lease if she should grant one to the Municipality. Such a lease she never granted. We are of opinion that under these circumstances Hirji has not established his right to brokerage against Motlibai.

(As to the second claim of the plaintiffs against the Municipality in suit No. 402 of 1893, *viz.*, the claim for brokerage in respect of the purchase from Muncherji Framji Cama, His Lordship after discussing the evidence held that the plaintiffs were entitled to recover brokerage from the Municipality on the amount of the purchase-money at *one per cent.*, and continued :—)

The decree in appeal No. 857 (suit No. 402) will, therefore, be varied, reducing the amount awarded by one-half. In other respects it stands confirmed. Each party to have their own costs of that appeal. The appeal No. 856 (suit No. 403) will be allowed and the suit dismissed. As to costs, we think that we ought not to allow Motlibai any costs either of the suit or appeal. It was her denial of Hirji's interviews with her, and the resulting charge of fabrication of books by him, which caused the great length of the hearing in this case. Even in appeal the same charges, though in a modified form, were insisted on. Moreover, by not answering Hirji's letters, and allowing him to assume that she recognized his claim to brokerage she in some measure was the cause of the litigation between Hirji and herself. The untrutbful line of defence which she adopted is, however, the reason which compels us to refuse her her costs.

Decree varied.

Attorneys for the appellants : Messrs. *Crawford & Co.* and Messrs. *Craigie, Lynch and Owen.*

Attorneys for the respondent (plaintiff) : Messrs. *Payne, Gilbert and Sayani.*

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(1) This exhibit was an extract from the diary of Hirji (plaintiff No. 2) under date 28th August, 1892, which was as follows :—

"To-day being Sunday (I) had had an interrupted interview with Bai Motlibai Wadia. In course of conversation as usual about her land (she) said as follows :—

"'My younger son does not agree with my view. He says that (the land) may either be sold (to the Municipality) at the rate of Rs. 5, or that (a portion of) the land sufficient for (the purpose of) the roads may be given free of charge. But I and (my) elder son are of opinion that (the land) should not be sold, but that the same should be given on perpetual lease, so that a permanent income may be secured. But do you, (she) said 'get (the Municipality) to pay something more than two annas (rate)' and suggested certain alterations in the conditions. But ultimately (she) said in sweet words 'do you arrange definitely with the Municipality and call (again) to-morrow (or) day after ; I will give a clear answer."

"To-day the aforesaid Bai asked (me) about the practice in respect of the brokerage. (I) told her the practice (was to charge the brokerage) at the rate of two per cent. on twenty years' rent.

"On this occasion the Bai often consulted an aged Parsi who was sitting by her side."

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[133] ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice B. Tyabji.

RAM RAVJI JAMBHEKAR (*Original Defendant*), *Appellant v.* PRALHADDAS SUBKARN (*Original Plaintiff*), *Respondent.**

[23rd August, 1895.]

Hundi—Bill of exchange—Hundi payable at fixed date—Dishonour by non-acceptance—Cause of action—Jurisdiction—Limitation Act (XV of 1877), s. 14.

On 14th April, 1889, the defendant at Gwalior drew a hundi for Rs. 2,500 on his firm at Bombay in favour of Damodar Sukhlal payable forty-five days after date. It was subsequently indorsed at Gwalior by Damodar Sukhlal to the plaintiff at Cawnpore, who sent it to the Bank of Bombay at Bombay for collection. It was to become payable on the 1st June, 1889, but on 23rd April, 1889, the Bank presented it to the defendant's firm at Bombay for acceptance, which was refused. The Bank thereupon returned it to the plaintiff at Cawnpore, and it was never presented for payment. On the 16th June, 1891, the plaintiff filed a suit upon the hundi against the defendant at Cawnpore, but on the 18th March, 1893, the plaint was returned to him, the Court holding that it had no jurisdiction. On the 16th April, 1893, the plaintiff filed this suit in the High Court of Bombay. Previously to the filing of the suit the defendant had ceased to carry on business at Bombay.

The defendant contended (1) that the hundi being payable at a fixed date, and not having been presented for payment when due, no cause of action had arisen to the plaintiff. (2) That the Court had no jurisdiction, inasmuch as (*a*) the defendant was a foreigner and at the date of suit did not carry on business in Bombay, and (*b*) no part of the cause of action (if any) had arisen in Bombay. (3) That the suit was barred by limitation.

Held—

(1) That the dishonour by non-acceptance of a hundi payable at a fixed date gives an immediate cause of action against the drawer, and there is no need to wait until the maturity of the hundi or to present it for payment.

(2) That under the Negotiable Instruments Act (XXVI of 1881) the dishonour of a hundi by non-acceptance constitutes now, as it has always done, part of the cause of action in a suit against the drawer.

(3) That the Court had jurisdiction under cl. 12 of the Letters Patent, 1865.

(4) That the suit was not barred by limitation, the plaintiff being entitled to the benefit of s. 14 of the Limitation Act (XV of 1877).

[R., 25 B. 528 (532); 29 M. 69; 29 M. 239 = 11 M.L.J. 91; 11 C.P.L.R. 49 (51).]

SUIT on a hundi for Rs. 2,500, dated 14th April, 1889, drawn by the defendant's firm at Gwalior on his firm at Bombay in favour of Damodar Sukhlal and indorsed at Gwalior by Damodar Sukhlal to the plaintiff at Cawnpore.

The plaintiff (respondent) carried on business at Gwalior under the name of Shivram Subkarn, at Cawnpore under the name of Lachminarayan Pralhaddas, and at Bombay under the name of Baldevdas Bunsidas.

[134] The defendant (appellant) had a firm at Gwalior under the name Gangadhar Yeshvantrao, and at the date of the hundi in question a firm also at Bombay under the name of Gopalrao Malharrao. This latter firm, however, (he alleged and the lower Court found) was closed in February, 1893, two months before this suit was filed.

The firm of Damodar Sukhlal carried on business at Gwalior. On the said 14th April, 1889, this firm at Gwalior obtained six hundis from the defendant's firm there for a total sum of Rs. 10,000. These hundis were

* Suit No. 183 of 1893; Appeal No. 858.

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all drawn by the defendant at Gwalior on his then existing branch firm at Bombay. The hundi now sued on was one of these, and was in the following form :—

"(This is) 1 hundi (for) Rs. 2,500, in letters rupees twenty-five hundred ; the double of the moiety thereof, rupees twelve hundred and fifty having here been in full deposited by and (received) from Bhai Damodardasji through Bhai Damodardasji Sukhlal. After (the expiration of) (45) forty-five days from the lunar date 13th of Chaitur Sud (14th April, 1889) do you be pleased to pay the moneys in hundi currency to Sha (*i.e.*, the holder, a respectable person). The lunar date the (13th) thirteen of Chaitur Sud of (Samvat) 1946 (14th April 1889)."

The above hundi and the other hundis given at the same time were to become due on the 1st June, 1889, and were made payable in Bombay. No cash was given for them, but, instead, Damodar Sukhlal gave the defendant two hundis, each for Rs. 5,000, drawn by him (Damodar Sukhlal) on two different firms in Bombay payable at sight. These hundis, though really drawn on the 14th April, 1889, were dated the 24th April, 1889.

A few days after obtaining the above hundis from the defendant (*viz.*, on the 19th April), the firm of Damodar Sukhlal became insolvent, and the partners absconded from Gwalior. In the meantime, however, they had (at Gwalior) indorsed and sent the above hundi for Rs. 2,500, which they had obtained from the defendant, to the plaintiff's firm at Cawnpore. That firm indorsed and sent it to the Bank of Bombay, in Bombay, for collection. On the 23rd April the Bank presented it to the defendant's firm in Bombay for acceptance, but that firm having heard of Damodar Sukhlal's insolvency refused to accept it. A day or two afterwards, the two hundis given by Damodar Sukhlal to the defendant on the 14th April were presented for payment by him and were dishonoured.

[135] On the 25th April, the Bank of Bombay returned the above hundi to the plaintiff at Cawnpore. The plaintiff appears to have kept it there. It became due, as above stated on the 1st June, 1889. It was, however, never presented *for payment*, nor were any steps taken by the plaintiff for two years to enforce payment. But on the 16th June, 1891, he filed a suit upon this hundi against the defendant in the Court of the Subordinate Judge at Cawnpore. The plaint in that suit was, however, returned to him on the 18th March, 1893, the Court holding that it had no jurisdiction to hear the suit.

The plaintiff at Cawnpore thereupon sent the hundi to the munim of his Bombay firm, by whom, on behalf of the plaintiff, this suit was filed on the 16th April, 1893.

The plaintiff claimed the sum of Rs. 2,500 from the defendant with interest from the 1st June, 1889, till payment.

The following were the material paragraphs of the plaint :—

"2. On the 13th Chaitur Sudha, Samvat 1946 (the 14th April, 1889), the defendants drew a hundi for Rs. 2,500 payable forty-five days after date upon their said Bombay firm payable in favour of Bhai Damodardas and the said Bhai Damodardas sold and indorsed the said hundi to the plaintiff's firm at Cawnpore. The said hundi was duly presented for payment in Bombay, but was dishonoured.

"3. On or about the 16th June, 1891, the plaintiff filed a suit to recover the amount of the said hundi against the defendant in the Court of the Subordinate Judge at Cawnpore, and on the 18th March, 1893, the said suit was dismissed for want of jurisdiction in the said Court to hear and determine the same. The plaintiff says that during the said

period, between the 16th June, 1891, and 18th March, 1893, he was prosecuting this suit in the said Court with due diligence and in good faith, and he submits that the said period should be excluded in computing the period of limitation for this suit."

The following were the issues raised at the hearing—

1. Whether at the time of the filing of this suit, the defendant carried on business in Bombay ?

2. Whether any part of the cause of action arose within the jurisdiction of this Court ?

3. Whether this suit is not barred by limitation ?

4. Whether the plaintiff is the holder, in due course, of the hundi sued upon ?

The Judge (Starling, J.) found the first issue in the negative, but found on the others for the plaintiff and passed a decree for the amount claimed.

[136] The defendant appealed.

Kirkpatrick and *Lowndes*, for the appellant.—The suit is barred by limitation. The cause of action (if any) accrued on the 1st June, 1889, when the hundi became payable. This suit was not filed until 16th April, 1893. The plaintiff is not entitled to exemption under s. 14 of the Limitation Act (XV of 1877). That section requires good faith and due diligence. The plaintiff delayed for two years before filing his suit at Cawnpore on 16th June, 1891, and he did not bring his suit to a hearing in that Court for a further period of two years, his plaint being returned on the 18th March, 1893. It was clear that Court had no jurisdiction. No part of the transaction took place at Cawnpore—*Ramjivanmal* v. *Chandmal* (1); *Sitaram Paraji* v. *Nimba valad Harishet* (2).

We contend that the plaintiff has never had any right of action upon this hundi, inasmuch as it has never been presented for payment. It is admitted that it was only presented for acceptance. That is not enough. Presentment for payment after due date is necessary, and there is no right of suit for non-payment without it—Negotiable Instruments Act XXVI of 1881, ss. 64, 66, 68, 69; Chitty on Bills of Exchange (11th Ed.), pp. 248, 251, 271. The lower Court held that non-acceptance of itself gave an immediate cause of action, and that subsequent presentment for payment was not necessary. That is the law in England, but not in India. It is a peculiarity of English law (Chalmers on the Negotiable Instruments Act, Introduction, p. xxviii). It originated in usage and is now embodied in Stat. 45 and 46 Vic., c. 61, s. 43. But in India the law is different. There has been no such usage here in the case of hundis payable at a fixed date, and there is no provision in Act XXVI of 1881, similar to s. 43 of the English Act. It is clear that it was intentionally omitted as to such hundis, because in the case of hundis payable at sight, presentment for acceptance is required by s. 61. The Negotiable Instruments Act (XXVI of 1881) is a Code (see preamble), and to such a code this Court can make no additions— *Bank of England* v. *Vagliano* (3). If acceptance of such hundis can be enforced without authority in the Act, then **[137]** s. 43 of the English Act is superfluous. To hold acceptance compulsory will be, in effect, to insert by implication in the Indian Act a new clause similar to s. 43 of the English Act. No usage in India as to acceptance has been proved. The refusal, therefore, of the defendant to accept this hundi before it was payable gives no right of action to the plaintiff.

(1) 10 A. 587. (2) 12 B. 320. (3) L.R. (1891) A.C. at p. 144, 145, 146.

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Again, the plaint alleges dishonour by non-payment, but the only evidence given was as to dishonour by non-acceptance. A plaintiff who has got leave under cl. 12 of the Letters Patent, 1865, cannot afterwards change his case—*Rampurtab Samruthroy* v. *Premsukh Chandamal* (1).

Further, the defendant is sued as drawer. But his contract as drawer was made at Gwalior. It was a contract that he would pay the hundi there, if the drawee did not pay it at Bombay. The failure of the drawee to pay in Bombay does not give a right to sue the drawer in Bombay. The suit should be at Gwalior. As to the liability of a drawer, see ss. 30, 31 and 92 of Act XXVI of 1881; *Sulleman Hussein* v. *New Oriental Bank* (2). The defendant is a resident of a foreign State, and this Court has no jurisdiction over him—*Gurdyal Singh* v. *Raja of Faridkot* (3); *Girdhar Damodar* v. *Kassigar* (4). The plaintiff is not a holder for value, but a mere agent for collection. His accounts with Damodar Sukhlal were not altered when he received this hundi—*Mulchand Joharimal* v. *Suganchand* (5).

Scott (with *Inverarity*) for the respondent (plaintiff).—The plaintiff as indorsee of the hundi had a right to have it accepted by the drawee before it became due. It was presented in Bombay for acceptance and dishonoured. Such dishonour gives an independent right of action, and a suit may be brought at once.—There is at once a complete right of action—Chitty on Bills of Exchange (11th Ed.). p. 195; *Ballingalls* v. *Gloster* (6); *Allan* v. *Mawson* (7); *Whitehead* v. *Walker* (8). The law laid down by these cases has always been the law in England. It is now the law there by statute; see Stat. 45 and 46 Vic., c. 61, s. 43. **[138]** The law in India is the same; see also *Miller* v. *The National Bank of India* (9). When the defendant's firm in Bombay refused to accept the hundi on the 23rd April, 1889, a cause of action at once accrued to the plaintiff. Part of the cause of action certainly accrued then, and leave to sue under cl. 12 of the Letters Patent, 1865, has been obtained. This Court has, therefore, jurisdiction. The hundi having been dishonoured by non-acceptance, it was not necessary afterwards to present it for payment —Negotiable Instruments Act XXVI of 1881, s. 76. The defendant was drawee as well as drawer, and from Gwalior he had written to his Bombay firm not to accept or pay the hundi.

As to limitation, the plaintiff is entitled to the benefit of s. 14 of the Limitation Act (XV of 1877). He sued at Cawnpore within the period of limitation, but that Court held that it had no jurisdiction. He is not responsible for the delay in getting the decision of that Court upon the point—*Sominadha* v. *Samban* (10).

JUDGMENT.

FARRAN, C.J.—This was a suit upon a hundi for Rs. 2,500, of which the plaintiff was the holder, drawn by the defendant's branch at Gwalior upon the defendant's Bombay branch, and alleged to have been dishonoured in Bombay. The plaintiff has obtained a decree for the amount of the hundi with interest from the Division Court.

The appellant (defendant) before us contends that the Court had no jurisdiction to try the suit, and that it was barred by limitation, and, on

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(1) 15 B. 93. (2) 15 B. 267 (278). (3) 22 C. 222.
(4) 17 B. 662. (5) 1 B. 23 (36). (6) 3 East. 481.
(7) 4 Camp. 115. (8) 9 M. and W. 506. (9) 19 C. 146.
(10) 16 M. 274.

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the merits, that the plaintiff was not the holder of the hundi "in due course," and that he was not entitled, under the circumstances, to maintain a suit upon it.

The circumstances, which are not disputed, are these:—The defendant, who is a Baroda shroff and banker, carries on business also at Gwalior by a munim under the name of Gangadhar Yeshwantrao. He had also, at the date of the hundi, a branch in Bombay carried on in the name of Gopalrao Malharrao. On the 14th April, 1889, the defendant's Gwalior branch drew six hundis for the aggregate amount of Rs. 10,000 on the defendant's [139] Bombay branch of Gopalrao Malharrao and indorsed them to the firm of Damodar Sukhlal, which was a firm carrying on business at Gwalior.

The hundis were all made payable forty-five days after date and fell due in Bombay on the 1st of June, 1889. At the same time, and in exchange for these six hundis, Damodar Sukhlal drew two hundis for Rs. 5,000 each, one on Baldevdas Bansilal and the other on Kushal Chand Punamchand, both of Bombay, and endorsed them to the defendant's Gwalior branch. They purported to be payable at sight, but were post-dated 24th April, 1889.

Out of the six hundis which the firm of Damodar Sukhlal so received from the defendant's branch at Gwalior, they sent one for Rs. 2,500 (the hundi now sued on) to the plaintiff's branch of Cawnpore which was carried on under the name of Lachminarayanji Pralhaddas with the following endorsement:—"This hundi is sent for (the purpose of) being sold from the camp by Damodardas Sukhlal to Sha Lachminarayan Pralhaddas of Cawnpore." It is not contested that, at the time when the plaintiff's Cawnpore branch received this hundi, the firm of Damodar Sukhlal was largely indebted to the plaintiff both on the Cawnpore and Bombay accounts. A hundi had also been drawn for Rs. 1,482 6 4 by Damodar Sukhlal on the plaintiff's Cawnpore branch, which fell due and was duly paid about the time of the receipt of the hundi in question by that branch.

Soon after the receipt of this hundi for Rs. 2,500, the plaintiff's Cawnpore branch sent it to the Bank of Bombay for collection. Gangadharrao Yeshwantrao also sent the two hundis for Rs. 5,000 each received from Damodar Sukhlal to Bombay for collection.

On the 19th April the owners of the firm of Damodar Sukhlal stopped payment and absconded from Gwalior. Whereupon Gangadharrao Yeshwantrao telegraphed and wrote to the defendant's Bombay branch of Gopalrao Malharrao directing the latter not to accept the six hundis of Damodar Sukhlal and to present the two hundis of that firm for acceptance through the bank. These last mentioned hundis were presented to the drawees thereof respectively, and were dishonoured. The [140] consideration for the six hundis of Gangadharrao Yeshwantrao, including the hundi sued upon, thereupon failed, as Damodar was a debtor to that firm at Gwalior.

The Bank of Bombay presented the hundi in question to the defendant's Bombay firm of Gopalrao Malharrao on the 23rd April, 1889. Acceptance was refused. It was then returned by the bank to the plaintiffs at Cawnpore. It was not presented at due date for payment.

After receiving back the hundi from the Bank of Bombay the plaintiff sent a vakil's notice to the defendant. The defendant refused to receive the notice, and did not pay the amount of the hundi.

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On the 16th June, 1891, the plaintiff instituted a suit upon the hundi in the Subordinate Judge's Court at Cawnpore. It was dismissed for want of jurisdiction on the 18th March, 1893. The plaintiff instituted the present suit on 11th April, 1893. The plaint was accepted with leave to sue under cl. 12 of the Letters Patent, 1865, on that day.

It has been found by the Division Court that the defendant ceased to carry on business in Bombay and closed his firm here shortly before suit filed. There is no cross-appeal against that finding. So it must be taken as a fact in the case.

Dishonour by the drawee has always been held to constitute part of the cause of action in a suit on a hundi by the holder against the drawer—*Mulchand* v. *Suganchand* (1). It is contended before us that in this case there has been no dishonour under the Negotiable Instruments Act (XXVI of 1881), as the hundi was not presented for payment. The definition, in the Indian Act, of the engagement which the drawer of a bill of exchange enters into with the person in whose favour it is drawn, is very compendiously expressed (s. 30). Under English law, upon which the Act is founded, the engagement of the drawer is that "*on due presentment* it shall be accepted and paid according to its tenor, and that if it be dishonoured, he will compensate the holder, provided that the requisite proceedings in dishonour shall [141] be duly taken." We take this definition from the English Act (45 and 46 Vic., c. 61 and 65); but it is merely a reproduction of the Common Law. This was also the law in British India before the passing of the Negotiable Instruments Act, and we can see no indication, in that Act, of an intention to alter it. The section in the Indian Act relating to this subject is s. 30. "The drawer of a bill of exchange is bound, in case of dishonour by the drawee in acceptance thereof, to compensate the holder, provided due notice of the dishonour has been given to the drawee." Dishonour may be by non-acceptance, which takes place "when the drawee makes default in acceptance *upon being duly required to accept the bill*" (s. 91), or by non-payment, which takes place "when the acceptor of the bill.....makes default in payment upon being duly required to pay the same" (s. 92).

In the case of bills drawn otherwise than payable after sight, there is no definition or explanation of the meaning of the italicised words "upon being duly required to accept the bill," and it is argued that, in the case of such bills, there is no dishonour within the meaning of the Act, except dishonour by non-payment, and thus the drawer incurs no liability until the Bill is presented for payment, and payment is refused. The English law does not require presentment for acceptance of a bill payable after a fixed date to be made by the holder before such fixed date arrives (see s. 39 (3) of the English Act, which is declaratory of the American law (Chalmers, p. 120) and *Whitehead* v. *Walker* (2)), nor does the Indian Act (s. 62). But under the English law it was not only allowable but was strongly advisable to do so; and we think that the Negotiable Instruments Act has made no alteration in that respect. Presentment for acceptance must always and in every case precede presentment for payment, and it appears to us that the drawer of a bill contracts that whenever the bill is duly presented, it will, subject to the provisions of s. 63, be accepted. The several sections in Chap. 61, relating to presentment for payment, appear to us to pre-suppose that the bill has not been already

(1) 1 B. 23.

(2) 9 M. and W. 506.

dishonoured by [142] non-acceptance. When it is dishonoured by non-acceptance, as well as when it is dishonoured by non-payment, the provisions of Chap. VIII come into play. It is true that there is no such explicit declaration of the law upon this subject contained in the Indian, as in s. 43 (2) of the English, Act. But the whole scope and tenor of Chap. VIII of the Indian Act appear to contemplate the same result as is there declared to follow from non-acceptance. We are, therefore, of opinion the dishonour of a bill by non-acceptance constitutes now, as it has always done, part of the cause of action in a suit against the drawer.

No notice of dishonour is required where, as in this case, the drawer and drawee are the same person. On dishonour of the bill, the right to sue the drawer immediately accrued and was complete, and there was no need to wait till the maturity of the bill, or present it to the drawee for payment. The same view of the position of a drawer under the Negotiable Instruments Act was taken by the Court in *Miller* v. *National Bank of India* (1) as we have adopted. But the point was hardly disputed and but little discussed. It would be unfortunate if we had felt ourselves compelled to declare the Anglo-Indian law to be different from the English law upon this subject.

It has been, however, argued upon the authority of *Gurdyal Singh* v. *The Rajah of Faridkote* (2) that, admitting that part of the cause of action arose in Bombay, the Court has no jurisdiction over the defendant, who is a subject of the Baroda State and a foreigner, inasmuch as before suit filed, he had ceased to carry on business in Bombay and to be amenable to the jurisdiction of this High Court.

The answer to this contention appears to us to be found in a passage of the judgment of the Privy Council itself. "In a personal action..... a decree pronounced *in absentem* by a foreign Court to the jurisdiction, of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in [143] the country of the forum by which it was pronounced." Except in the case of *Kessowji* v. *Khimji Jayaram* (3), where, to escape from a grave anomaly, one of the heads of jurisdiction conferred on the High Court by cl. 12 of its Letters Patent was read as though the words "being a British subject" were inserted in it, it has been considered, since the establishment of this High Court, that the several heads of jurisdiction specified in the clause were applicable to actions where a foreigner was a defendant. The number of suits which have been brought, and without question decided, upon that view of the law must have been very great. The judgment of the Court of Appeal in *Girdhar* v. *Kassigar* (4) virtually overrules *Kessowji* v. *Khimji* (3), and decides that the case of foreigners resident out of the jurisdiction, but carrying on business within it, is not to be impliedly excluded from the purview of cl. 12 of the Letters Patent. The reasoning upon which the decision is founded, is directly applicable to the case before us. Thus we feel that we should be virtually overruling that decision if we were to accept the contention of the counsel for the appellant. We do not, however, doubt its correctness, and willingly follow it. The plea to the jurisdiction, therefore, fails. ... ...

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(1) 19 C. 146.
(2) 21 I.A. 171=22 C. 222 (238).
(3) 12 B. 507.
(4) 17 B. 662.

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As to limitation, we see no sufficient reason for not excluding, from the period prescribed for the suit, the time occupied by the plaintiff in prosecuting his suit in the Court at Cawnpore. That it was a *bona fide* suit, in which the plaintiff hoped to obtain a decree in his favour, there can, we think, be no doubt. It was prosecuted to decree, but failed. We feel unable to accept the argument for the appellant that because the mistake made in filing the suit at Cawnpore was an error of law, that the suit was not a *bona fide* one. It was a stupid, though not an unaccountable, blunder; but the ignorance of law, or the ill-advice of a pleader, does not, in our opinion, necessarily or *prima facie* establish a want of good faith. We do not assent to the ruling, in which a contrary proposition appears to be laid down. We also cannot say that the plaintiff has not established that his suit was prosecuted with diligence. He engaged a pleader and took [144] the usual steps which a litigant is compelled to adopt. If there had been undue delay in the service of the summons, it would have been pointed out in the cross-examination of the plaintiff. Nothing of this kind has been shown. The hearing of the case appears to have been delayed in part by defendant not putting in his written statement, in part by the state of the business of the Court. It would, under these circumstances, be rather an extreme step to deprive the plaintiffs of the benefit of s. 14 of the Limitation Act.

Lastly, as to the plaintiff being a holder in due course (s. 9), we do not entertain any doubt. The circumstances show that the hundi was sent to the plaintiff to prevent the plaintiff dishonouring the hundi which Damodar Sukhlal had drawn on him, and to reduce the amount of Damodar Sukhlal's indebtedness to the plaintiff. The several cases, in which the holder of a bill is said to be a holder for consideration or value, will be found in the illustrations to the English Bills of Exchange Act, s. 27. The present case clearly falls within them.

We, therefore, confirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

Attorney for the plaintiff.—Mr. *H. S. Dikshit.*
Attorneys for the defendant.—Messrs. *Payne, Gilbert and Sayani.*

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20 B. 145.

[145] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Starling.

QUEEN-EMPRESS *v.* HARI SAVBA AND ANOTHER.*

[31st October, 1895.]

Criminal Procedure Code (Act X of 1882), s. 411—Appeal from a conviction by a Presidency Magistrate—Appeal—Practice.

Section 411 of the Code of Criminal Procedure (Act X of 1882) does not allow an appeal in the case of a conviction by a Presidency Magistrate where the sentence inflicted is six months' rigorous imprisonment and a fine of Rs. 125, or in default a further period of three months' rigorous imprisonment.

[R., 3 Ind. Cas. 285 (286).]

THIS was an appeal from a conviction by the Chief Presidency Magistrate in the case of *Queen-Empress* v. *Hari Savba and another.*

* Criminal Appeal, No. 315 of 1895.

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APPELLATE CRIMINAL.

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The two accused were charged with the offences of cheating and abetment of cheating under ss. 417 and 109 of the Indian Penal Code (Act XLV of 1860).

The Chief Presidency Magistrate relying on the evidence of the prosecution convicted both the accused of the offences charged, and sentenced each to six months' rigorous imprisonment and a fine of Rs. 125, or, in default, to a further period of three months' rigorous imprisonment.

Against this conviction and sentence the accused appealed to the High Court.

N. S. Deorukar, for the accused.

There was no appearance for the Crown.

JUDGMENT.

PER CURIAM.—The Court is of opinion, following *Schein* v. *Queen-Empress* (1) that s. 411 of the Code of Criminal Procedure does not allow an appeal in this case. The appeal is barred by s. 404.

Appeal dismissed.

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20 B. 146.

[146] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

THE AHMEDABAD MUNICIPALITY (*Original Defendant*), *Appellant* v. MANILAL UDENATH (*Original Plaintiff*), *Respondent.**

[28th November, 1894.]

The Bombay District Municipal Act (Bombay Act VI of 1873), s. 17†—Public street—Street—Construction of Act—The City of Bombay Municipal Act (III of 1888) s. 3.‡

In a suit brought by the plaintiff against the Municipality of Ahmedabad, the question was whether a certain street was a public street within the contemplation of the Bombay District Municipal Act (Bombay Act VI of 1873). The District Judge, on the evidence and having regard especially to the fact that the street in question was protected by a gate closed at night by a *polia*, or watchman, who lived over the gate, and was under the control of and paid by the owners of the houses in the street, held that there had been no dedication of the land to the public, and that the public had not acquired such a right of going over it as to

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* Second Appeal. No. 479 of 1892.

† Section 17 of the Bombay District Municipal Act (Bombay Act VI of 1873)—

17. All property of the nature hereinafter specified shall be vested in and belong to the Municipality, and shall, together with all other property, of what nature or kind soever, which may become vested in the Municipality, be under their direction, management, and control, and shall be held and applied by them as trustees for the purposes of this Act; that is to say:—

. . . . .

(*f*) All public streets not being portions of provincial high roads or trunk roads specially reserved by Government, and the pavements, stones, and other materials thereof, and also all trees, erections, materials, implements and things provided for such streets.

‡ Section 3 of the City of Bombay Municipal Act (III of 1888)—

. . . . .

(*x*) "Public street" means any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the corporation and any street which becomes a public street under any of the provisions of this Act.

(1) 16 C. 799.

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make it a public street vested in the Municipality. On second appeal by the defendant the High Court refused to interfere with the decision of the lower Court.

In the absence of a definition of a public street in the Bombay District Municipal Act VI of 1873 the High Court refused to apply the definition contained in the City of Bombay Municipal Act (III of 1888).

[Appr., 25 B. 315 (317); R., 24 B. 600 (605); 27 B. 221 (233); 30 B. 558 (568) = 8 Bom. L.R. 457.]

SECOND appeal from the decision of G. McCorkell, District Judge of Ahmedabad, confirming the decree of Rao Saheb Maneklal Narottamdas, Joint Second Class Subordinate Judge of Ahmedabad.

[147] The plaintiff sued for an injunction restraining the defendants from removing a bench standing upon the ground in front of the plaintiff's *ota* (verandah), alleging that the bench had been there for more than twenty years.

The defendants pleaded (*inter alia*) that the ground on which the bench stood, did not belong to the plaintiff, but was part of a public street.

The Subordinate Judge found (1) that the bench had been standing upon the ground in front of the plaintiff's *ota* (verandah) for upwards of twenty years, (2) that the ground on which the bench stood formed part of a street, but not of a public street, and (3) that the Municipality had no right to remove the bench. He, therefore, passed a decree for the plaintiff.

The defendants appealed, urging (*inter alia*) that as there had been no issue raised at the trial as to whether the ground on which the bench stood formed part of a public street, they had called no evidence on the point, and they contended that they should be given an opportunity of calling such evidence. The Judge confirmed the decree, but on second appeal by the defendants, the High Court remanded the case for a finding on the following issue (see I. L. R., 19 Bom., 212):—

"Whether the land in question forms part of a public street vested in the Municipality?"

The finding of the Judge was in the negative. The following is an extract from his judgment:—

"A public street is nowhere defined in the Bombay District Municipal Acts (No. VI of 1873 and No. II of 1884). An attempt has, therefore, been made to use the definition in s. 3 of Bombay Act III of 1888, the City of Bombay Municipal Act. A public street is therein defined as 'any street heretofore levelled, paved, metalled, channelled, sewered or repaired by the corporation, and any street which becomes a public street under any of the provisions of that Act.' It has been contended for the defence that as the street is lighted and swept by the Municipality, and a channel is cut in it during the rainy season by the Municipality, and as the sullage water of the houses in the street is removed by municipal servants, the definition above quoted applies. On the other hand, it has been contended that as it is neither levelled, nor paved, nor metalled, nor sewered, nor repaired by the Municipality, the definition does not apply. As to the facts, I believe the evidence of the Municipal Secretary, Mr. Dayabhai, as it is not materially contradicted, and the facts of lighting, sweeping, and removal of sullage [148] water, are admitted, and the fact of channelling is proved by the accounts produced by him (Exs. 48 and 49). But I do not think the definition given in an Act for the City of Bombay can properly be applied to a town in the Mofussil like Ahmedabad in all its strictness:

"The real test would seem to be whether every member of the public has the right of way over the street in question. I should think that they

had not such right. This *pol* is completely closed on one side, and where it opens on the main road, there is a gate-way with a storey over it. A watchman, called a *polia*, lives on that storey and keeps charge of the gate and closes it at night, opening it when necessary. This gate-way and storey are kept in repairs by the house-holders of the *pol*, and the *polia* is also paid by them in various ways. Most of these facts are admitted by the Municipal Secretary, Mr. Dayabhai. He says: 'The street people are the owners of the storey, and the man who lives in it, does so for and on their behalf. The street has a gate with shutters. The street people repair the gate and shutters.' The nature of the payments to the *polia* is stated by Motilal (Ex. 57), a municipal inspector, who lives in the *pol* in question and was called as a witness by the Municipality and by the *polia* himself (Ex. 78). The existence of the gate-way, its possession and control by the inhabitants of the street, and the fact that it is closed every night, show that the street has all along been a private one and has been intended to be so. Private individuals certainly cannot control the right of access to a public street. It has been contended that there exists no such control, because no case can be quoted in which such access was disputed. But the very fact of closing the gate at night is a proof of this control. No doubt it is opened, if necessary, for the purposes of the inhabitants of the *pol*, but it would hardly be contended that any member of the public can cause it to be opened in order to enter at any hour he chooses. For example, if 4 or 5 Mahomedans wanted to enter it at night, merely for the purpose of walking through the street, surely they would not have the right of causing the gate to be opened for the purpose. Similarly, if a couple of suspicious-looking Kolis wanted to enter the *pol*, the *polia* would be justified in keeping the door closed until they could give good reason for letting them in. If the road were public, could any private individual prevent access, in either case, without rendering himself liable to prosecution for wrongful restraint?"

The defendants filed objections to the above finding.

Wadia with *Gangaram B. Rele*, for the appellants (defendants).—The Judge finds that the street in question is paved and channelled by the Municipality, but he holds that it is not a public street. The term "public street" is not defined in the District Municipal Act, but it is defined in the Bombay Municipal Act III of 1888, s. 14, there being no definition in the District Municipal Act, the definition given in the similar Act relating to the City of Bombay should be accepted.

Chimanlal H. Setalvad, for the respondent (plaintiff).—The public may have a right of way in a street which is not a public [149] street, and the proprietary right to which may be in private individuals. The Judge has found that the persons who own houses in this street are the proprietors of the street. The Court cannot read into one Act a definition contained in another.

JUDGMENT.

SARGENT, C.J.—The issue sent down to the lower appellate Court (I.L.R., 19 Bom., 212) involves the question what constitutes a "public street" within the contemplation of Bombay Act VI of 1873. That Act contains a definition of a "street," but not of a "public street," although several sections refer only to public streets, among which is s. 17, which provides for the vesting of "public streets" in the Municipality, but at the same time leaves the question still open as to what are "public streets." The District Judge has come to the conclusion on the evidence,

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and more especially on the fact, that the street in question is protected by a gate closed at night by a *polia*, or watchman, who lives over the gate and is under the control of, and paid by, the owners of the houses in the *pol*; that there has been no dedication of the land to the public, and that the public has not acquired such a right of going on it as to make it a public street which it was intended by the Act to vest in the Municipality. The language of the High Court in *Kalidas* v. *The Municipality at Dhandhuka* (1) supports the view of the District Judge, where they say "no one's rights of property would be safe if the Municipality could take advantage of such limited access by members of the public, in order to make out a claim to hold the land in question as public property."

It was contended before us, on appeal, that the Court should have applied the test afforded by s. 3 of the Bombay City Municipal Act III of 1888. But that Act has no bearing on the Mofussil Municipal Act VI of 1873 in question, which relates to a state of things and conditions of life entirely different, and is, moreover, framed on entirely different lines. Under these circumstances we see no reason for interfering, on second appeal, with the finding on the issue, and must, therefore, confirm the decree with costs.

Decree confirmed.

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20 B. 150.

[150] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

ANPURNABAI AND OTHERS (*Original Defendants*), *Appellants v.* DURGAPA MAHALAPA NAIK (*Plaintiffs*), *Respondents.**

[29th November, 1894.]

Lunatic—Lunatic's estate—Act XXXV of 1858, *s.* 14†—*Manager appointed under the Lunacy Act—Manager of joint family—Alienation by manager.*

Where a person is appointed manager of a lunatic's estate under Act XXXV of 1858, he can only make a valid alienation in accordance with the provisions of that Act, although he may also be *de facto*, manager of the family property.

A Hindu married woman having a lunatic husband and minor sons was appointed guardian of the lunatic's estate under Act XXXV of 1858. She was also *de facto* manager of the family. She mortgaged the family property without the sanction of the Court, as required by s. 14 of the Act.

Held, that the mortgages were invalid as regards the lunatic's interest in the property, but as regards the interest of the minors, which was vested in them at the time of the mortgages, the property being ancestral, the mortgages were binding if made for family purposes.

[F., 18 A. 373.]

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* Second Appeals Nos. 383 and 551 of 1890.

† Section 14 of the Lunacy Act (XXV of 1858)—

14. Every manager of the estate of a lunatic appointed as aforesaid may exercise the same powers in the management of the estate as might have been exercised by the proprietor, if not a lunatic; and may collect and pay all just claims, debts, and liabilities due to or by the estate of the lunatic. But no such manager shall have power to sell or mortgage the estate, or any part thereof, of to grant a lease of any immoveable property for any period exceeding five years, without an order of the Civil Court previously obtained.

(1) 6 B. 686 (689).

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THESE were second appeals from the decision of Gilmour McCorkell, District Judge of Kanara, reversing the decree of Rao Saheb V. D. Joglekar, Subordinate Judge of Honavar.

Suit for possession of land. The land in question was the property of one Venkatesh, who was found to be a lunatic under the Lunacy Act (XXXV of 1858). His wife Lakshmibai was appointed manager of his estate under s. 14 of that Act. She was also *de facto* manager of the family, which consisted of her lunatic husband and two minor sons Ganpaya and Pandurang (defendants Nos. 3 and 4). In 1876 she mortgaged the land, without possession, to the first defendant.

On the 4th February, 1882, Ganpaya having then attained [151] majority, sold the same land to the plaintiff, who in 1889 brought this suit for possession.

The first defendant claimed as mortgagee from Lakshmibai. Defendants Nos. 2 and 3 did not defend the suit. Defendant No. 4 (Ganpaya's brother Pandurang) contended that his share in the property was not bound by Ganpaya's sale to the plaintiff.

The Subordinate Judge dismissed the suit, holding that defendant No. 1 had proved his mortgage, and that the share of defendant No. 4 was not bound by the plaintiff's purchase from defendant No. 3.

On appeal, the Judge passed a decree for the plaintiffs, ordering that they "should recover possession of the land free from all incumbrances on the part of defendants Nos. 1 and 2, and mesne profits from the date of suit."

The following is an extract from his judgment :—

"Lakshmibai was the wife of one Venkatesh Pai, who had been declared a lunatic, and his wife had obtained a certificate. In 1876 she mortgaged to defendant No. 1. Plaintiffs contend that that mortgage is invalid. On this point there can be no doubt. Lakshmibai had obtained a provisional order to sell some lands, but she did not fulfil the conditions imposed. She had, therefore, no authority to sell. Now it must not be assumed that even an absolute authority to sell can be construed as an authority to mortgage. Under such special Acts as Acts XXXV of 1858 and XX of 1864,* the administratrix must act in strict conformity to the authority conferred ; otherwise her acts are invalid *ab initio*. The argument of the Subordinate Judge, that she was acting as the guardian *de facto* of her sons, cannot be sustained for a moment. Her husband was alive, and she held in trust for him and not for her children. Her children could only claim proper maintenance, but they had no proprietary right in the estate such as came after the death of their father.

"Defendant No. 5 obtained a decree against Lakshmibai as administratrix of her husband's estate in respect of maintenance. The maintenance of a widow in a joint Hindu family is a charge against the general family estate, and not against any particular portion. The maintenance of defendant No. 5 must be held as a charge against the lands in dispute along with the rest of the family estate."

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* Section 18 of the Minors' Act (Bombay Act XX of 1864)—

18. Every person to whom a certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts and liabilities due to or by the estate of the minor. But no such person shall have power to sell, alienate, mortgage, or otherwise incumber any immoveable property or to grant a lease thereof for any period exceeding five years without the sanction of the Civil Court previously obtained.

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[152] The first defendant (Anpurnabai) preferred a second appeal.

Scott with *Ghanasham N. Nadkarni*, appeared for appellant (original defendant No. 1):—The mortgage by Lakshmibai to the first defendant was valid. She acted in two capacities. She had been appointed manager under the Mofussil Courts' Lunacy Act, and, therefore, any alienation made by her in that capacity was effectual. She also acted as the *de facto* manager of the family, and borrowed money from the first defendant to pay off previous debts. Therefore the alienation made by her as the *de facto* manager cannot be impeached, the alienation being for a family necessity—*Bai Amrit* v. *Bai Manik* (1); *Girraj Baksh* v. *Kazi Hamad Alli* (2); *Keshav* v. *Doulatkhan* (3); *Manishankar* v. *Bai Muli* (4).

[FULTON, J.—Lakshmibai did not obtain the sanction of the Court under s. 14 of the Lunacy Act to mortgage the property. Therefore the alienation made by her as the manager of her lunatic husband would be bad. See *Court of Wards* v. *Kupulmun Sing* (5).]

The family having derived the benefit of the mortgage transaction, it should not now be set aside—*Dilkoer* v. *Roy Anand Kishore* (6). As the mortgages were made for the benefit of the family, neither the lunatic nor the minors are entitled to have it set aside without making restitution.

We further contend that the lunatic had no interest in the family property. Lunacy deprived him of his share, and he became entitled only to maintenance. A lunatic is not entitled to a share on partition—Mayne's Hindu Law, art. 443.

Shamrao Vithal, for the respondents (original plaintiffs) :—The previous sanction of the Court under s. 14 of the Lunacy Act was not obtained, and, therefore, the mortgage was not valid so far as the lunatic was concerned—*Court of Wards* v. *Kupulmun Sing* (5). It was not as the *de facto* manager of the family that he purported to deal with the property, but as [153] manager appointed under the Lunacy Act. She ought to have obtained the sanction of the Court either under the Lunacy Act or the Minors' Act. There is no authority for the proposition that a lunatic is under no circumstances entitled to a share in the family property. If a man becomes a lunatic after partition, he cannot be deprived of his share. It is only where a man is a lunatic at the opening of the inheritance that he is not entitled to a share.

Narayan G. Chandavarkar, appeared for respondents (original plaintiffs) in Appeal No. 551.

JUDGMENT.

SARGENT, C. J.—The District Judge has decided in favour of the plaintiff on the ground that the mortgages by Lakshmibai, under which defendant No. 1 claims, were bad, both as regard her lunatic husband and the defendants Nos. 3 and 4. As to the latter, he disputes the ground of the Subordinate Judge's decision in favour of defendant No. 1 as proceeding on the assumption that she was acting as the guardian *de facto* of her minor sons. But this is a mistaken view of the Subordinate Judge's reasoning. He treated Lakshmibai as being the *de facto* manager of the family, and, as such, being able to alienate the property for family purposes. It was not disputed that she did fill that character; but the question for consideration is, whether having been appointed a guardian of her lunatic

(1) 12 B.H.C.R. 79. (2) 9 A. 340. (3) P.J. (1891), 147.
(4) 12 B. 686. (5) 10 B.L.R. 364. (6) 10 C.L.R. 547.

husband's estate under Act XXXV of 1858, she could mortgage the lunatic's interest without the consent of the Court as required by s. 14 of the Act. The decisions in *Shurrut Chunder* v. *Rajkissen* (1) and *Bhupendro Narayan* v. *Nemye Chand* (2) are conclusive that in the case of a manager of a minor appointed under the Minors' Act, although he may have been *de facto* manager of the family property, he can only make a valid alienation in accordance with the Minors' Act. The language of s. 14 of the Act XXXV of 1858 is the same as that of s. 18 of the Bombay Minors' Act XX of 1864, and the decision must be the same with regard to the manager of a lunatic. The remarks of Phear, J., with respect to a lunatic's estate in *The Court of Wards* v. *Kupulmun Sing* (3), and which is referred to in *Shurrut Chunder* v. *Rajkissen* (1), are to that effect. [154] The mortgages, therefore, under which defendant No. 1 claims, were invalid as regards the lunatic's interest in the property, but as regards the interest of the minors, defendants Nos. 3 and 4, which was vested in them at the time, it being admittedly ancestral property, if the mortgages were for family purposes, they would be binding on defendants Nos. 3 and 4, through whom plaintiff claims. Owing to the view the District Judge took of the rights of the parties, there is no finding as to this. It was contended for defendant No. 1 that the lunatic was only entitled to maintenance after the partition, but this would not be so if the lunatic was not one at the time of Giriappa's death so as to disqualify him from inheriting or demanding a partition, and as no issue was raised in either Court below relative to the lunatic's proprietary right, it must be assumed that such was the case, as was held by Phear, J., under similar circumstances in *The Court of Wards* v. *Kupulmun Sing* (3).

Lastly, it was said that, at any rate, equity requires that the plaintiff should not recover possession of the lunatic's proprietary interest in the property without paying some portion of the amount of the mortgage passed to defendant No. 1, as it was expended on the family estate, and the plaintiff has had the benefit of it. This question cannot be satisfactorily dealt with until it has been determined whether the money raised by defendant No. 1's mortgages was for a family purpose. We must, therefore, before disposing of the case send down the following issue for determination :—

Were the mortgages executed by Lakshmibai to defendant No. 1 or was either and which of them for a family purpose?

Finding to be sent to this Court within three months.

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20 B. 155.

[155] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

DINKAR AND OTHERS (*Original Defendants Nos.* 4, 5, 1 *and* 6), *Appellants v.* APPAJI (*Original Plaintiff*), *Respondent.**

[10th December, 1894.]

Hindu law—Joint family—Manager of joint family—Power of manager to revive a time-barred debt—Limitation.

The manager of a Hindu family has no power to revive by acknowledgment a debt barred by limitation, except as against himself.

* Second Appeal No. 420 of 1893.

(1) 15 B. L. R. 350. (2) 15 C. 627 (634). (3) 10 B. L. R. 364.

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SECOND appeal from the decision of Rao Bahadur Lalshankar Umiashankar, Joint Subordinate Judge of the First Class, A. P., of Thana, in appeal No. 190 of 1891.

Three brothers, Ravji, Parashram and Sitaram, were members of a joint Hindu family.

In April, 1870, the three brothers passed two bonds (Exs. 6 and 7) in favour of the plaintiff's father for debts incurred for the benefit of the joint family.

After this Ravji died, leaving behind him his widow and two minor sons (defendants Nos. 4 and 5).

On the 14th October, 1874, Parashram and Sitaram passed a bond (Ex. 8) for Rs. 1,990-5-0, being the balance due on the previous bonds (Exs. 6 and 7), mortgaging certain family property. The claim in respect of the previous bonds was at that time barred by limitation.

In 1879, Parashram and Sitaram adjusted the account of the debt due on Ex. 8, and executed for themselves, and as guardians of defendants Nos. 4 and 5, two mortgage-bonds (Exs. 10 and 11) in plaintiff's favour for Rs. 2,500 and Rs. 466-7-0, respectively.

In 1890, the plaintiff sued to recover Rs. 3,999 due on Ex. 11 by sale of the mortgaged property as well as from the defendants personally.

Defendants Nos. 1, 2 and 3 (who were sons of Parashram) and defendant No. 6, Sitaram, contended that they were not personally liable.

[156] Defendants Nos. 4 and 5, the sons of Ravji, contended (*inter alia*) that their uncles, Parashram and Sitaram, had no authority to execute the bond sued upon as their guardians, or to revive the debt in respect of which it was passed, so as to affect their shares in the family property, and that the debt was not for the benefit of the family.

The Court of first instance held that the bond sued upon was passed for a debt incurred for the benefit of the joint family; that the mortgage was not binding on defendants Nos. 4 and 5; and that the shares of defendants Nos. 1, 2, 3 and 6 in the mortgaged property, as well as the defendant No. 6 personally, were liable to pay the debt. The Court passed a decree accordingly, and dismissed the suit as against defendants Nos. 4 and 5.

On appeal, the Subordinate Judge with Appellate Powers found that the debt was contracted for the benefit of the whole family, and, therefore, binding on all the defendants; and that the shares of defendants Nos. 4 and 5 were liable. He, therefore, amended the first Court's decree by directing that the defendants should pay to plaintiff Rs. 2,895-0-6 and costs within six months from the date of the decree, and in default the plaintiff should recover the amount by sale of the mortgaged property.

The following extract from his judgment gives his reasons:—

"It is contended that on the dates of Exs. 10 and 11, the old debts were barred by limitation as against defendants Nos. 4 and 5, and that Parashram and Sitaram had no right to renew them, so as to bind the minors (defendants Nos. 4 and 5). But as the old debts due on Exs. 6, 7 were joint, and binding on all the members of the joint family, the bond Ex. 8 was binding on defendants Nos. 4 and 5, even if their names did not appear therein. The joint family property was also liable for the joint debt (I. L. R., 5 Bom. 38). As the disputed property was joint, and as it was mortgaged for the joint debt, I hold that the contention of defendants Nos. 4 and 5 is not good, and that the shares of all the members of the family in the disputed property are liable to pay the debt."

Against this decision the defendants Nos. 1, 4, 5 and 6 appealed to the High Court.

N. G. Chandavarkar, for appellant.—At the date of Ex. 8, the debt due on Exs. 6 and 7 was time-barred. Neither Parashram nor Sitaram had any right to revive a time-barred debt. The manager of a Hindu family is not competent to do [157] so—*Gopalnarain* v. *Muddomutty* (1); *Chinnaya* v. *Gurunatham* (2); *Naranji* v. *Bhagvandas* (3); *Sobhanadri Appa Rau* v. *Sriramulu* (4).

Manekshah Jehangirshah, for respondent.—Under the Hindu law, a debtor is bound to pay his debts, whether they are barred or not by limitation. A manager of a Hindu family can pay a time-barred debt, just as an executor can do under the English law—*Tillakchand* v. *Jitamal* (5). Suppose the manager were to pay a barred debt, can the other members of the family be allowed to question his act? A manager can acknowledge a debt, so as to give a fresh starting point to limitation—*Bhasker* v. *Vijalal* (6). If he can do so, why may he not revive a barred debt? A widow can pay a time-barred debt of her deceased husband; it is her duty to do so. The manager is under a similar obligation to pay off the debts of the family. He does not exceed his authority if he revives a barred debt.

JUDGMENT.

JARDINE, J.—The first question raised in this appeal relates to the mortgage-bond (Ex. 8) dated the 4th October, 1874. This was given in satisfaction of two money-bonds (Exs. 6 and 7) by Parashram and Sitaram, as managers of the Hindu family, to which defendants Nos. 4 and 5, minor sons of Ravji, belonged. It is found as a fact that at the date of this mortgage-bond (Ex. 8), the debt evidenced by the two earlier bonds was barred by limitation.

The Subordinate Judge held under these circumstances that the defendants Nos. 4 and 5 were not bound by Ex. 8. The lower Court of appeal has held the contrary, considering the revival of the debt to be within the authority of the managers, but without citing any text of Hindu law or judicial decision. Mr. Mankeshah, who supported this view, has urged that the manager is in a position like that of an executor at English law—*Tillakchand* v. *Jitama* (5)—with a duty imposed on him to pay debts. But on this point a contrary view has been expressed by Couch, C. J., in *Gopalnarain* v. *Muddomutty* (1), that "the manager of a joint Hindu family has no power to revive a debt by an acknowledgment [158] except as against himself." The same view was taken under the Limitation Act of 1877, s. 19, by a Full Bench at Madras in *Chinnaya* v. *Gurunatham* (2), which followed the decision in *Kumara Sami* v. *Pala* (7), on the words "generally or specially authorized" in s. 20 of the Limitation Act (IX of 1871). See also *Naranji* v. *Bhagvandas* (3) and *Wajibun* v. *Kadir* (8), as regards acknowledgments. Following these authorities we must disallow the claim against defendants Nos. 4 and 5 altogether; they are not liable either personally or as regards their shares in the mortgaged property.

The lower Court of appeal allowed Rs. 1,103-15-6 to the defendants on the sixth issue, being seven years' rent at Rs. 99 per annum, plus Rs. 410-15-6 interest. But *per incuriam* it assumed that the plaintiff had not filed his books of account, whereas it appears that they were

(1) 14 B.L.R. 21. (2) 5 M. 169. (3) P. J. (1881), 238.
(4) 17 M. 221. (5) 10 B.H. C.R. 206. (6) 17 B. 512.
(7) 1 M. 385. (8) 13 C. 298.

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brought to Court, and the defendants filed extracts therefrom. It is contended for the respondent that the questions about the amount of rent and the plaintiff's possession of the land have thus been dealt with by the lower Court of appeal on a misconception of the case. Taking that view, we refer the sixth issue to the District Court for a fresh finding on the evidence on the record, to be certified within two months.

This Court will pass directions about interest and costs when it makes the final decree.

Order accordingly.

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20 B. 158.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

JETHABHAI DAYALJI (*Original Defendant*), *Appellant v.* GIRDHAR (*Original Plaintiff*), *Respondent.** [10th December, 1894.]

Registration Act (III of 1877), s. 50—Priority—San-mortgage optionally registrable, but not registered—Subsequent mortgage registered—Decree passed on san-mortgage—Execution—Purchaser at execution sale—Priority of mortgagee under registered mortgage to such purchaser—Notice.

In 1875 the land in dispute was mortgaged to defendant No. 2 under two *san*-mortgage bonds, which were optionally registrable, but were not registered. In [159] 1885 the land was mortgaged to plaintiff by a registered mortgage accompanied with possession. In 1886 the defendant No. 2 obtained a decree upon his *san*-mortgage bond, in execution of which the mortgaged property was brought to sale and purchased by defendant No. 3.

Defendant No. 3 was afterwards put in possession by the Court. Thereupon the plaintiff sued to enforce his mortgage lien against the property in the hands of defendant No. 3 who pleaded that the *san*-mortgages of 1875 were entitled to priority over the plaintiff's mortgage of 1885, and that he as purchaser at a sale under a decree obtained upon the *san*-mortgages held the property free from the plaintiff's claim.

Held, that the plaintiff's mortgage, having been executed and registered after Act III of 1877 had come into force, was entitled under s. 50 of the Act to priority over the unregistered *san* mortgage bonds.

A *san*-mortgage is not within the exceptions mentioned in s. 50 of the Act.

Held, also, that under s. 47 of the Registration Act (III of 1877) the plaintiffs' registered mortgage began to operate from the date of its execution, and was not affected by the decree subsequently obtained upon the earlier mortgages.

By the custom of Gujarat, transfer of possession, which is necessary under general Hindu law, is not essential to validate *san*-mortgages, and such mortgages have always been held valid charges as between mortgagor and mortgagee, but they are liable to be defeated in case of the transfer of interest to third parties under registered instruments.

Apart from the doctrine of equitable notice, registration under Act XVI of 1864 and Act VIII of 1871 conferred no priority on a registered document as against a document the registration of which was optional. Since Act III of 1877, however, the competition obtains in a more general form, and confers priority on all documents required to be registered, and registered since Act III of 1877 was passed, over all prior unregistered deeds of an antagonistic character.

[F., 28 C. 139=5 C.W.N. 419; R., 22 B. 945 (948); 27 B. 452 (482).]

SECOND appeal from the decision of J. J. Heaton, Acting Joint Judge of Ahmedabad, in appeal No. 399 of 1891.

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* Second Appeal No. 301 of 1893.

The property in dispute was mortgaged by one Bava Jagpal to defendant No. 2 by two *san*-mortgage deeds, dated 23rd March, 1875—one for Rs. 99 and the other for Rs. 98, respectively. The deeds were optionally registrable (see s. 18 of Act VIII of 1871), but neither of them was registered.

On the 22nd June, 1885, Bava Jagpal mortgaged the same property to the plaintiff for Rs. 651. The mortgage-deed was registered, and the mortgagee got possession.

Subsequently, defendant No. 2 sued Bava Jagpal, the mortgagor, on the *san*-mortgage bonds of 1875, and obtained a decree, in execution of which the mortgaged property was put up [160] for sale and was purchased by defendant No. 3, who was afterwards put into possession by the Court.

In 1891 the plaintiffs filed the present suit upon the registered mortgage of the 21st June, 1825, for possession of the property, and in the alternative to enforce their mortgage lien by a sale.

Defendant No. 1, the son and heir of Bava Jagpal, the mortgagor, did not admit the plaintiff's mortgage.

Defendants Nos. 2 and 3 pleaded (*inter alia*) that the *san*-mortgage-deeds of 1875 were entitled to priority over plaintiff's mortgage of 1885, and that a decree having been obtained on the *san*-mortgages, defendant No. 3 had purchased the property at the Court sale free from the plaintiff's mortgage lien.

The Court of first instance awarded the plaintiff's claim, holding that the *san*-mortgages relied upon by defendants Nos. 2 and 3 were not proved, and that the decree based upon the said mortgages was fraudulent and collusive.

On appeal the Acting Joint Judge held that the *san*-mortgages were genuine, but that though they were earlier in point of time, and optionally registrable, the plaintiff's mortgage being registered was entitled to priority under s. 50 of the Registration Act (III of 1877).

He, therefore, varied the decree of the first Court, and ordered defendant No. 3 to pay to plaintiffs, within six months, Rs. 675 with interest at six per cent., or in default to restore possession of the land in suit to plaintiff.

The defendants Nos. 2 and 3 appealed to the High Court.

Ganpat Sadashiv Rao, for the appellant (defendant No. 3).— The defendant No. 2 obtained a decree upon the *san*-mortgage of 1875. In execution of that decree, the right, title, and interest of the mortgagor was sold as it existed at the date of the *san*-mortgage. That was what defendant No. 3 bought at the sale. The property in his hands as purchaser is, therefore, free from all incumbrances subsequently created by the mortgagor—*Kasandas Laldas* v. *Pranjivan Asharam* (1). The plaintiff's mortgage was subsequent, and defendant No. 3 is not liable to satisfy it. A [161] *san*-mortgage is valid without possession according to the custom of Gujarat and is binding on all subsequent incumbrances—*Sobhagchand* v. *Bhaichand* (2).

Chimanlal Harilal, for appellant (defendant No. 2).

Nagindas Tulsidas, for respondent (plaintiff).—Under s. 50 of the Registration Act III of 1877 the plaintiff's mortgage being registered, is entitled to priority over the earlier *san*-mortgages, which are unregistered —*Shivram* v. *Saya*(3). A *san*-mortgage is not within any of the exceptions mentioned in s. 50 of the Act.

(1) 7 B. H. C. R. A. C J. 146. (2) 6 B. 193. (3) 13 B. 229.

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Ganpat Sadashiv Rao, in reply.—The *san*-khats are merged in the decree. And a decree is within the exceptions to s. 50 of Act III of 1877.

JUDGMENTS.

JARDINE, J.—The appellant (defendant No. 2) relied upon two unregistered documents of 1875 of which the registration was optional, *viz.*, two *san*-mortgage-deeds passed to him, on which in 1886 he obtained a decree, in execution whereof the mortgaged property was put up for sale by the Court, and purchased by defendant No. 3, who obtained possession. The plaintiffs-respondents relied upon a registered mortgage, dated the 25th June, 1885.

In this case no question of notice requiring us to consider whether the equitable rule applies, arises as in *Vinayak* v. *Vasudev* (1). In that case the change effected in the law by s. 50 of Act III of 1877 was pointed out. That section makes a rule under which the plaintiffs' registered mortgage would have priority over every unregistered document of earlier date, unless the latter be held to come within an exception. Mr. Ganpatrav urged that the contrary view had been taken in *Vinayak* v. *Sitaram* (2), where *Sobhachand* v. *Bhaichnad* (3) is referred to, but, as we have ascertained from the record, only for the equitable rule about notice. In Appeal No. 453 of 1893 decided on the 29th November, 1894, by Sargent, C. J., and Candy, J., where, as in the present case, the competition was between a *san*-mortgage-deed executed in Gujarat in 1876, optionally registrable and unregistered, and a sale-deed **[162]** executed and registered after Act III of 1877 had come into force, the later document was awarded priority. The judgment of the District Court in that case shows that it took that view after consideration of *Sobhagchand* v. *Bhaichand* (*supra*), *Hasha* v. *Ragho*(4) and *Shivram* v. *Saya*(5). We are of opinion, then, that we would exceed the province of interpretation if we imported into s. 50 of Act III of 1877 an exception in favour of *san*-mortgage-deeds. On this point we consider the law has been correctly applied by the Court below.

Mr. Ganpatrav then urged that as defendant No. 2 had on some date later than that of the registration of the plaintiff's mortgage obtained decrees on his *san*-khats against the person now represented by defendant No. 1, s. 50 of Act III of 1877 gave those unregistered mortgages priority. This point seems not to have been raised in the two Courts below, and no authority was cited here. Under s. 47, the plaintiffs' registered mortgage began to operate from the date of execution—*Santaya* v. *Narayan*(6) and is not affected by the decrees obtained by defendant No. 2—*Madar* v. *Subbarayalu* (7) followed in *The Himalaya Bank, Limited* v. *The Simla Bank, Limited* (8).

For the above reasons the Court confirms the decree with costs.

RANADE, J.—I concur in the view taken by Mr. Justice Jardine in disposing of this appeal. The question at issue in this case is solely whether appellant Bechardas, who is the auction-purchaser in execution of the decree passed on the unregistered *san*-mortgages of 1875, was properly required by the lower Court to pay to the respondents, original plaintiffs, the sum due in respect of the registered mortgage of 1885 executed in their favour by the common mortgagor Bava Jagpal.

(1) P.J. (1894) p. 133. (2) P.J. (1883) p. 112. (3) 6 B. 193 (200).
(4) 6 B. 165. (5) 13 B. 229. (6) 8 B. 182.
(7) 6 M. 88. (8) 8 A. 23.

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The appellant's pleader chiefly rested his case on the authority of the Full Bench decision in *Sobhagchand* v. *Bhaichand* (1), affirmed in *Sankana* v. *Virupakshapa* (2) and *Mohan* v. *Togu* (3). In the first of these decisions, it was held that in the case of [163] *san*-mortgages, the transfer of possession, necessary under the general Hindu law, was not essential, and that such mortgages were valid under the custom of Gujarat. The case of *Sankana* v. *Virupakshapa* came from Dharwar side, while *Mohan* v. *Togu*. though it related to a *san*-mortgage, and the facts were some what similar to those of the present case, was not decided on the ground of any peculiar custom in regard to *san*-mortgages in Gujarat. In that case the auction-purchaser in execution of the decree on the unregistered, though prior, *san*-mortgage, was put in possession, but the subsequent registered mortgagee was permitted to redeem the *san*-mortgage charge. None of these cases thus supports the appellant's contention about the privileged character of *san*-mortgages in the way of dispensing with the priority conferred by the Registration Act of 1877 on registered mortgages. The only privilege recognized is in regard to the objection about possession. *san*-mortgages have always been held to be valid charges, as between mortgagor and mortgagee, even when not accompanied by transfer of possession—*Lakhmichand* v. *Kastur* (4); *Dwarkadas* v. *Galabhai* (5). Even these early decisions, however, recognized the fact that this privilege was liable to be defeated in case of the transfer of interests to third parties under registered instruments—*Lakhmichand* v. *Kastur*. This view was also given effect to in *Kasandas* v. *Pranjivan* (6), in which the contest was between a registered mortgage of 1864, and an unregistered mortgage of 1862, and the *superior* claim of the former was upheld.

Leaving, therefore, the question of special custom aside, we must apply the general law to the case. It is true that in *Sobhagchand* v. *Bhaichand*, Westropp, C. J., and the Judges who sat with him, held that the registered certificate of sale did not defeat the prior unregistered mortgage. Melvill, J., explained the reason clearly in his judgment by stating that under the Registration Act, competition for priority can only exist between documents which are in their nature antagonistic. The decision by the Full Bench of the third point referred to it is thus not applicable here, or, if it is applicable, it tells against appellant's contention.

[164] As regards the general law, the authorities are clear that, under Act XVI of 1864 and Act VIII of 1871, the competition *about priority* was only recognized in regard to documents of a like kind, either optional or compulsory. Apart from the doctrine of equitable notice, which question does not arise in the present case, registration under those Acts by itself conferred no priority on a registered document if its registration was compulsory as against a document whose registration was optional. Since Act III of 1877, however, the competition obtains in a more general form, and confers priority on documents required to be registered, and accordingly registered since Act III of 1877 was passed, over all prior unregistered documents of an antagonistic character.

The Allahabad High Court decided the point in *Kuar Gir Prasad* v. *Bansi* (7), *Lachaman Das* v. *Dip Chand* (8), and it was subsequently affirmed in *The Himalaya Bank* v. *The Simla Bank* (9). The Bombay

(1) 6 B 193 (200). (2) 7 B. 146. (3) 10 B. 224.
(4) 9 B. H.C.R. 60. (5) P.J. (1882), p. 218. (6) 7 B.H.C.R. A.C.J. 146.
(7) 2 A. 431. (8) 2 A. 851. (9) 8 A. 23.

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High Court reconized this same change in the law in *Kanitkar* v. *Joshi*(1), *Ichharam* v. *Govindram* (2), *Shivram* v. *Saya* (3). The Madras High Court affirmed it in *Nallappa* v. *Ibram* (4), and that Court went to the length of allowing s. 50 of Act III of 1877 to overide even the equitable doctrine of notice, in which last respect this Court has not been able to accept the Madras view—*Shivram* v. *Genu* (5) and *Dundaya* v. *Chenbasapa* (6). The Calcutta High Court also recognized the change effected by Act III of 1877 in *Shib Chandra* v. *Johobux* (7). The expression of opinion contained in *Dundaya* v. *Chenbasapa* (*supra*), that the principles of the former Acts are equaliy applicable to the recent Act, must be confined to the two points directly decided in that case, namely, about the equitable doctrine of notice, and the effect of possession, and cannot be extended to embrace the point now under consideration, in respect of which all the High Courts are in accord in holding that Act III of 1877 has effected an important change. On the whole, we feel satisfied that the **[165]** *san*-mortgages in this case were entitled to no particular privilege by force of custom, and that as the registered mortgage competing with them was executed since Act III of 1877 was passed, and the execution sale in which the appellant Bechardas bought the property took place subsequent to the registered mortgage, the appellant Bechardas was very properly ordered by the lower Court to pay off the encunbrance, subject to which the sale must be held to have taken place.

As regards the contention that the *san*-mortgages merged in the decree, and that s. 50 exempts decrees from competition with registered mortgages, the authorities are clear that no such exemption can be claimed. In *The Himalaya Bank, Limited* v. *The Simla Bank, Limited* (8), it was expressly held that a mortgage registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered bond. The principle of that decision is that the decree and the sale only give effect to the rights under the bond, and cannot confer any higher right. See also *Dullabhdas* v. *Lakshmandas* (9).

We accordingly reject the appeal, and confirm the decree with costs.

Decree confirmed.

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20 B. 165.

ORIGINAL CRIMINAL.

Before Mr. Justice Jardine, Chief Justice (Acting).

EMPRESS *v.* LESTER. [1st July, 1895.]

Evidence—Evidence Act (I of 1872), s. 26—Statement of accused—Custody of police—Statement made in temporary absence of police.

A person under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed, to Godhra. A friend drove with her in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for

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(1) 5 B. 442. (2) 5 B. 653. (3) 13 B. 229.
(4) 5 M. 73. (5) 6 B. 515. (6) P. J. (1883), p. 83.
(7) 7 C. 570. (8) 8 A. 23. (9) 10 B. 88.

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some miles without any escort. In the absence of the policeman, the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said, on the ground that she was not then in custody, and that s. 26 of the Evidence Act (I of 1872) did not apply.

[166] *Held*, that, notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question must be disallowed.

[R., Rat. Unr. Cr. Cas. 855 (856).]

THE prisoner Emily Lester was charged with the murder of her husband at Navlak Kota near Pavagadh, in the Panch Mahals, on the night of the 8th May, 1895. Mr. Lester was District Superintendent of Police.

Professor Littledale, who was then in camp at some distance, heard of Lester's death. He at once sent word to Bhaskarrav Ramchandra Heblikar, who was a Magistrate of the First Class, and both of them went to Navlak. After some inquiry it was determined to remove the prisoner to Godhra.

Mr. Littledale in his evidence said :—

"At 9-15 we started, and I drove her into Godhra with one pair. During the day I had said 'I'll drive her in, but I won't take any responsibility for her custody, but will see to her being treated humanely.' I said this to Heblikar, I think, and to the Mahalkari of Halol. In consequence, a mounted savar accompanied me and Mrs. Lester. He rode in front. About 14 miles from Champaner, in a village called Kalol, I said to him there 'You had better go in and get another savar. Your horse will be tired.' He said yes and turned into Kalol off the road, and I with only Mrs. Lester and the coachman went on slowly. But till we had gone two miles, we were not overtaken by the savar. During his absence, I remember something said by her (the prisoner) about the shooting of Lester."

Machpherson (Acting Advocate General) for the prosecution.— I propose to ask the witness what the prisoner said : No policeman was present. The savar had gone away. The prisoner was no longer in custody. Section 26 of the Evidence Act (I of 1872), therefore, does not apply.

Lowndes, for the prisoner objected.

ORDER.

JARDINE, C. J. (Acting).—I think the prisoner must be regarded as still in the custody of the police, and that the question ought not to be put.

Question disallowed.

Attorney for the Crown.—Mr. *A. Little.*
Attorneys for the prisoner:—Messrs. *Crawford, Burder & Co.*

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[167] ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Starling.

RAMJI MORARJI (*Original Defendant*), *Appellant v.* J.E. ELLIS AND THE STANDARD OIL COMPANY OF NEW YORK (*Original Plaintiffs*), *Respondents.** [20th September, 1895.]

Costs—Decree—Assignment of decree pending appeal—Assignee of decree made respondent to appeal—Decree reversed in appeal—Liability of assignee for costs of hearing in lower Court.

The Standard Oil Company and one Ellis sued the defendant for damages. The lower Court found that there was no privity of contract between the company and the defendant, and dismissed the suit of the company (plaintiff No. 1) with costs, but passed a decree for Ellis (plaintiff No. 2) with costs. The defendant appealed in the first instance making Ellis (plaintiff No. 1) the sole respondent. The company, however, gave the defendant (appellant) notice that the decree obtained by Ellis had been assigned to them. Whereupon he (the appellant) obtained leave to make the company party-respondents as assignees of the decree from Ellis. The company objected to be made respondents. The appeal Court reversed the decree of the lower Court and dismissed the suit, and the question arose whether the company could be made liable for the general costs of the hearing in the lower Court.

Held, that the company were liable only for the costs of the appeal in which they had taken an active part, but not for the general costs of hearing in the lower Court, except so far as the suit was their suit. Ellis was liable for the costs throughout. The appellant (defendant) was not entitled, by bringing the company on the record against their will, to obtain an additional security for the costs already incurred in the lower Court.

The assignee of a decree who is made respondent in an appeal from it, and takes no steps actively to support it, ought not to be ordered to pay costs.

[R., 22 A. 231 (233).]

THE Standard Oil Company of New York (plaintiff No. 1) had a branch in Bombay and imported oil. Ellis (plaintiff No. 2) was a broker and commission agent, who obtained orders for the company and for others from native dealers.

This suit was brought by the company and Ellis against the defendant (appellant) to recover damages for his non-acceptance of five hundred barrels of oil, for which, it was alleged, he gave Ellis (plaintiff No. 2) an indent, in August, 1893, requesting him, or his agents, to purchase it for him. The plaint stated that Ellis accordingly ordered from the company (as the defendant intended) the said oil, but when it arrived, the defendant refused to take **[168]** delivery, repudiated the indent, and denied that he ever gave the order.

The plaint contained the following clause :—

"9. To avoid any technical defence the plaintiff John Edward Ellis has joined with the said company as a plaintiff in this suit. The plaintiffs submit that the plaintiff company is entitled to recover from the defendant the said damages, or, in the alternative, that the said second plaintiff is so entitled. The second plaintiff is willing that the said plaintiff company should recover the said damages."

The lower Court found that there was no privity of contract between the Standard Oil Company (plaintiff No. 1) and the defendant; that they had sold the oil to the commission agent Ellis (plaintiff No. 2) and not to his correspondent (the defendant).

* Suit No. 91 of 1894; Appeal No. 852.

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In his judgment the Judge (Candy, J.) said :—

"I now come to the question, who can recover from the defendant No. 1—the Standard Oil Company or Ellis? Admittedly both cannot, nor can there be a decree in the alternative. Ellis is the only man who can recover from the defendant. The correspondence recorded in the case shows that there was no privity between the Oil Company and Ramji Morarji. The Oil Company who supplied the oil to the commission agent (Ellis) sold to him and not to his correspondent. 'There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brick-maker who supplies the bricks to a person building a house and the owner of that house' (Per Blackburn, J., in *Ireland* v. *Livingston* (1)."

The lower Court accordingly dismissed the suit of the company with costs, but passed a decree for Ellis (plaintiff No. 2) for Rs. 8,892, with costs.

The defendant appealed, in the first instance making Ellis the sole respondent. On the 1st August, 1894, the Standard Oil Company gave the defendant notice that the decree obtained by Ellis had been assigned to them. Thereupon (on 31st August, 1894) the defendant obtained leave to make the company party-respondents as assignees of the decree from Ellis.

The appeal Court reversed the lower Court's decree with costs and dismissed the suit. In speaking to the minutes of the decree, the question arose whether the Standard Oil Company could be made liable for the general costs of the hearing in the lower Court.

[169] *Inverarity*, for the Standard Oil Company.—We cannot dispute our liability for the costs of the appeal; but we contend that we are not liable for the general costs of the hearing in the lower Court. The decree of the lower Court has dismissed our suit with costs, and, of course, we must pay these costs so far as it was our suit. But for the costs of the suit in so far as it was Ellis' suit we are not liable. In the lower Court, Ellis succeeded and got a decree against the defendant. We have bought that decree, and it has been assigned to us as purchasers. We are in the same position as a complete outsider would occupy who bought the decree. He could not be held liable for the costs of the decree which he bought from the decree-holder. The cost of obtaining it is probably taken into account in fixing the price paid for it. The point is, therefore, to be considered as if we had not been parties at all. The Court has no jurisdiction to make persons not parties pay costs—*Ram Coomar* v. *Chunder Canto* (2). That is a strong case, for the Court thought that the person whom it refused to fix with costs had such an interest that he ought to have been a party. Here we had no interest. The Court found that to be so, and dismissed our suit, while it gave Ellis a decree. The defendant contended that we were not a proper party, and had no claim against him, and succeeded in his contention.

Macpherson (Acting Advocate General) for the defendant (appellant).—The company ought to be made liable for the whole of the costs in the lower Court. The company has been the really active party in the litigation. The suit againt us, so far as it was their suit, was dismissed with costs. We could not appeal against that order as to costs; but Ellis got a decree against us, and we appealed against that decree. The company took over that decree and were made respondents as assignees. An assignee by operation of law is liable to costs *ab initio*. A person who

(1) L. R. 5 Eng. and Ir. Ap. 395 (408).
(2) 2 App. Cas. 186 (212).

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voluntarily makes himself assignee is *a fortiori* similarly liable—*Watson* v. *Holliday* (1); *Borneman* v. *Wilson*(2); *Harland* v. *Garbutt* (3); *Boynton* v. *Boynton* (4). An appeal is part of a suit—**[170]** *Bachubai* v. *Shamji Jadowji*(5). He referred to ss. 372 and 582 of the Civil Procedure Code (Act XIV 1882).

Inverarity in reply.—The cases cited are distinguishable. First, in each case the party made liable for costs took the initiative and applied to be made a party. We did not do that; we objected to be made a party to the appeal, and it was done against our will. Secondly the trustee in bankruptcy in one case and the executor in the other represented the whole interest of the party for whose costs they were made liable. But we do not represent Ellis. The buyer of an article does not represent the seller, or accept his liabilities. Nor does the buyer of a claim such as this. Once our suit was dismissed we stood in the position of a mere outsider so far as Ellis' suit was concerned, and this Court has no power to make us pay the costs for which he alone is liable.

JUDGMENT.

FARRAN, C. J.—The question which we have to consider is as to the liability of the assignee of a decree in favour of a plaintiff to pay the costs of suit in the event of the decree being reversed.

We agree with the argument of Mr. Inverarity that (except possibly in a very extreme and exceptional case) a person assisting the plaintiff is not liable in respect of, and cannot be ordered to pay, costs unless he is made a party to the suit—*Hayward* v. *Giffard*(6); *Ram Coomar* v. *Chunder Canto*(7). Now, in the present case the Standard Oil Company having originally, under s. 26 of the Civil Procedure Code (Act XIV of 1882) been wrongly made party-plaintiffs to the suit, were by the decree dismissed from it, and were ordered to pay the costs of the defendant occasioned by their having been so joined.

From this order of dismissal there has been no appeal. Their liability to pay the general costs of the suit must, we think, under these circumstances, be determined as if not having been joined as plaintiffs originally, they had been for the first time made parties respondents, by reason of having taken an assignment of the decree.

[171] It appears, from the correspondence which has been read, that they did not consent to be made respondents; but they took no steps to have the *ex-parte* order, making them respondents, set aside, and they have since actively supported the decree, which has been reversed in appeal. That is their position.

It has been contended that under s. 582 of the Civil Procedure Code the Court had no power to make them respondents in consequence of the assignment of the decree to them; but that contention is opposed to the ruling in *Rajaram* v. *Jibai* (8) which shows that under s. 372 they were liable to be made respondents without calling in aid the provisions of s. 582, and cannot be supported. We must take it that the company have been properly made respondents.

Now, it is a well-settled rule that executors and trustees in bankruptcy and others suing in *autre droit* are liable for costs as though they were suing in their own right, and when, pending a suit, they come in as

(1) 20 Ch. D. 780 (785).
(2) 28 Ch. D. 53 (55).
(3) Weekly Notes (1881), p. 8.
(4) 4 App. Cas. 733—5.
(5) 9 B. 536 (551).
(6) 4 M. and W. 194.
(7) 2 App. Cas. 186 (212).
(8) 9 B. 151.

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plaintiffs in lieu of original plaintiffs and adopt the proceedings, they become liable personally for the costs *ab initio*. See the earlier cases collected in *Cook* v. *Hathway*(1) and see *Watson* v. *Holliday*(2); *Borneman* v. *Wilson*(3); *Boynton* v. *Boynton*(4); Daniel's Chancery Practice, p. 1175 (6th Ed.).

It cannot, we think, be doubted that an assignee of a claim in suit, who in virtue of his assignment is made a party to the suit as plaintiff before decree, is liable to have the same rule as to costs applied to him. *Secar* v. *Lawson*(5) is an instance of a person acquiring an interest in the subject-matter of the suit by assignment so being made a party. It shows that such parties are treated just as an executor coming in after the death of his testator or a trustee in bankruptcy coming in after adjudication would be treated, and we cannot doubt that the same rule as to costs would be applied to them. We have not been referred to, nor have we found a case in which the assignee of a decree has been made respondent, or in which his liability to costs has been dealt with. We think that, on principle, the Court has jurisdiction to make such an assignee liable for the costs of the suit *ab* [172] *initio*, if he is made a respondent at his own desire in lieu of the original plaintiff, or if, having been so made a respondent *ex parte*, he actively supports the decree. In principle we can see no difference between his case and that of the trustee in bankruptcy who actively supports an erroneous decree in favour of the bankrupt. Admitting, however, the jurisdiction, we think that the assignee of a decree, who is made respondent in an appeal from it, and takes no step actively to support it, ought not be ordered to pay costs. A person who takes an assignment of a decree already made takes a completely legitimate security, and ought not, we think, as a rule, to be subjected thereby to liability for the costs of the litigation which led up to it, even though the defendant succeed in getting him made *in invitum* a party respondent.

In the present case the assignee company have taken an active part in the appeal, though they have been brought upon the record against their consent. It is admitted that they may properly be ordered to pay the appellant's costs of the appeal, but it is argued that they ought not to be ordered to pay the costs incurred in the Court below. There is this difference between this case before us and that of an executor or trustee coming in and supporting the decree, that here the original plaintiff is still retained upon the record, and that the assignee company are only added as an additional security for costs already incurred or for those to be incurred in the appeal. We have felt great doubt upon the subject, but, on the whole, we think the defendant is not entitled, by bringing the assignee company upon the record against their will, to obtain an additional security for the costs which have been already incurred in the Division Court. The decree will, therefore, be drawn up making the Standard Oil Company liable only for the appellant's costs of appeal and Ellis liable for the costs throughout. The costs of speaking to the minutes will be borne by the parties respectively.

Attorneys for the appellants (defendants):—Messrs. *Chalk, Walker and Smetham.*

Attorneys for the respondent (The Oil Company):—Messrs. *Ardesar, Hormasji and Dinsha.*

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(1) L.R. 8 Eq. 612. (2) 20 Ch. D. 780 (785). (3) 28 Ch. D. 53 (55).
(4) 4 App. Cas. 733—5. (5) 16 Ch. D. 121.

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[173] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

VENILAL (*Original Plaintiff*), *Appellant v.* PARJARAM (*Original Defendant*), *Respondent.** [11th December, 1894.]

Hindu law—Inheritance—Son's daughter—Great-grandson of a brother—Gotraja-sapinda—*Bandhu.*

According to Hindu law, the daughter of a predeceased son of the *propositus* is not a *gotraja-sapinda*, and is not entitled to inherit in preference to the great-grandson in the male line of a separated brother.

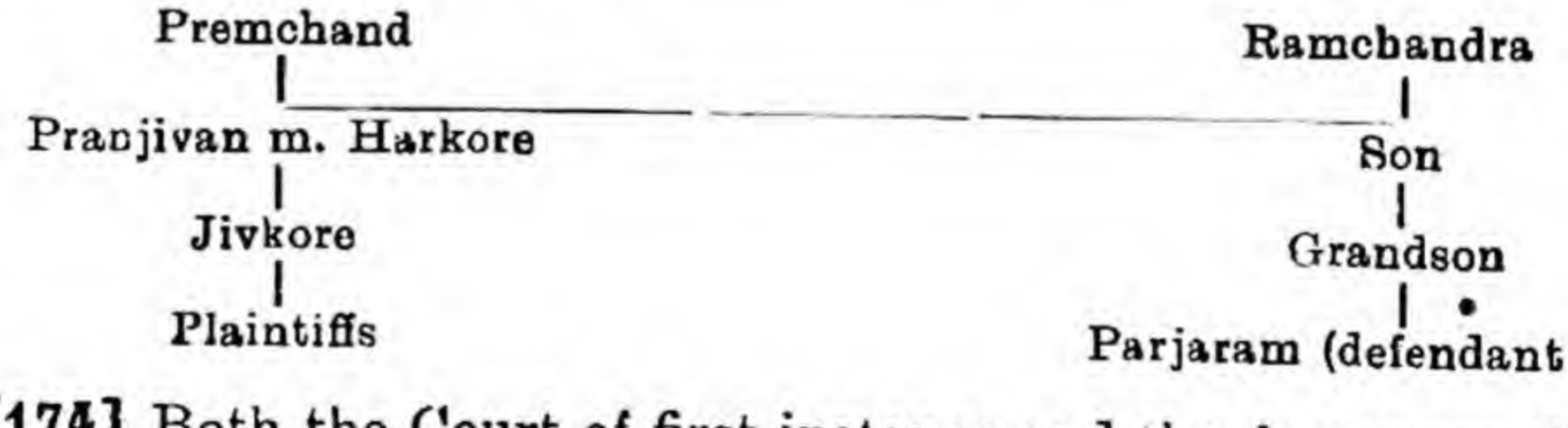
[F., 24 B. 563 (582); R., 11 Ind. Cas. 907=7 N.L.R. 116.]

SECOND appeal from the decision of P. Khareghat, Assistant Judge of Broach, in appeal No. 63 of 1889.

Suit for an injunction directing the first defendant to pay annually to the plaintiffs and their heirs the sum of Rs. 17-8-10 as their share of the *mazmundari hak* paid by Government to the first defendant and for the arrears thereof for the years 1885-87.

The plaint alleged that a *mazmundari hak* of Rs. 123-7-0 stood in the names of three persons, *viz.*, Parjaram (defendant No. 1) and two others, and was duly paid each year; that of this total amount the sum of Rs. 54-4-7 was received by Parjaram (defendant No. 1) and that in this latter sum the plaintiffs were sub-sharers, their share being Rs. 17-8-10; that this sub-share originally belonged to their grandfather Pranjivan Premchand, who received it annually from Parjaram (defendant No. 1); that after Pranjivan's death his widow Harkore received it until her death in 1877; that after her death her daughter Jivkore (plaintiffs' mother) received it until 1884, and that on the 26th May, 1885, by a deed of gift of that date she gave it to the plaintiffs. They now sued to recover payment from Parjaram (defendant No. 1).

The defendant (*inter alia*) denied the plaintiffs had right to the *hak* in question, and contended that he was a nearer heir of Premchand than the plaintiffs or their mother Jivkore. The following table shows the relationship of the parties:—



[174] Both the Court of first instance and the lower appellate Court rejected the plaintiffs' claim, holding that the defendant was a *gotraja-sapinda* of Premchand, and as such entitled to succeed in preference to Jivkore, who as daughter of a predeceased son ranked as a *bandhu* of the *propositus*.

Against this decision the plaintiffs preferred a second appeal to the High Court.

C. H. Setalvad, for appellants.—We claim through Jivkore. Jivkore is the nearest blood-relation of the *propositus*. She is the daughter of a

* Second Appeal, No. 565 of 1892.

predeceased son of Premchand. She is, therefore, entitled to succeed in preference to the remoter kinsmen. She is a *gotraja-sapinda* and not a *bandhu* as held by the lower Courts. The word *gotraja* means one born in the same family. The sister, though she passes by marriage into a different *gotra*, still ranks as a *gotraja-sapinda* according to the Vyavahara Mayukha, and succeeds immediately after the paternal grandmother on account of her propinquity of relationship. On the same principle I contend that a son's daughter would inherit as a *gotraja-sapinda* in preference to the remoter *gotraja-sapindas*. Refers to Mandlik's Vyavahar Mayukha, p. 81; West and Bühler's Digest (3rd Ed.), p. 130: *Lallubhai Bapubhai* v. *Mankuvarbai* (1); *Kesserbai* v. *Valab Raoji* (2). In Yadnavalkya's sloka 175, the word 'daughter' includes grand-daughter.

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Vicaji (with him *M. M. Munshi*), for respondent.—A son's daughter is not in the list of heirs. The general rule is that females are excluded from inheritance, unless they are specially named as heirs. A son's daughter is a *bandhu*—West and Bühler's Digest, pp. 137, 496; Mayne's Hindu Law, p. 574: see also *Mohandas* v. *Krishnabai*(3).

JUDGMENT.

JARDINE, J.—It has been argued for the appellants that the reasoning of the Vyavahara Mayukha in regard to the inclusion of sisters among *gotraja-sapindas* logically includes the daughter of a son of a *propositus*, although this daughter is not mentioned **[175]** as such in any of the sacred texts. We are, however, of opinion that this argument goes beyond the principles on which *Lallubhai* v. *Mankuvarbai*(1) was decided; see pp. 422 and 446 of the Report. We, therefore, confirm the decree with costs.

Decree confirmed.

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20 B. 175.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

SHIVRAM CHINTAMAN (*Original Plaintiff*), *Appellant v.*
SARASVATIBAI (*Original Defendant*), *Respondent.**
[3rd December, 1894.]

Execution—Decree—Application for execution—Obstruction—Suit to remove obstruction under s. 331 of Civil Procedure Code (Act XIV of 1882)—Failure of such suit—Subsequent application for execution of original decree—Limitation—Limitation Act (XV of 1877), sch. II, arts. 178, 179—Time occupied in suit under s. 331 not excluded where such suit falls.

On the 7th March, 1889, a decree-holder presented a *darkhast* for execution of a decree which awarded him possession of certain immoveable property. This *darkhast* was opposed by a third party, who was in possession of the property.

The decree-holder thereupon applied to the Court to have the obstruction removed. This application was registered under s. 331 of the Code of Civil Procedure (Act XIV of 1882), as a suit between the decree-holder as plaintiff and the party who offered the obstruction as a defendant.

On the 22nd January, 1891, the decree-holder withdrew this latter suit. Thereupon his *darkhast* of the 7th March, 1889, was struck off the file. On the 12th November, 1892, he presented a second *dharkhast* for execution.

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* Appeal No. 149 of 1894.

(1) 2 B. 388 (445). (2) 4 B. 188 (199). (3) 5 B. 597.

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Held, that the second *darkhast* was barred by limitation. The decree-holder having failed to remove the obstruction under s. 331 of the Code of Civil Procedure, the second *darkhast* could not be treated as a continuance or revival of the first.

Kalyanbhai v. *Ghanashamlal*(1) and *Chintaman* v. *Balshastri*(2) distinguished.

[R., 14 C.L.J. 610=11 Ind. Cas. 48.]

APPEAL from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Poona, in *darkhast* No. 655 of 1893.

[176] On the 2nd December, 1888, the plaintiff obtained a decree against one Sarasvatibai for possession of certain immoveable property.

On 7th March, 1889, the plaintiff applied for execution of the decree. This application was opposed by the Nazir of the District Court, who was in possession of the property as a receiver.

The plaintiff applied to the Court to have the obstruction removed.

Thereupon the Nazir's claim was registered under s. 331 of the Code of Civil Procedure (Act XIV of 1882) as a suit between the decree-holder as plaintiff and the Nazir as defendant.

On the 22nd January, 1891, the decree-holder withdrew this latter suit, with liberty to bring a fresh suit.

On the 24th January, 1891, the *darkhast* of the 7th March, 1889, the proceedings on which had in the meantime been kept in suspense, was struck off the file, on the ground that as the suit under s. 331 of the Code of Civil Procedure (Act XIV of 1882) had been withdrawn, the *darkhast* had come to an end.

On the 12th November, 1892, the plaintiff presented a fresh *darkhast* for execution. The plaintiff afterwards withdrew from this *darkhast*, with liberty to file a fresh *darkhast*.

On the 2nd November, 1893, the plaintiff again applied for execution. This application was rejected by the Subordinate Judge as barred by limitation, on the ground that the second *darkhast* of the 12th November, 1892, having been presented more than three years after the date of the first *darkhast* (7th March, 1889) was time-barred, and consequently the present *darkhast* was also barred by limitation.

Against this decision the decree-holder appealed to the High Court.

Shivram v. *Bhandarkar*, for appellant.—The second *darkhast* was a continuance of the first. The proceedings under the first *darkhast* had remained in suspense pending the suit under s. 331 of the Code of Civil Procedure. When the decree-holder withdrew [177] that suit, he was not allowed to proceed with his *darkhast*. The Court struck it off the file. The decree-holder was, therefore, obliged to present a fresh *darkhast*. This *darkhast* should be treated as a continuation of the first. The proceedings taken in the suit under s. 331 of the Code of Civil Procedure were steps in aid of execution within the meaning of art. 179, cl. 4 of the Limitation Act. Refers to *Becharam Dutta* v. *Abdul Wahed* (3); *Gobind Pershad* v. *Rung Lal* (4); *Shurat Chunder Sen* v. *Abdool Khyr* (5); *Chandra Prodhan* v. *Gopi Mohun Shaha* (6); *Kallyanbhai* v. *Ghanashamlal*(1); *Chintaman* v. *Balshastri* (2); *Ram Narayan Rai* v. *Bakhtu Kuar* (7) : *Tarachand* v. *Kashinath* (8); *Vellaya* v. *Jaganatha* (9). At any rate, the later *darkhast* should be regarded as a revival of the first *darkhast*, and so art. 178 of Act XV of 1877 would apply.

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(1) 5 B. 29.
(2) 16 B. 294.
(3) 11 C. 55.
(4) 21 C. 23.
(5) 23 W.R. 327.
(6) 14 C. 385.
(7) 16 A. 75.
(8) 10 B. 62.
(9) 7 M. 307.

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N. G. Chandavarkar, for respondent.—The second *darkhast* having been presented more than three years after the date of the first, was clearly time-barred, and so no right to revive the first *darkhast* was left. What was the legal effect of the suit under s. 331 of the Code of Civil Procedure? If the decree-holder had succeeded in removing the Nazir's obstruction, then, no doubt, the time occupied in that suit would have been excluded. But the obstruction was not removed. The withdrawal of the suit filed under s. 331 left matters precisely where they were before that suit. The Nazir held as a trustee for the rightful owner. The latter can, therefore, take advantage of the Nazir's proceedings—*Sanganabasaga* v. *Nagalingaya* (1). The cases cited show that the proceedings under the first *darkhast* can go on only if the obstruction is removed. Here it was not. The cases, therefore, do not apply. I rely on *Unnoda Persad Roy* v. *Sheikh Koorpan Ally* (2); *Nilmoney Singh* v. *Ramjeebun* (3); *Krishnaji* v. *Anandrao* (4).

JUDGMENT.

[178] JARDINE, J.—On the 7th March, 1889, the plaintiff (now appellant) applied for execution of the decree against the property. The Nazir as receiver of an estate objected to give possession; and on the 8th April, 1889, the plaintiff applied to the Court to remove the obstruction. Under s. 331 of the Code of Civil Procedure (Act XIV of 1882), the Nazir's claim was registered as if the decree-holder had sued. On the 22nd January, 1891, the plaintiff withdrew this suit, with liberty to bring a fresh suit. In this interval the proceedings on the *darkhast* of the 7th March, 1889, had remained in suspense; and on the 24th January, 1891, it was struck off, on the ground that, as the suit based on the Nazir's claim had been withdrawn, the *darkhast* had come to an end. On the 12th November, 1892, the plaintiff made a fresh *darkhast*.

In the matter of appeal before us the question is, whether the Subordinate Judge was right in holding that this second *darkhast* was barred by limitation—*Unnoda* v. *Sheikh Koorpan* (2). Mr. Shivram has urged that it was presented within the periods allowed by arts. 178 and 179 of sch. II of the Limitation Act. The cases cited nearly all bear upon art. 179, clause 4. He claims that the time occupied in the suit under s. 331 of the Code should be excluded; or that the second *darkhast* should be treated as a revival of the first, as in *Kalyanbhai* v. *Ghanashamlal* (5), *Chandra Prodhan* v. *Gopi* (6), *Chintaman* v. *Balshastri* (7), which last case is relied upon as being similar to the present.

With regard to these and other cited authorities, we must remark that they apply to proceedings in execution, held in suspense pending other proceedings, such as suits under s. 331, until the decree-holder has *succeeded* in removing the obstacle. None has been shown where when the decree-holder has not succeeded, but *failed* to remove it, the second *darkhast* has been treated as a revival or legal continuance of the first. We must make this distinction, which is made also in *Ragunandun* v. *Bhugoo* (8).

[179] It is unnecessary to consider whether in no circumstances the time taken up by an unsuccessful suit should be deducted or the

(1) P.J. (1878), 173.
(2) 8 C. 518.
(3) 8 C.L.R. 335.
(4) 7 B. 293.
(5) 5 B. 29.
(6) 14 C. 385.
(7) 16 B. 294.
(8) 17 C. 268.

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subsequent second *darkhast* treated as a revival. The suit in the present case having been withdrawn by the plaintiff, the assignee of the decree-holder, cannot be treated as a step-in-aid of the execution. We confirm the decree with costs.

Decree confirmed.

20 B. 179.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

DWARKANATH APPAJI (*Original Plaintiff*), *Appellant v.* ANANDRAO RAMCHANDRA (*Original Defendant*), *Respondent.**

[18th December, 1894.]

Limitation Act (XV of 1877), art. 179, cl. 4—"Step-in aid of execution"—Payment of deficient Court fee—Execution of decree.

An application for execution of a decree was presented on 17th July, 1890. A notice under s. 248 of the Code of Civil Procedure (Act XIV of 1882), was issued on 18th July, 1890. The process fee for service of the notice being deficient, the decree-holder paid the deficiency on 29th August, 1890. On the 22nd August, 1893, the decree-holder presented a fresh application for execution.

Held, that the second application for execution was time barred. The payment of the additional Court fee was not "a step-in-aid of execution of a decree" within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act (XV of 1877).

[R., 22 A. 358=20 A.W.N. 100; 22 B. 722 (726); 20 A.W.N. 88; D., 13 C.W.N. 521=1 Ind. Cas. 341.]

SECOND appeal from the decision of H. F. Aston, District Judge of Thana, in appeal No. 367 of 1893.

The plaintiff having obtained a decree, applied for execution on 17th July, 1890. Thereupon a notice was issued under s. 248 of the Code of Civil Procedure (Act XIV of 1882) on the 18th July, 1890. A process fee of annas 8, instead of Rs. 2, was levied by mistake on the notice in question in the first instance. When the mistake was found out, the decree-holders were required by the Court to make good the deficiency. The deficient Court fee was paid on 29th August, 1890, but the notice under s. 248 of the Code of Civil Procedure had already been issued and served on the judgment-debtor.

[180] On the 22nd August, 1893, the decree-holders presented a fresh *darkhast* for execution. This *darkhast* was rejected by the Subordinate Judge, on the ground that it was barred by limitation.

This order of rejection was confirmed, on appeal, by the District Judge, whose judgment was as follows:

"I agree with the view taken by the Subordinate Judge that a mere compliance with the Court's demand for the deficiency in a Court-fee on a notice already issued under an application for execution is not an *application* in accordance with law to the proper Court to take some step-in-aid of execution, and that such a compliance does not come within the description of the application referred to and contemplated in the above quoted cl. (4 of art. 179 of sch. II of the Limitation Act, XV of 1877)."

* Second Appeal No. 401 of 1894.

Against this decision the decree-holders appealed to the High Court.
Daji Abaji Khare, for appellant.
T. R. Kotwal, for respondent.

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JUDGMENT.

JARDINE, J.—After the executing Court had on the application of the decree-holder taken a step-in-aid, *viz.*, the issue of a notice under s. 248 of the Code of Civil Procedure, the Court ordered him to pay up some deficiency in the Court fee therefor. It is contended that the District Judge ought to have held that this payment saved limitation under art. 179, cl. 4, of the Limitation Act of 1877. The case of *Bhoma* v. *Kamaji* (1) is relied upon; but there is nothing in that case to show that the payment was made *after* the application to the Court and the step taken by it. On the present facts it does not appear that any application for execution, or to take a step-in-aid, was made when the additional Court fee was paid. The words of cl. 4, therefore, do not save the limitation—*Vellaya* v. *Jaganatha* (2). *Radha Prosad* v. *Sundar Lall* (3) is of a contrary tenor, but the reported judgment does not notice all the words of the clause. That case appears also inconsistent with *Rajkumar Banerji* v. *Rajlakhi Dabi* (4). We concur with the District Judge in his decree rejecting the *darkhast* as time-barred, and confirm the decree with costs.

Order confirmed.

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[181] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

MAHARANA SHRI FATESANGJI JASVATSANGJI (*Original Defendant*), *Appellant v.* KUVAR HARISANGJI FATESANGJI (*Original Plaintiff*), *Respondent.** [20th December, 1894.]

Molesalam Girasias—*Custom—Hindu converts to Mahomedanism—Retention of Hindu law and usages—Maintenance—Rights of junior members of a Thakor's family to maintenance out of an estate of the nature of an impartable* raj—*Limitation.*

The Hindu law of inheritance and succession applies to *Molesalam Girasias* who were originally Rajput Hindus, but were subsequently converted to Mahomedanism.

The plaintiff was the second son of the defendant, who was the Thakor of Amod, a talukdari estate of the nature of an impartible *raj* or principality. The plaintiff's family belonged to the community of *Molesalam Girasias*. Plaintiff alleged that according to a family usage he as a junior member of the family was entitled to receive maintenance from his father, who was the holder of the *gadi*. The estate was under the management of the Talukdari Settlement Officer from 1878 to 1888, during which period that officer granted the plaintiff an allowance in lieu of maintenance without any objection on the defendant's part. On the 1st August, 1888, the estate was restored to the defendant, who stopped the allowance. The plaintiff thereupon sued in 1891 to recover from the defendant arrears of maintenance for two years and eleven months at Rs. 200 a month.

Held, the plaintiff was entitled to recover, and that the claim was not time-barred.

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* Appeal No. 139 of 1892.

(1) P. J. (1884), 311. (2) 7 M. 307. (3) 9 C. 644. (4) 12 C. 441.

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APPELLATE CIVIL.

20 B. 181.

[R., 38 B. 449 (499) ; 15 Ind. Cas. 412=23 M.L.J. 79=12 M.L.T. 245=(1912) M.W.N. 790.]

APPEAL from the decision of Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Surat, in suit No. 154 of 1891.

Suit for arrears of maintenance.

The plaintiff was the second son of the Thakor of Amod, which was a large talukdari estate of the nature of an impartible *raj* or principality.

The plaintiff's family belonged to the community of the Molesalam Girasias, who were Rajput Hindus converted to Mahomedanism several centuries ago.

The plaintiff alleged that the Molesalam Girasias were governed by the Hindu law in matters of inheritance and succession, that the Amod estate was of the nature of an impartible *raj* **[182]** or principality, and that according to a long-established family usage he as a junior member of the family was entitled to receive from his father (the defendant), who was the holder of the *gadi*, an allowance in lieu of maintenance suitable to his rank and station in life ; that he had been in receipt of such allowance from 1878 to 1888 during the period the Talukdari Settlement Officer was in management of the estate ; that on the 1st August, 1888, the estate was restored to his father the defendant, who refused to allow him any maintenance.

The plaintiff thereupon filed the present suit in 1891 to recover from his father Rs. 7,000 on account of arrears of maintenance for two years and eleven months at the rate of Rs. 200 a month. He also claimed a sum of Rs. 575 on account of the birth ceremonies of his sons, and the funeral rites of his deceased wife.

The defendant pleaded (*inter alia*) that the estate was his self-acquired property ; that there was no custom in his family securing maintenance to the younger sons of the Thakor of Amod ; that the plaintiff was not entitled to claim maintenance from him simply because the Talukdari Settlement Officer had allowed him maintenance ; and, lastly, that the claim was time-barred.

The Subordinate Judge held that the estate was ancestral ; that the parties were governed by the Hindu law of inheritance, modified by the ancient customs of the Molesalam Girasias ; that the younger sons of the Thakor of Amod were by family usage entitled to maintenance ; that the plaintiff's claim was not barred by limitation ; that the estate was worth Rs. 50,000 a year, and that the plaintiff was entitled to recover maintenance at the rate of Rs. 200 a month.

The Subordinate Judge accordingly passed a decree awarding the plaintiff Rs. 7,000 on account of arrears of maintenance, but rejected the rest of his claim.

Against this decision the defendant appealed to the High Court.

Rao Saheb *Vasudev Jagannath Kirtikar*, for appellant.

Lang, Advocate-General (with him *Gokaldas Kahandas*), for respondent.

[183] The following authorities were referred to in argument.—*Jowala Buksh* v. *Dharum Singh* (1) ; *Abraham* v. *Abraham*(2) ; *Raj Bahadur* v. *Bishen Dayal*(3) ; *Himmatsing* v. *Ganpatsing* (4) ; *Shib Singh* v. *Sita Ram* (5) ; *Shivram Dinkar* v. *The Secretary of State for India* (6) ;

(1) 10 M.I.A. 511.
(2) 9 M.I.A. 195.
(3) 4 A. 343.
(4) 12 B.H.C.R. 94.
(5) 13 A. 76.
(6) 11 B. 222.

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The East India Company v. *Oditchurn Paul* (1); 2 Campbell's Gazetteer, 378; 1 Forbes Ras Mala, 343.

JUDGMENT.

RANADE, J.—This is a maintenance suit brought by the respondent (original plaintiff) against his father, the appellant, who is the Maharana Thakor of Amod, a large talukdari estate in the Broach District. The admitted facts of the case are that plaintiff is the second son of the defendant, and the family belongs to the community of Molesalam Girasias, who were originally Rajput Hindus, but became Mahomedans some centuries ago. The plaintiff's case is that the Molesalam Girasias follow the Hindu law and custom in matters of inheritance and partition, and that as the estate in impartible, he, as a second son of the defendant, is entitled by ancient family custom to receive (*khoraki poshaki*) maintenance suitable to defendant's rank and means, and also to receive special contributions on occasions of death and birth ceremonies in his family.

The plaint stated that during the time that the estate was under the management of the Talukdari Settlement Officer, plaintiff used to receive an allowance, at first of Rs. 50, and afterwards of Rs. 100, a month from that officer. That allowance was discontinued by defendant when the estate was restored into his possession on the 1st August, 1888. The income of the estate was stated to be about Rs. 80,000 a year. Plaintiff accordingly claimed arrears of maintenance for thirty-five months from 1st August, 1888, besides Rs. 575 on account of the *Bismillah*, *i. e.*, birth ceremonies of his two sons, and the funeral rites of his deceased wife.

Among other defences, which it is not necessary to notice here, as they were not pressed in argument in the appeal before us, defendant urged (1) that the estate, though ancestral, had been lost to the family, and had been acquired by the defendant after [184] forty years of litigation; (2) that the net yield of the estate was only Rs 41,000 a year; (3) that there was no family custom securing maintenance and contributions for birth and death ceremonies as of right to the younger sons of the Thakor of Amod, and that only the eldest son was entitled to have *jivai* of about Rs. 1,000 or 1,500 per year; (4) the fact that the Talukdari Settlement Officer allowed maintenance to plaintiff did not confer any right on plaintiff to claim maintenance from the defendant; (5) that plaintiff had other sources of income which yielded him Rs. 3,800 a year, besides his income from service as police inspector; (6) that *khoraki poshaki* was only a subsistence allowance, and plaintiff could not claim Rs. 200 a month on that account, simply because he was the second son of defendant, and the estate was considerable; (7) and, lastly, it was urged that plaintiff's claim was time-barred.

The lower Court held (1) that plaintiff's claim was not time-barred; (2) that the estate was ancestral, and not self-acquired; (3) that the net income of the estate was Rs. 50,000; (4) that the Hindu law, modified by the ancient custom of the Molesalams, governed the parties, and that the special custom set up by the defendant was not proved; (5) that defendant's allegations as regards plaintiff's other income were not proved, and that plaintiff was entitled to claim maintenance, but not the other contingent expenses; (6) and that plaintiff was entitled to the maintenance claimed. Plaintiff's claim for Rs. 7,000 was accordingly awarded, and he

(1) 5 M. I. A. 43.

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was allowed maintenance at the same rate from the date of the suit till the date of the decree.

The defendant appealed from this decree, and the chief points argued before us related to the question of limitation, the applicability or otherwise of a modified Hindu law to the parties, and the adequacy of the maintenance awarded by the lower Court. The points for consideration are thus (1) whether plaintiff's claim was time-barred; (2) whether the parties were governed by a modified Hindu law; (3) whether the maintenance awarded was fair and reasonable. The question of limitation can more conveniently be considered after the question of the law applicable to the parties is disposed of.

[185] If plaintiff has no claim under the law which governs the parties to demand maintenance from the defendant, it is plain that the mere payment of maintenance by the Talukdari Officer, or its discontinuance by the defendant, would furnish no cause of action to the plaintiff to bring his present suit.

It was contended on appellant's behalf that as the parties admittedly professed the Mahomedan faith, the Mahomedan law governed them, unless it was satisfactorily established that there was any binding family or local custom which subjected them to any other law, and that the burden of proving such a custom lay heavily on the party who claimed the benefit of the same—*Abraham* v. *Abraham* (1); *Jowala Buksh* v. *Dharum Singh* (2); *Raj Bahadur* v. *Bishen Dayal* (3). The general correctness of these propositions was not disputed by the respondent, but it was urged on his behalf, that as the community to which the parties belong were Rajputs, who were converted by force into Mahomedanism, and who retained many of the Hindu customs and usages, among them the old law of inheritance, the present case fell within the class of the cases relating to similar communities, such as the Khojas and Kutchi Memons, in respect of whom their customs have been allowed to prevail over the Mahomedan law. It was to prove such a custom that the plaintiff filed numerous decisions of the Subordinate Courts confirmed in appeal, which judicially recognized the custom of the applicability of Hindu law to the Molesalam community. The lower Court has placed its chief reliance on these decisions, copies of which were filed as Exs. 43—52. It is, however, of more consequence to note the express admission of the defendant in this connection. Defendant admitted (Ex. 68), that the Mahomedan law did not govern his community of Molesalams, to which he belonged, in matters of inheritance and maintenance. It is true he stated at the same time that the Hindu law also did not govern them. But there is not much force in this last contention, seeing that he admitted that, if a Molesalam father left behind him his widow, sons, and daughters, the sons succeeded to the property, and maintained the widow and the daughters till these last were married. **[186]** Similarly, a joint brother displaced the sonless widow as heir, while, in the case of separation, the widow succeeded as heir, if there was no male issue. These rules are distinctively rules of Hindu law, and they are not recognized by Mahomedan law. Moreover, defendant admitted (Exs. 68, 65,) that *khoraki poshaki*, monthly maintenance, was given by the Thakor in possession of the *gadi* to his sons, and that after the father's death, the younger sons obtained land as *aida* or *jivai* from their eldest brother, who succeeded to the *gadi*. This again is a rule of succession known to Hindu law in respect of impartible

(1) 9 M. I. A. 195. (2) 10 M.I.A. 511. (3) 4 A. 343 (348).

raj estates. These admissions must be read with the admitted facts that the names borne by the parties and their ancestors (Exs. 70, 54) are all Hindu names, and that defendant's accounts show that, in his family, the Hindu rate of *homa* is performed by, and *dakshina* given to Brahmins, and the goddesses Laksbmi and Sharada worsbipped on Divali and Dasara days (Exs. 115—121, 122—126).

Next in order we have to consider tbe decisions and the authority of writers like Mr. Forbes. Mr. Forbes in his Ras Mala has given an account of the conversion of these Rajputs, and he states that while the Molesalams follow the Mahomedan practices of circumcision, *nika*, and burial, they yet worship certain Hindu gods, and have *bhats* to recite their pedigrees, and they follow the Hindu law and custom in matters of inheritance. The cases referred to in Exhibits 43—52 fully bear out these assertions. Exhibit 43 is a copy of a decision, passed so far back as 1865, in which the District Court remanded the case back specially for an inquiry into this question of the applicability of Hindu law to the Molesalam parties, and both the Court of first instance and the District Court found this issue in the affirmative. Ex. 45 is a decision of the Subordinate Judge's Court of Anklesvar, which goes fully into this question, and the decision arrived at was to the same effect. These two cases were also noticed and followed in a later decision of 1887 (Ex. 46), and upheld in appeal here, Ex. 47. Exhibits 48, 52 relate to a case in which the present defendant was a party, and one of his female relations brought a suit for maintenance against him in 1865. That suit was disposed of on the same ground in the lower Courts, and their decision was upheld in special appeal by this Court. **[187]** Exhibits 49, 50, 51 also relate to a suit between Molesalams in which the same point of the applicability of Hindu law was affirmed in all the Courts. In a more recent case decided by Division Bench of this Court, *Bai Baiji* v. *Bai Santok* (1) (Ranade and Fulton, JJ.) a few months ago, this point was argued at some length, and the course of decisions noted above was followed, and it was held that the general Hindu law governed disputes about inheritance in this community.

Under the general Hindu law the person in possession of an ancestral impartible estate or *raj* is bound to provide maintenance for the younger branches of the family who cannot claim partition—*Mutusawmy* v. *Venkataswara* (2); *Himmatsing* v. *Ganpatsing* (3). The sons and daughters expressly come under this category. Plaintiff will thus have a right to claim maintenance, unless indeed, as the Molesalams are converted Hindus, defendant succeeded in establishing a particular custom to the contrary, in which case the special custom, and not the general law, must prevail—*Rahimatbai* v. *Hirbai* (4); *Mahomed Sidick* v. *Haji Ahmed* (5). So far from this being the case, it is admitted by the defendant, that the younger brothers have a claim to demand *aida* from their eldest brother when he succeeds to the *gadi*, Ex. 95, though he denies the son's right to claim *jivai* from the father. Defendant himself has cited instances in his own family when such *aida* settlement was made in favour not only of younger brothers, but of younger sons also. Exhibits 80, 90, 91 show that a son's claim for maintenance was recognized by the Civil Courts in the case of the Thakor of Saroda. Exhibits 98, 113 are documents passed in 1861 by Abheysing to his brother, the present defendant and his father.

(1) P. J. (1894) p. 350.
(2) 12 M.I.A. 203.
(3) 12 B. H. C. R. 94.
(4) 3 B. 34.
(5) 10 B. 1.

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by which an allowance of Rs. 1,500 was fixed for Abheysing, Rs. 400 out of which were to be paid during defendant's father's lifetime, and the whole after defendant succeded to the *gadi*. Defendant has been himself paying not only to his eldest son, the Patwi Kuwar Ishvarsingh, but also to his other sons, both before and after the attachment was removed, certain sums annually for their private expenses, **[188]** Exs. 222, 211, 240. Taking all these circumstances into account, it cannot be maintained that any special custom derogatory of the general law has been established by which a Thakor in possession of an impartible *raj* is absolved from the obligation of providing maintenance (*khoraki poshaki*, *i.e.*, food and dress) to his second son. The lower Court, therefore, very properly found this issue in plaintiff's favour, and against the defendant.

The plaintiff's right to claim maintenance being thus established, the next question is, whether plaintiff's present claim is time-barred. Defendant's contention is that he refused plaintiff's demand in 1873 or 1876. The appellant's counsel before us stated that the refusal was made in February, 1877, and that, counting from that time, the present suit brought in 1891 was time-barred. He also contended that the intervening attachment did not extend the period, and that the Talukdari Officer's acts did not bind appellant. Plaintiff alleges that his claim was never refused, and that there were distinct admissions of the defendant of a much later date, and that he received maintenance from the Talukdari Settlement Officer from 1878 to 1887, and it was only in 1888 that this allowance was discontinued, from which period the suit was admitted within the time allowed by law. It is, therefore, necessary to examine the evidence to see how far defendant's contention is made out. (His Lordship referred to the evidence at length and continued :—)

It is unnecessary to refer to the other exhibits. The correspondence shows clearly that defendant never objected to plaintiff's claim for maintenance. His objections were confined solely to the amount, offering first to settle Rs. 150, and then Rs. 400 a year. As late as 1887, defendant asked an increase of his own allowance and those of all sons by Rs. 25 for each of the sons, Ex. 72. Defendant certainly objected to settle lands on plaintiff during his lifetime, but he so far recognized plaintiff's claim as to express his readiness to settle at first lands yielding an income of Rs. 1,500, and next an income of Rs. 2,400, to come into effect after his own death. This latter question of *aida* is not now before us, and it is only necessary to refer to it here for satisfying ourselves that, according to defendant, plaintiff has a right after his death to have an income from land of **[189]** Rs. 2,400 a year. It furnishes a measure of the fairness or otherwise of the maintenance settled by the lower Court during defendant's lifetime. That Court has properly given weight to the rank of the defendant, and plaintiff's near relationship on the one hand, and the circumstances of the family on the other.

The question of limitation does not, therefore, arise in this case for the simple reason that there has been no formal and final refusal on defendant's part of plaintiff's claim till 1888. The claim being recognized as an obligation by the defendant, the Talukdari Officer simply stood in defendant's place in settling Rs. 50 in 1878, and raising that allowance to Rs. 100 in 1886. Defendant had never refused plaintiff's claim either before the estate was taken over for management by the Talukdari Officer, or while it was under such management.

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The last issue in appeal relates to the adequacy of the amount. The estate admittedly yields a net income of Rs. 41,000. Its gross income appears, from Exs. 223, 226, 229, 233, 272, 241, 244, to be Rs. 67,000 a year. There are no debts now, and the income is rising. Defendant himself fixed plaintiff's *aida* after his death at Rs. 200 per month or Rs. 2,400 per year, Ex. 211. That amount, therefore, cannot be said to be unreasonably high during defendant's lifetime. The fact that plaintiff is employed in the Police Department cannot detract from the merits of plaintiff's claim as the Thakor's son.

On the whole, therefore, the lower Court's decision appears to be correct, and we dismiss the appeal, and confirm the decree with costs on appellant.

Decree confirmed.

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20 B. 190.

[190] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

ABDUL KADIR AND OTHERS (*Original Plaintiffs*), *Appellants v.* DHARMA (*Original Defendant*), *Opponent.** [8th January, 1895.]

Regulation II of 1827, s. 21—"*Caste*"—*Caste question—Contribution to the caste fund—Arrangement between members of the caste for the purpose of paying off the debts of the caste—Hindus—Mahomedans.*

The term "caste" in s. 21 of Reg. II of 1827 (1) is not necessarily confined to Hindus, but comprises any well defined native community governed for certain internal purposes by its own rules and regulations.

An agreement embodying an arrangement come to between members of the caste for the purpose of paying off the debts of the caste, out of certain contributions to the caste funds, involves a caste question.

[R., 26 B. 174 (188); 31 B. 366 (371) = 9 Bom. L.R. 451.]

APPLICATION under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb P. B. Joshi, Subordinate Judge of Rajapur, in a small cause suit.

The plaintiffs sued to recover Rs. 10 from defendant Dharma *valad* Gulam Lambe under the following circumstances :—

The plaintiffs alleged that they and the defendant were residents of Madhil Mohola (street) at Rajapur ; that the defendant and other people of the mohola executed an agreement on the 18th November, 1885, whereby the plaintiffs were appointed *adhikari* (headmen) of the *jamat* (caste), and as such were authorized to recover rupees seven on account of *gav-jevan* (feeding the villagers) for each marriage when the bride and the bridegroom

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* Application No. 85 of 1894 under extraordinary jurisdiction.

(1) Section 21, Reg. II of 1827 :—

First.—(The jurisdiction of Civil Courts shall extend to the cognisance of all original suits and complaints between natives and others (not British-born subjects) respecting the right to moveable or immoveable property, rents. Government revenues, debts, contracts, marriage, succession, damages for injuries and generally of all suits and complaints of a civil nature), it being understood that no interference on the part of the Court in caste questions is hereby warranted beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party.

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were from their mohola, and rupees ten from the [191] person at whose house the marriage took place when the bridegroom was from a different locality; that the defendant having given his daughter in marriage to a bridegroom from a different place became liable to pay rupees ten, and that the defendant declined to pay that amount though called upon to do so.

The following is an extract from the agreement:—

"We have appointed you two persons to be the headmen in connection with the business and affairs of the community. As to that it has been the practice among us from former times to take certain amounts as on account of village (caste) dinner on occasions of the marriages of giris in our said street. Particulars thereof are as follow:—

"7. If the bridegroom and the bride be residing in our street, the amount to be paid to the community on account of caste dinner in that behalf is rupees seven.

"10. If a bridegroom comes from another street or from another village to marry a bride living in our street, the amount which he is to be caused to pay to the community on account of caste dinner is rupees ten.

"In this manner it being the practice from former times to this day to take the amounts on account of caste dinner, we have taken the same as mentioned above. In the same way, you are to receive the amounts as stated in the above agreement, when marriages take place at the house of any member of our community. And if any one of our community should raise any objection to pay the amount on accouut of caste dinner as stated above, the said amount should be recovered from him by taking legal steps. In the event of marriage taking place at the house of any one of us in our street according to the above agreement, we will pay you the amount as stated above. You are to receive the said amount and pay the same to Bapu *valad* Baba Malim Vagu, inhabitant of Rajapur, and take an acknowledgment from him. Our community owe to the said Malim

* * about Rs. 300 on account of a decree, dated 23rd June, in suit No. 278 of 1877, and Rs. 400 received in cash on the 16th November 1885. On account of this amount you are to pay the said Malim the amount of the above income and render an account thereof to us (members of) the community every year. We have given this agreement in writing of our own free will and pleasure."

The defendant pleaded (*inter alia*) that the suit involved a caste question, and was, therefore, not maintainable in a Civil Court.

The Subordinate Judge held that the question at issue was a caste question, and dismissed the suit.

The plaintiff applied to the High Court under its extraordinary jurisdiction, urging that the Judge erred in law in holding the claim to be a caste question. A rule *nisi* was issued to the defendant to show cause why the decision of the Judge should not be set aside.

[192] *Narayan G. Chandavarkar* appeared for the applicants (plaintiffs) in support of the rule.—The Judge was wrong in dismissing the suit on the ground that it involved a caste question. Our suit was based upon the agreement executed to us by the defendant and other members of the community; therefore the objection of caste question cannot arise in the case. Even supposing that the case does involve that point, still the parties being Mahomedans, s. 21, Chap. II, of Reg. II of 1827 has no application to the present case—*Sayad Hashim Saheb* v. *Huseinsha* (1).

(1) 13 B. 429.

Macpherson with *Ghanasham N. Nadkarni* appeared for the opponent (defendant) to show cause.—He relied on s. 21, Chapter II, of Reg. II of 1827; *Dodhusa* v. *Khemchand*(1); *Kazee Shaik Mohinoodeen* v. *Usmalji Momudjee* (2).

JUDGMENT.

SARGENT, C. J.—We think that the term "caste" in Reg. II of 1827 is not necessarily confined to Hindus, but comprises any well defined native community governed for certain internal purposes by its own rules and regulations; and that the agreement referred to in the plaint simply embodies an arrangement come to between members of the caste for the purpose of paying off the debts of the caste out of certain contributions to the caste funds, and as such involves a caste question. We must, therefore, discharge the rule with costs.

Rule discharged.

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20 B. 193.

[193] CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* PARASHRAM YESHVANT.*
[10th January, 1895.]

Indian Penal Code (Act XLV of 1860), ss. 292 and 293—"Obscene," meaning of the word.

In interpreting the word "obsence" in ss. 292 and 293 of the Indian Penal Code, the Courts may rightly follow *Reg.* v. *Hicklin* (3) where Lord Cockburn, C.J., says: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

Whether a publication is obscene, is a question of fact.

[F., 32 C. 247 (248)=2 Cr.L.J. 201; 39 C. 377=15 C.L.J. 151=13 Cr. L.J. 177=13 Ind. Cas. 993; R., 28 A. 100 (102)=25 A.W.N. 203=2 Cr. L J. 520.]

THIS was a reference by G. Jacob, Sessions Judge of Poona, under s. 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged under s. 293 of the Indian Penal Code with having in his possession certain obscene pictures for the purpose of sale.

Mr. Plunkett, the trying Magistrate, found that "the pictures were decidedly obscene and indecent." He, therefore, convicted the accused and sentenced him to pay a fine of Rs. 10.

The accused applied to the Sessions Court for revision of the Magistrate's proceedings, contending that the pictures were not obscene.

The Sessions Judge thereupon made a reference to the High Court on the following grounds:—

"I am of opinion, however, that the Magistrate was wrong in holding the pictures to be obscene within the meaning of the exception. There are four pictures. The pictures are of female figures partly, and in one case

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* Criminal Reference, No. 162 of 1894.

(1) P. J. (1882), p. 377.
(2) Morris' Selected Decisions, Vol. IV, p. 48.
(3) L.R. 3 Q.B. 360.

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entirely, naked, but in the latter case a somewhat strained attempt at conventional decency has been observed. I have not given a more full description, as I forward herewith copies of the four pictures for inspection.

"The pictures are not, I think, such 'as to deprave and corrupt those whose minds are open to such immoral influences, or [194] that their primary and palpable result would be to excite to lust' (see Mayne's Notes under s. 292 of the Indian Penal Code). The Magistrate's finding that the pictures are obscene, cannot, I think, be accepted as final, as he has given no reasons for it. It would be, I think, well if there should be an authoritative decision on this point if the Magistrate's opinion be deemed correct, as it would seem, from the documents now tendered by the applicant, that such pictures are passed without objection through the Custom Office.

"The effect of the Magistrate's decision would be that even partial nudity is obscenity, for he makes no distinction between the different pictures. There is nothing objectionable in attitude or gesture, apart from the mere fact of nudity or partial nudity.

"I am of opinion that the Magistrate's decision should be reversed and that the fine be refunded."

There was no appearance either for the Crown or for the accused.

JUDGMENT.

JARDINE, J.:—The trying Magistrate found that "the pictures were decidedly obscene and indecent," and convicted and fined the accused under s. 293 of the Indian Penal Code. The accused moved the Sessions Judge to refer the case to this Court. The learned Judge thinks the judgment defective as not stating reasons, and wrong in fact, as in his opinion the primary and palpable result of the pictures is not to deprave or corrupt or excite to lust.

We are of opinion that in the interpretation of the word "obscene" in ss. 292 and 293 the Courts may rightly follow *Reg.* v. *Hicklin* (1) which was approved by the Court of Common Pleas in *Steel* v. *Brannan* (2). It was followed in *Empress* v. *Indarman* (3). Lord Cockburn, C. J., said in *Reg.* v. *Hicklin*, p. 371: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the [195] young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character." The Court below had found the book to be, "by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come."

The Sessions Judge remarks that the effect of the Magistrate's decision would be that even a partial nudity in a picture is obscenity, for he makes no distinction between the different pictures. If the conviction related only to the half-draped pictures entitled Danube and Lorely, we might use our powers of revision, following the opinion expressed by Mr. Mayne in his Commentary on s. 292, as we do not think they are of such a sort as excite to sensual feelings. The other two pictures, which are naked women, are so drawn and coloured as to make it a question, in our

(1) L.R. 3 Q. B. 360. (2) L.R. 7 C. P. 261. (3) 3 A. 837 (843).

opinion, for the trying Court whether or not they come within the mischief at which s. 293 explained by the decisions quoted above is intended to strike. Now, the Magistrate has found that they are "indecent," and we presume that this is the reason why he held them to be obscene. It was open to the accused at the trial to show by argument and evidence that the effect of these two pictures is not necessarily to deprave or debauch, or that they are artistic or conventional or otherwise not polluting to the morals of the public. We are of opinion that there are no sufficient grounds for interfering with the decision of the Magistrate, to whom the law leaves the question of obscenity which is very much one of fact.

We, therefore, return the record and proceedings.

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[196] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

PARSHOTAM BHAISHANKAR AND ANOTHER (*Original Plaintiffs*), *Appellants v.* RUMAL ZUNJAR AND OTHERS (*Original Defendants*), *Respondents.** [10th January, 1895.]

Practice—Procedure—Suit for ejectment turned into a redemption suit.

A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment.

Nilakant v. *Suresh Chunder* (1), referred to and followed.

[**F.**, 4 O.C. 257 (260); **Appl.**, 28 B. 153 (161) = 5 Bom. L.R. 892; **Rel. on.**, 18 Ind. Cas. 457; **R.**, 35 B. 507 = 13 Bom.L.R. 895 = 12 Ind. Cas. 387; 6 Ind. Cas. 997 = 13 O.C. 128; **Expl. & D.**, 5 C.L.J. 527.]

SECOND appeal from the decision of John Fitz Maurice, Assistant Judge of Ahmedabad, confirming the decree of Rao Saheb B. Y. Gupte, Subordinate Judge of Umreth.

The plaintiffs brought this suit in 1892 to recover certain land from the defendants, alleging that they had bought it in 1891 from one Parshotam Liladhar, who had purchased it in the year 1880 in execution of a decree against the father of defendant No. 1.

Defendant No. 1 answered that his father had mortgaged the land to defendants Nos. 2 and 3.

Defendants Nos. 2 and 3 answered (*inter alia*) that they were mortgagees in possession, and that the plaintiffs were bound to pay to them the amount due under their mortgage before they (plaintiffs) could recover possession.

At the hearing the plaintiffs' pleader while stating his clients' case stated that the plaintiffs were willing to pay the amount properly due to defendants Nos. 2 and 3 on their mortgage.

The Subordinate Judge found that the sale to the plaintiffs was proved; that the mortgage relied on by defendants Nos. 2 and 3 was proved; and he held that the plaintiffs must bring a redemption suit before they could be allowed to obtain possession of the land in dispute. He, therefore, rejected the claim.

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* Second Appeal No. 456 of 1893.

(1) P.J. (1882), 21.

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On appeal by the plaintiffs the Judge confirmed the decree, holding that as the plaintiffs had not amended their plaint by adding a prayer for redemption, they could not be allowed to [197] redeem now against the consent of defendants Nos. 2 and 3, but must be referred to a fresh suit.

The plaintiffs preferred a second appeal.

Gokaldas K. Parekh, for the appellants (plaintiffs).—The Judge has fallen into an error in supposing that the defendants did not consent to our redeeming the land. Their written statement clearly shows that they were willing to allow redemption in this suit. Further on, pleader also stated, at the hearing, that we were willing to redeem. The question of mortgage was considered, and the mortgage was held proved. Therefore, it was wrong not to allow redemption simply on the ground that the suit was one in ejectment and not for redemption—*Vasudeo Balaji* v. *Narayan Krishna* (1); *Mansukh Pitambar* v. *Tarbhovan Parshotam* (2); *Nilakant Banerji* v. *Suresh Chunder Malik* (3).

Chimanlal H. Setalvad, for the respondents (defendants).—The plaintiffs having brought a suit in ejectment, it was rightly dismissed. In an ejectment suit, a plaintiff cannot be allowed to redeem—*Chandu* v. *Kombi* (4). We did not say in our written statement that we were willing to allow redemption in the suit. We merely contended that the plaintiffs were not entitled to bring a suit for possession before the redemption of our mortgage.

JUDGMENT.

SARGENT, C. J.—It would be difficult after the decree passed by the Privy Council in *Nilakant* v. *Suresh Chunder* (3) to hold that the Court cannot in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. In the present case the passage in the written statement, in which the defendants virtually admit they are ready to be redeemed, taken in connection with the statement of the plaintiffs' pleader at the hearing that his clients were ready to redeem, was virtually equivalent to an alternative case being made at the hearing, if not in the pleadings. As the Courts below were both under the impression that a decree for redemption could not be made, and exercised no discretion in the matter, we may, on second appeal, exercise that discretion in favour of the plaintiffs. We must, [198] therefore, reverse the decrees, and send back the case for the Court to pass a redemption decree after ascertaining what (if any) amount may be found due on the defendants' mortgage or mortgages to which the plaintiffs may be subject. The parties to pay their own costs in this Court and in the lower Court of appeal. Defendants Nos. 2 and 3 to have their costs in the Court of the Subordinate Judge.

Decree reversed and case sent back.

(1) 12 I.A. 171.
(2) P.J. (1882), 213.
(3) P.J. (1882), 21.
(4) 9 M. 208.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

SADASHIV GANPATRAO, A MINOR (*Original Plaintiff*), *Decree-holder* v. VITTHALDAS NANCHAND (*Original Defendant*), *Judgment-debtor.**

[17th January, 1895.]

Civil Procedure Code (Act XIV of 1882), *s.* 39—*Act VI of* 1892, *s.* 4—*Application for execution of decree—Proceedings in the suit—Vakalatnama.*

Applications for execution of the decree are proceedings in the suit. A vakalatnama remains in force until all proceedings in the suit are ended.

[Appl., 26 B. 109 (118) = 3 Bom. L.R. 565; R., 15 C.L.J. 89 = 16 C.W.N. 736 = 13 Ind. Cas. 365.]

THIS was a reference by Rao Saheb Krishnaji Sadashiv Risvadkar, Subordinate Judge of Parner in the Ahmednagar District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

One Sadashiv Ganpatrao got a decree against Vitthaldas Nanchand in the Court of the Subordinate Judge of Parner. Vitthaldas appealed against the decree to the District Court. The decree being confirmed in appeal. Sadashiv's vakil, Vaman Trimbak, who had been engaged in the Court of the Subordinate Judge to conduct the suit, presented an application for the execution of the decree, and got it fully executed according to the judgment in appeal. In the meanwhile, Vitthaldas preferred a second appeal to the High Court, which confirmed the decree of the District Court. After the disposal of the second appeal, Vaman Trimbak presented an application for the recovery of the plaintiff's costs in second appeal. A question having arisen whether the vakalatnama **[199]** filed by Vaman Trimbak in the suit gave him authority to present the application for execution for recovery of the costs, the Subordinate Judge was of opinion that the vakil had authority under s. 39 of the Civil Procedure Code (Act XIV of 1882); still as the section was not explicit on the point, he submitted the following questions:—

"(1) Whether the execution of the *darkhasts* is a proceeding in the original suits within the meaning of s. 39 of the Civil Procedure Code (Act XIV of 1882)?

(2) Whether the pleader in the original suits has authority to present those *darkhasts* and to seek the execution of the decree to which they relate without filing a fresh vakalatnama?"

OPINION.

FULTON, J.—We are of opinion that both questions must be answered in the affirmative. Under s. 39 of the Civil Procedure Code the vakalatnama shall be considered in force until all proceedings in the suit are ended so far as regards the client. Applications for execution of the decree are proceedings in the suit—see s. 4 of Act VI of 1892, and the decision of the Privy Council in *Thakur Parshad* v. *Fakir-ul-lah* (1).

Order accordingly.

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* Civil Reference No. 19 of 1894.

(1) Appeal from the High Court, Allahabad, not yet published. See Rulings of the Privy Council, dated 24th November, 1894. (17 A. 106 = 22 I. A. 44 = 6 Sar P. C.J. 526).

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20 B. 199.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

BABA, A MINOR (*Original Defendant No.* 2), *Appellant v.* SHIVAPPA (*Original Plaintiff*), *Respondent.** [14th January, 1895.]

Mahomedan law—Minor—Guardian—Mother of minor—Power to sell property of minor.

According to Mahomedan law a mother, not being the legal guardian of her minor child, cannot do any act relating to the property of the minor so as to bind him.

[F., 18 A. 373; R., 20 B. 338; 35 B. 217=13 Bom.L.R. 326=11 Ind. Cas. 352; 29 C. 473=6 C.W.N. 723; 26 M. 734 (738); 30 M. 197=17 M.L.J. 9=1 M.L.T. 433; 11 C.L.J. 632=5 Ind. Cas. 571; 2 Ind. Cas. 922=12 O.C. 146; 15 Ind. Cas. 576=37 M. 514 (519)=23 M.L.J. 244=12 M.L.T. 147=(1912) M.W.N. 889; 19 Ind. Cas. 911=6 S.L.R. 268; 9 O.C. 97.]

SECOND appeal from the decision of C. G. W. Macpherson, District Judge of Belgaum.

[200] Suit for possession. The land in question had been the property of one Rahiman, the father of the appellant (defendant No. 2), and was mortgaged by him. After his death his widow Husenbi (defendant No. 1) on the 16th July, 1881, sold it to the plaintiff in order to pay off the mortgage and other debts of her deceased husband.

The plaintiff now sued her and the appellant (defendant No. 2), who was her minor son, for possession and for mesne profits. Husenbi (defendant No. 1) did not appear. The minor son (defendant No. 2) pleaded that by Mahomedan law his mother had no authority to sell the land, and that he was not bound by the sale.

The Second Class Subordinate Judge of Saundatti (Rao Saheb G. V. Patvardhan) found that the sale to plaintiff was proved, and that the minor defendant No. 2, Bala, was bound by it. He, therefore, allowed the claim.

On appeal by Bala the Judge confirmed the decree. Defendant No. 2 filed a second appeal.

Gangaram B. Rele, for the appellant (defendant No. 2).—According to Mahomedan law a mother is not the legal guardian of her minor son, and the first defendant, therefore, had no authority to sell the property to the plaintiff—*Sita Ram* v. *Amir Begam* (1); *Hamir Singh* v. *Musammat Zakia* (2); *Hasan Ali* v. *Mehdi Husain* (3); *Mussamat Bukshun* v. *Mussamat Dookhin* (4). Under Mahomedan law there are two classes of guardians, near and remote. The near guardians are fathers, paternal grandfathers, their executors and the executors of such executors. The remote guardians are the more distant paternal kindred. The near guardians only have control over the property—Macnaghten's Mahomedan Law, pp. 62, 63, 64. The mother, not being included in the list of the near guardians, cannot alienate the property of her minor son.

[FULTON, J.—Husenbi had a share in her husband's property. Therefore, the sale by her would be good to the extent of her share in the land.]

The plaintiff did not claim a share in the land. He did not make out that case in the plaint.

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* Second Appeal No. 497 of 1893.

(1) 8 A. 324 (338). (2) 1 A. 57. (3) 1 A. 533. (4) 12 W. R. 337.

[201] *Gokuldas K. Parekh*, for the respondent (plaintiff).—The position of the parties and the circumstances of the case must be considered in order to decide upon the effect of the rule. Husenbi was in possession of all the property left by her husband. She dealt with the property as ostensible owner. The plaintiff purchased the property *bona fide* and for valuable consideration. The property was sold to us for a necessity, namely, to pay off the husband's debt. According to Mahomedan law, the discharge of debts is a matter of necessity, and the heirs of a deceased person acquire their right as such after the debts due by the deceased are discharged. Both the lower Courts have found that the transaction was beneficial to the minor and that the course adopted by Husenbi was the best for him.

JUDGMENT.

SARGENT, C. J.—The mother not being the legal guardian of her minor child according to Mahomedan law cannot do any act relating to the property of the minor so as to bind him—*Sita Ram* v. *Amir Begam* (1). If, therefore, the sale in this case by defendant No. 1 can be supported, it can only be on the ground that, by Mahomedan law, the mother, as one of the heirs in possession of the property of her husband, had the right to sell to pay off creditors. As to this, it may be that an heir who has possession of the entire property may sell in execution of a decree obtained against him by creditors—see the judgment of the Allahabad High Court in *Hamir Singh* v. *Musammat Zakia* (2)—but here the sale was in discharge of debts which had not been adjudged; nor have any special circumstances been found by the Courts below such as led the Allahabad High Court, whether rightly or wrongly, in *Hasan Ali* v. *Medhi Husain* (3) to give effect to the sale by the mother.

We must, therefore, reverse the decrees of the lower Courts and dismiss the plaint, as the plaintiff seeks to recover the whole of the property, but without prejudice to the plaintiff's right to sue to recover the mother's share (if any) in the land in question. Appellant to have his costs throughout.

Decree reversed.

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20 B. 202.

[202] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

ANYABA (*Original Defendant*), *Appellant* v. DAJI AND OTHERS (*Original Plaintiffs*), *Respondents.** [21st January, 1895.]

Adoption—Suit for declaration that defendant not the adopted son—Parties to suit—Reversioner—Suit for declaration when maintainable—Specific Relief Act (I of 1877), s. 42.

A suit by persons who are merely distant relations and not reversionary heirs for a declaration that the defendant is not the adopted son, is not maintainable under s. 42 of the Specific Relief Act (I of 1877).

Every declaratory decree must be ancillary to some consequential relief obtainable thereby, and no such relief is possible in the case of distant and contingent, and not presumptive, reversionary heirs.

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* Appeal from Order No. 14 of 1894.

(1) 8 A. 324 (333). (2) 1 A. 57. (3) 1 A. 553.

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SECOND appeal from the decision of Rao Bahadur R. D. Paranjpe, First Class Subordinate Judge of Satara with appellate powers, reversing the decree of Rao Saheb Shivram Sitaram Vagle, Second Class Subordinate Judge of Karhad.

This action was brought by plaintiffs against the defendant, who called himself Bapuji bin Gopalji, to obtain a declaration that he was not the legally adopted son of one Gopalji, and that his adoption, even if it took place, was null and void.

The plaint alleged that in the patilki vatan of mauje Kale in the Satara district the plaintiffs had $\frac{2}{3}$rds share and the deceased Gopalji had $\frac{1}{4}$th share; that Gopalji had been appointed to officiate as patil during his lifetime; that after his death, which occurred in April, 1890, the right to officiate as patil belonged to the plaintiffs, and that the defendant, in order to oppose the plaintiffs' right to officiate as patils, represented himself as the adopted son of Gopalji and fraudulently got his name registered by the revenue authorities in 1891.

The defendant answered (*inter alia*) that he had been duly adopted by Gopalji's widow Mohanai; that the plaintiffs had no right to sue to set aside his adoption, inasmuch as they were not persons entitled to succeed as reversioners after Mohanai's death, nor **[203]** were they authorized by the reversioners to bring the suit; that the defendant was one of those who were entitled to succeed after Mohanai's death, and that the suit was not maintainable in the Civil Court, the subject-matter thereof being within the cognizance of the revenue authorities, which had sanctioned the defendant's adoption and appointed him to officiate as patil.

The Subordinate Judge dismissed the suit on the grounds that the plaintiffs were not entitled to sue to set aside the adoption and that the declaration asked for could not be made.

On appeal by the plaintiffs the decree was reversed, and the suit was remanded for trial on the merits.

The defendant preferred appeal.

Lang (Advocate-General) with *Gangaram B. Rele*, appeared for the appellant (defendant).—It is admitted that the plaintiffs' family and Gopalji's family are quite distinct. The heir of Gopalji is to be sought for in his branch of the family. The plaintiffs do not claim to be reversioners, either presumptive or contingent, after Gopalji's widow, who is still alive. They are utter strangers to Gopalji's family, and, therefore, they have no right to challenge the defendant's adoption. A suit to set aside an adoption by a widow, is open only to reversioners and not to strangers—*Rani Anund* v. *The Court of Wards* (1); *Bhikaji* v. *Jagannath* (2); *Ramabai* v. *Rangrav* (3); *Kattama* v. *Dorasinga* (4).

We do not deny that the plaintiffs are vatandars. We only deny their right to officiate as vatandars, a matter which is entirely in the cognizance of the Collector under the provisions of the Vatan Act (Bom. Act III of 1894).

Setlur with (*Balaji Abaji Bhagavat*), appeared for the respondents (plaintiffs).—We contend that we have an existing interest in the vatan and, therefore, we are entitled to bring the suit under s. 42 (*f*) of the Specific Relief Act (I of 1877). We do not claim interest in any property other than the vatan. We simply ask for a declaration that the defendant has not become a vatandar by his adoption. The following authorities

(1) 8 I. A. 14.
(2) 10 B. H. C. R. 351.
(3) P. J. (1894), 287.
(4) 2 I.A. 169.

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were cited during [204] the argument :—*Ningangavda* v. *Satyangavda* (1) ; *Dadaji* v. *Bhaskarrav* (2) ; *Yellapa* v. *The Secretary of State for India* (3) ; *Ramchandra* v. *Anant* (4) ; *Govind* v. *Bapuji* (5).

JUDGMENT.

RANADE, J.—The only point at issue in this case is whether the suit brought by the respondents for a declaration that appellant was not the adopted son of Gopalji was or was not maintainable under s. 42 of the Specific Relief Act. The record of the case, Exs. 42, 43, 46 to 49, shows that as far back as 1858, notwithstanding the objections of respondents' ancestors, Gopalji was recognized as the sole owner of 16 annas' patilki vatan, and his right to officiate as sole patil was recognized by the revenue authorities. Respondents applied to the revenue authorities, in 1868, and claimed to be owners of 12 annas' shares in the vatan, but they were informed that they might establish their claim when the next vacancy occurred, Ex. 32. Gopalji died in 1890, and respondents put in their claim, but in the inquiry under the Vatandars' Act, appellant was recognized to be Gopalji's adopted son, and sole heir to his 16 annas' vatan (Exs. 44, 45), and respondents were directed to secure a decree setting aside appellant's adoption by Gopalji (Ex. 33). Thereupon the present suit was brought for a declaration that appellant's adoption was not valid. Appellant replied that as he was adopted by Gopalji's widow, who was still alive, and as respondents were not her reversionary heirs, the declaratory suit was not maintainable. The Court of first instance held that the suit did not lie, but the lower Court of appeal reversed that decree, and held that the suit could be maintained, as respondents were of the vatandar family, and the declaration sought would help them in their application to the revenue authorities to have their names entered as representative vatandars in the vatan register.

The appellant's counsel referred to the following authorities :—*Bhikaji* v. *Jagannath* (6) ; *Rani Anund* v. *The Court of Wards* (7) ; [205] *Ramabai* v. *Rangrav* (8) and *Kattama* v. *Dorasanga* (9) ; and the respondents' counsel relied upon *Dadaji* v. *Bhaskarrav* (2) ; *Ningangavda* v. *Satyangavda* (1) ; *Ramchandra* v. *Anant* (4) ; *Yellapa* v. *The Secretary of State for India in Council* (3) and *Govind* v. *Bapuji* (5) in support of his contention.

On a careful consideration of these rulings, we feel satisfied that respondents' suit in its present form was clearly not maintainable. Respondents admitted that they were distant relations, and not reversionary heirs, and not entitled to Gopalji's property (Ex. 50). Under such circumstances, it is clear that they had no right to bring a suit to set aside appellant's adoption by Gopalji's widow. In *Bhikaji* v. *Jagannath* (6), it was ruled that a suit to set aside the adoption made by a widow could only be brought by the nearest reversioner, and that a more distant heir could only sue when the nearer heir's rights had been waived. Respondents in this case are admittedly very distant relations, and Gopalji has left nearer heirs and reversioners, one of whom appellant himself claims to be. The principle of the decision in *Bhikaji* v. *Jagannath* (6) was approved of by their Lordships of the Privy Council in *Rani Anund* v. *The Court of Wards* (7), where it was expressly held that a suit to set aside adoption

(1) 11 B. C. H. R. 232. (2) P. J. (1878), 64. (3) P. J. (1888), 224.
(4) 8 B. 25. (5) 18 B. 516. (6) 10 B. H. C. R. 351.
(7) 8 I.A. 14=6 C. 764. (8) P.J. (1894), 287. (9) 2 I.A. 169.

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must be brought by a presumptive reversionary heir. It is only when he colludes, or refuses without sufficient cause to sue, that more distant heirs can sue. The principle of these rulings is that every declaratory decree must be ancillary to some consequential relief obtainable thereby—*Kattama* v. *Dorasinga* (1)—and it is plain that no such relief is possible in the case of distant and contingent, and not presumptive reversionary, heirs.

The respondents' counsel admitted the correctness of these propositions. He, however, contended that the consequential relief need not in all cases be in respect of property, and that if the declaration was likely to be of use in influencing the decision **[206]** of the revenue authorities, the suit would lie on the analogy of the principle recognized in *Kalova* v. *Padapa* (2). It was further contended that though a suit for the declaration of a right to officiate as representative vatandar could not be maintained, as that jurisdiction was vested by law in the Collector—*Khando* v. *Apaji* (3) and *Chinto* v. *Lokshmibai* (4), yet when the entry of a name in the revenue records is the result of the recognition of a private right by a Civil Court, it is competent for a Civil Court to make such a declaration—*Rangrav* v. *Krishnarav* (5). In *Yellapa* v. *The Secretary of State for India in Council* (6) it was further held that though a party may not sue for a declaration of his right as vatandar to officiate, yet he can bring a suit to have it declared that another person had not the status of a vatandar, and could not, therefore, be selected to officiate. In *Ramchandra* v. *Anant* (7) this Court decided that the Vatandars' Act did not take away the jurisdiction of the Civil Courts to determine who was or was not entitled to have his name entered in the list of vatandars. See also P.J. for 1874, p. 205, and *Ningangavda* v. *Satyangavda* (8) and *Govind* v. *Bapuji* (9).

It is obvious, however, that these rulings have no direct application to the suit in its present form. The suit has been admittedly brought by a distant *bhauband* to set aside appellant's adoption by Gopalji's widow, and the authorities relied upon by the respondent's pleader do not show that such a suit can be maintained, unless it is proved that nearer reversionary heirs have waived their rights. Respondents have not brought this suit to secure a declaration that the appellant is not a vatandar. He is admittedly a member of the vatandar family, and claims to be a nearer heir in his natural right to Gopalji than the respondents. Moreover, it must be noted that respondents' real object in securing the declaration is to influence the Collector to enter their names as representative vatandars. Their names were excluded from the register so far back as 1858, more than thirty-five years ago; and even if appellant's adoption were not proved, **[207]** Gopalji's widow could and would certainly adopt another son, who would have, as Gopalji's heir, a right, by reason of his father's thirty-five years of adverse enjoyment, to have his name entered in Gopalji's place. The declaration will thus be of an abstract fact which can lead to no consequential relief. A mere contingency, which confers no present or certain interest, will not suffice as a basis for such a declaration. The reply of the revenue authorities could not confer on respondent a right to bring a suit which they did not already possess. The grant of relief in declaratory suits is not a matter of right, but of discretion and a claim so obviously stale cannot be entertained where no right to bring the suit has been clearly established.

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(1) 2 I.A. 169.
(2) 1 B. 248.
(3) 2 B. 370.
(4) 2 B. 375.
(5) P.J. (1877), 98.
(6) P.J. (1888), 224.
(7) 8 B. 25.
(8) 11 B.H.C.R. 292.
(9) 18 B. 516.

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On the whole, the authorities referred to above seem to allow no choice but to reject the claim, so far at least as the suit in its present form is concerned. We accordingly reverse the decree of the lower Court of Appeal, and restore that of the Subordinate Judge. The respondents should pay all the costs to the appellant throughout.

JARDINE, J.—I concur. The view taken in *Bhikaji* v. *Jagannath* (1) and approved in *Rani Anund* v. *The Court of Wards* (2) is also suggested by Illustration F of s. 42 of the Specific Relief Act. The plaintiffs in the present suit wish to influence the Collector by shewing that the defendant, though a vatandar, is not as large a sharer as he would be if his status as adopted son is admitted. There are many facts which may influence the Collector, but which are not to be ascertained by civil suits for declarations; he makes his own inquiries as to personal ability and superior fitness. The present suit is barred on the same grounds as the suits where the plaintiffs sought to be declared *vadil* mentioned in *Ningangavada* v. *Satyangavda* (3).

Decree reversed.

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20 B. 208.

[208] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Fulton.

RAJMAL MOTIRAM MARVADI (*Original Plaintiff*), *Applicant v.* KRISHNA VALAD MAHIPATI HAGADEKAR (*Original Defendant*), *Opponent.** [22nd January, 1895.]

Dekkhan Agriculturists' Relief Act (Bom. Act XVII of 1879), *s.* 44†, *para.* 2—*Expression "show cause," meaning of—S.* 525 *of the Civil Procedure Code (Act XIV of* 1882).

The expression "show cause" in para. 2, s. 44 of the Dekkhan Agriculturists' Relief Act (Bom. Act XVII of 1879) means to allege and prove sufficient cause and not simply to object.

THIS was an application under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order passed by C. H. Jopp, Special Judge under the Dekkhan Agriculturists' Relief Act (Bom. Act XVII of 1879).

The plaintiff, who was a creditor of the defendant, applied under the provisions of the Dekkhan Agriculturists' Relief Act to the conciliator of Tembhurdi to effect an amicable settlement between them. The

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* Application under the extraordinary jurisdiction, No. 89 of 1894.

† Section 44 of the Dekkhan Agriculturists' Relief Act (Bom. Act XVII of 1879).

44. When the agreement is one finally disposing of the matter, the conciliator shall forward the same in original to the Court of the Subordinate Judge of lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides;

and shall at the same time deliver to each of the parties a written notice to show cause before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

The Court which receives the agreement shall, after the expiry of the said period of one month, unless cause has been shown as aforesaid, order such agreement to be filed; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed and from which no appeal lies.

The Court may in any case, for reasons to be recorded by it in writing, from time to time extend the period of one month allowed for showing cause under this section.

(1) 10 B.H.C.R. 351. (2) 8 I. A. 14=6 C. 764. (3) 11 B H. C. R. 232.

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conciliator did so, and after reducing the settlement to writing in the form of an agreement forwarded it to the Subordinate Judge of Karmala to be filed in Court according to s. 44 of the Act. Before the Subordinate Judge the defendant [209] impeached the agreement as fraudulent, imputing fraud both to the conciliator and to the plaintiff, but he adduced no evidence in support of his allegations. The Subordinate Judge in the absence of the plaintiff passed an *ex parte* order refusing to file the agreement on the ground that the defendant did not admit it.

The plaintiff applied for revision to the Special Judge, who issued notice to the defendant to appear and answer the application. On the appointed day neither the plaintiff nor the defendant appeared before the Judge. He, therefore, rejected the application, holding that the agreement was not an "amicable" one as contemplated by s. 41 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The plaintiff then applied to the High Court under its extraordinary jurisdiction contending (*inter alia*) that the Subordinate Judge had no jurisdiction to dispose of the matter *ex parte* in the absence of the plaintiff, and that he had no jurisdiction to refuse to file the agreement unless cause was "shown" in the sense of "proved." A rule *nisi* was issued calling upon the defendant to show cause why the order of the Special Judge should not be set aside.

Ganesh K. Deshamukh, appeared for the applicant (plaintiff) in support of the rule:—The Subordinate Judge had no jurisdiction to dispose of the matter, especially when notice of the defendant's objections had not been duly served on us. Service of notice is a condition precedent to the Court having jurisdiction—*Murari* v. *Hari* (1). Both the Courts appear to have thought that cause is sufficiently shown when it is only alleged. But the expression "to show cause" has been judicially interpreted in reference to s. 525 of the Civil Procedure Code by the different High Courts to mean not only to allege, but to allege and prove cause. We submit that the same interpretation should be put on the expression in the Dekkhan Agriculturists' Relief Act—*Dandekars* v. *Dandekars* (2), *Surjan Raot* v. *Bhikari Raot* (3).

The defendant alleged fraud only in vague and general terms. The particulars of the fraud were not given. As there was no [210] sufficient averment of fraud such as the Court should take notice of, the Judge should not have entertained the plea of fraud at all—*Krishnaji* v. *Wamnaji* (4).

There was no appearance for the opponent (defendant).

JUDGMENT.

SARGENT, C. J.—The Special Judge and the Subordinate Judge have both construed the expression "show cause" in the second paragraph of s. 44 of the Dekkhan Agriculturists' Relief Act as meaning "allege cause" without proving it, or, in other words, as simply to "object." But we think that the expression, as was held by this Court in construing s. 525 of the Civil Procedure Code in *Dandekars* v. *Dandekars* (2), is a well-known one denoting both to allege and prove sufficient cause. If that be the correct meaning of it, the subordinate Court could not act upon the defendant's mere statement of objection, but should have decided as to its sufficiency after giving notice to the other side. This was not done by the

(1) P. J. (1887), 39. (2) 6 B. 663. (3) 21 C. 213. (4) 18 B. 144.

Subordinate Judge. However, the applicant had an opportunity of supporting the argument before the Special Judge, and if he did not intend to do so on the day fixed for the hearing, he cannot now complain if the Special Judge confirmed the decision of the Subordinate Judge, and ask for the exercise of this Court's extraordinary jurisdiction. We must, therefore, discharge the rule.

Rule discharged.

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20 B. 210 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine and Mr. Justice Candy.

REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY.* [24th January, 1895.]

***Stamp Act** (I of 1879)—Instrument—Trust-deed—Settlement—Testamentary document—Stamp.*

An instrument called a trust-deed by the party executing it was intended to have immediate operation. It vested the property in the trustees at once, and the provisions [211] as to the management and the ultimate beneficial interest in the property showed that it was contemplated that its operation might extend beyond the lifetime of the owner.

***Held*, that the instrument fell under the definition of a settlement in the Stamp Act (I of 1879), and should be stamped accordingly.**

[F., 33 M. 304=7 Ind. Cas. 357=20 M.L.J. 519=8 M.L.T. 139.]

THIS was a reference by J. M. Campbell, Collector and Superintendent of Stamps, Bombay, under s. 46 of the Indian Stamp Act (I of 1879).

The reference was made in the following terms:—

"On the 19th January, 1890, Hormasji Sorabji Tadivala, of Poona (now deceased), executed a writing in the Marathi language. The following is the substance of the several clauses of the said document:—

"*Clause* 1—Sets out the names of his children, two of whom are sons named Shapurji and Ardesarji.

"*Clause* 2—Animadverts on the conduct of his said sons.

"*Clause* 3—Describes his property.

"*Clause* 4—Specifies the property which he has set apart for charitable purposes.

"*Clause* 5—Makes over his property other than that devoted to charitable purposes for the benefit of his grandson Pestonji, the son of the said Shapurji, and states that the said Pestonji has no right to sell or mortgage it, but he is only to enjoy its income.

"*Clause* 6—Appoints himself and three other persons as trustees for the administration of the property.

"*Clause* 7—States that the settlor will so long as he lives carry on the management of his property, and will administer its income in the interest of his said grandson Pestonji, and that no one has authority to hinder him in any way.

"*Clause* 8—Provides that, in the event of his becoming incompetent to manage the estate or relinquishing it, the other three trustees should carry on its management and should appoint a fourth until the said

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* Civil Reference, No. 17 of 1894.

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Pestonji arrives at the age of 21 years when it is to be handed over to him after satisfying themselves that he would protect it.

"*Clause* 9—Gives directions as to employing a man for the management of the property and as to his wages.

"*Clause* 10—Contains provisions for the sons in the event of their getting into difficulties, and for the wives of his sons in case of the deaths of their respective husbands.

"*Clause* 11—Contains provisions for future sons of his said two sons.

"*Clause* 12—Contains provisions for daughters and their funeral ceremonies.

"*Clause* 13—Provides for payment of a certain sum per month for the education of the grandson Pestonji.

[212] "*Clause* 14—Makes provisions for marriage expenses of his son Shapurji's daughters.

"*Clause* 15—Contains provisions regarding the said grandson after he attains the age of twenty-one years.

"*Clause* 16—Specifies the amount to be spent for the settlor's funeral expenses.

"*Clause* 17—Gives directions as to the management of the property in the event of the grandson behaving himself badly.

"*Clause* 18—Is as to outstandings.

"*Clause* 19—Is as to payment of debts.

"*Clause* 20—States that the said Shapurji and Ardesir and his daughters or their respective creditors have no claim whatever to the said property.

"*Clause* 21—Directs that all the property, both moveable and immoveable, should be considered as trust property.

"The said Hormasji does not state the value of his property, but it is believed that it is of the value of about Rs. 3,00,000.

"That, in a suit lately filed by the trustees against a tenant in the Court of Small Causes at Bombay, the said document was produced, and on its admissibility in evidence being disputed by the defendant in the suit on the ground of insufficiency of stamp, it was impounded and forwarded to me under s. 35 of the said Act.

"I think it is a question whether the document is a settlement, or whether it is intended to operate only after the death of the said Hormasji Sorabji Tadivala, and whether, in the latter event, it is a testamentary document and therefore not chargeable with an *ad valorem* duty under art. 57 of the first schedule of the Stamp Act. I also think that it is not a declaration of trust, and that the stamp of rupees fifteen is not required on that ground, and if it is a settlement, it is at present insufficiently stamped."

The Collector, therefore, referred the following question .—

"Whether the above-mentioned document requires any and what stamp?"

The reference was fixed for argument and disposal before a Full Bench consisting of Sargent, C. J., and Jardine and Candy, JJ.

Macpherson (with *Little*, Government Solicitor) appeared for the Government of Bombay :—The question is whether the document [213] is a testamentary instrument and, therefore, exempted from the payment of stamp duty, or is it liable to be stamped as a settlement or otherwise. The executant has named it a trust-deed, but the context of the document shows that it is a settlement. It is not a mere declaration of trust. The executant has appointed trustees, and has settled the estate on his grandson. Under

the terms of the document he himself is to continue in management of the property, and the trustees are to take over charge of the property in case he becomes incompetent. All these circumstances show that the instrument is a settlement, and it should be stamped as such.

Cleary, Q.C. (with *Sitanath G. Ajinkya*) appeared for the administratrix and son of Hormusji Sorabji, deceased.—We submit that the document is a testamentary instrument. The mere form of a document is not a test of its particular nature. The present document has made provisions for certain things which are to take effect *in futuro*. A trust-deed can have nothing to do with such things.

Manekshah J. Taleyarkhan appeared for Sorabji Shapurji, trustee, and the minor Pestonji Shapurji was represented by his guardian Shapurji Hormasji.

Macpherson, in reply.—The executant had appointed himself a trustee. Therefore, it is clear that the document was to take effect during his lifetime, and that being so, it is not a testamentary disposition. The form of the document is immaterial—*Thorncroft* v. *Lashmar* (1).

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C. J.—The only question which has been argued before us is whether the instrument is a testamentary document or a settlement. The party executing it calls it a trust-deed. It was clearly intended to have immediate operation, the most important test in distinguishing a settlement from a will. It vests the property in trustees at once, and the provisions as to the management and the ultimate beneficial interest in the property show that it was contemplated that its operation might extend beyond the lifetime of the owner.

[214] The reservation of the management by the owner during his life cannot affect its character. In *Crossman* v. *The Queen* (2) and *Attorney-General* v. *Heywood* (3) it was held that even the reservation of a life estate by the settlement did not render the instrument less a settlement.

It was argued by Mr. Cleary that the concluding words in para. 7 of the instrument "as long as I am alive, I have authority to increase or decrease" gave the owner the right to revoke the instrument. In the first place, those words must, we think, apply to the management which had just previously been reserved to the owner "in the interest of the property and (the beneficiary) Pestonji." But in any view of the words, as pointed out by Mr. Jarman in his Treatise on Wills, the insertion of a clause of revocation so far from indicating an intention to make a will, gives quite a contrary colour to the transaction, as a will does not require an express power to render it revocable.

It was also argued that the circumstance of the owner providing that any future property he might acquire and all sums to become due to him should be brought into the settlement, and all sums to become due from him during his lifetime should be paid out of the property, were provisions which were never heard of before in a settlement, and that an assignment of such property could not have effect given to it, and that such disposition gave a testamentary character to the whole. But, as pointed out by Mr. Jarman, the introduction of such disposition into the

(1) 31 L.J.P. 150. (2) 18 Q.B.D. 256. (3) 19 Q. B. D. 326.

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instrument would only show that he attempted to include what he could not, and not that he intended to resort to a different species of disposition. On the whole we think the instrument is one which falls under the definition of a settlement in the Stamp Act, and should be stamped accordingly.

Order accordingly.

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[215] CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* DEVJI GOVINDJI.* [29th July, 1895.]

Verdict of jury—Special verdict—Murder—Culpable homicide—Grave and sudden provocation—Loss of self-control—Burden of proving loss of self-control on accused—Penal Code (Act XLV of 1860), ss. 299 and 300—Criminal Procedure Code (Act X of 1882), ss. 238, 303 and 307—High Court's power of interfering with the verdict of a jury.

The accused was tried for murder. The first verdict of the jury was "guilty of murder under grave and sudden provocation." The Sessions Judge told the jury that it was their duty, after considering the question of provocation, to return a simple verdict of guilty or not guilty. The jury, therefore, brought in a second verdict of "not guilty." The Judge, considering this verdict to be perverse, referred the case to the High Court under s. 307 of the Code of Criminal Procedure (Act X of 1882).

Held, that the direction given to the jury after the first verdict was wrong, as the case fell under s. 238 of the Criminal Procedure Code (Act X of 1882). Although the charge was only one of murder, the jury had a right to bring in a verdict of culpable homicide, if there was grave and sudden provocation so as to deprive the prisoner of the power of self-control.

Held, also, that the jury were not bound to find a simple verdict of guilty or not guilty. They might have found a special verdict, or findings on matters of fact to which the Judge applies the law.

Held, also, that the first verdict was a verdict of murder, as the jury did not find that the provocation had destroyed the power of self-control.

It is not a necessary consequence of anger, or other emotion, that the power of self-control should be lost. Except where unsoundness of mind or real fear of instant death is proved, the pressure of temptation is no excuse for breaking the law.

Held, lastly, that the High Court will not interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong.

A verdict ought to be considered a proper and not a perverse verdict if it is one which reasonable men might find on the facts in evidence.

Queen-Empress v. *Dada Anna* (1) and *Queen-Empress* v. *Maganlal*(2) followed.

[F., 8 Cr. L.J. 143=10 Bom. L.R. 632 (633); R., 11 Cr. L.J. 630=8 Ind. Cas. 373=13 O.C. 295; Rat. Unr. Cr. Cas. 982 (985).]

THIS was a reference unders 307 of the Code of Criminal Procedure (Act X of 1882) by G. McCorkell, Sessions Judge of Ahmedabad, in the case of *Queen-Empress* v. *Devji*.

The accused was charged with the murder of his wife under s. 302 of the Indian Penal Code.

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* Criminal Reference No. 94 of 1895.

(1) 15 B. 452.

(2) 14 B. 115.

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[216] The reference was made under the following circumstances :—

" On the return of the jury into Court, the foreman stated that they were unanimously of opinion that the accused was guilty of murder under grave and sudden provocation.

" The Court pointed out that such a verdict could not be accepted, and that the jury were bound to find a simple verdict of guilty or not guilty. That, if they were of opinion that there was such grave and sudden provocation as the law allows, their verdict should be one of acquittal, but if they find that there is an absence of such grave and sudden provocation, then their verdict should be one of guilty.

" The Court then read over the two accounts of the killing given by the accused in his confession of the 12th May, and in his statement before the committing Magistrate, and pointed out to the jury that, assuming that there was provocation, it was neither grave nor sudden, and it was actually created by the actions and conduct of the accused himself. Before the committing Magistrate, the accused practically admits that he had misbehaved with his mother-in-law, and, therefore, he was debarred from pleading that provocation, howsoever grave and sudden, as a plea in abatement of his offence.

" The jury again retired for five minutes and came into Court, and through their foreman delivered a unanimous verdict of 'not guilty.' This verdict is, in my opinion, so clearly perverse, that I feel bound to refer the case to the High Court under s. 307, Criminal Procedure Code" (Act X of 1882).

The reference was heard by a Division Bench (Jardine and Ranade, JJ.).

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

Hormasji C. Coyaji, for the accused.

JARDINE, J.—The jury by unanimous verdict acquitted the prisoner of murder, the only charge made against him. The Sessions Judge considered this verdict to be clearly perverse, and, therefore, submitted the case for the disposal of the High Court under s. 307 of the Code of Criminal Procedure. Before [217] dealing with the facts as a jury, we have as Judges to make some remarks on procedure. The jury were not bound to find a simple verdict of guilty or not guilty. They might have found a special verdict, a string of facts, as in *Reg.* v. *Dudley* (1), to which the Judge applies the law. The option is theirs, not his. This is clearly laid down in *Queen-Empress* v. *Dada Anna* (2), and again in *Imperatrix* v. *Abdul Razak* (3), a case from the Consular Court at Mombassa in Africa. The verdict first returned was "guilty of murder under grave and sudden provocation." This was, in terms, a verdict of murder under the Indian Penal Code as the provocation does not reduce the offence to culpable homicide unless it destroys the power of self-control, a fact which this verdict did not find. If a man acting in cold blood slays the man who has given him grave and sudden provocation, the homicide is murder. The verdict does not affirm either that the person provoking was the person killed. Still as the jury in the second verdict acquitted of murder, it may be supposed that they meant at first that only culpable homicide had been proved. This would have been made clear if the learned Judge had questioned them under s. 303. Upon their finding a verdict of culpable homicide, which is punishable more severely where there is an

(1) 14 Q.B.D. 273.
(2) 15 B. 452.
(3) Cr. Rulings for 1894, No. 42. (Rat. Unr. Cr. Cases 710).

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intention to kill than in other cases, it would have been the duty of the Judge to ascertain from the jury if there was in their judgment such an intention. Killing by criminal negligence or gross want of skill is different in its quality from killing with intention to kill, caused by grave provocation, suddenly given by the person who is killed. See Criminal Ruling No. 62 of the 27th November, 1890, on s. 304 of the Penal Code. The learned Judge also appears to have told the jury that their duty after considering the question of provocation was only to acquit or convict of the charge of murder. This direction was wrong. The present is a case falling within s. 238 of the Procedure Code, which says: "When a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it." If the jury found as a fact that the person killed had given grave and sudden provocation [218] so as to deprive the prisoner of the power of self-control, they as the Judges of the facts had a right where the only charge was murder, to find a verdict of culpable homicide.

Before approaching the merits I refer again to *Dada Anna's* case and to *Queen-Empress* v *Mania*(1), as showing the settled practice of this Court not to interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong. These are the words in *Queen-Empress* v. *Mania*, which Sargent, C. J., adopted in *Dada Anna's case*. I sat in both, and it is well known that in my opinion, in which Mr. Justice Ranade has in sundry cases concurred, a verdict, whether correct or not, ought to be considered a proper and not a perverse verdict, if it is one which reasonable men might find. The case ought not to come before this Court under s. 307 unless the Judge disagrees so completely with the jury that he considers it necessary for the ends of justice to submit the case. This view taken in *Imperatrix* v. *Bhawani*(2), by Westropp, C. J., and Melvile, J., was adopted in the Code of 1882. There are many cases where two juries, both composed of reasonable men, unswayed by any prejudice, may take different views, exactly as two Judges may differ. One kind of mind more readily believes in testimony, more readily draws inference of crime. Another kind of mind hesitates to believe, pauses and gives the benefit of doubt. Each draws on its experience of life; and thus we find wide differences between Judges and juries, between the Judge that tries the case and the Judges of appeal. In criminal cases such things as confessions, the testimony of accomplices, the possession of stolen property, are weighed in different scales by different minds. The same occurs in Civil cases; *e. g.*, where indiscreet familiarities of a married woman are proved, are they evidence of adultery? A harshly judging set of men might say yes. A more lenient or cautious jury might say no; but if you allowed a new trial in the one case you would have to do the same in the other, as the Judge Ordinary points out in *Gethin* v. *Gethin* (3), and so you would never get to finality. *Dada Anna's case* is a sample where two different Sessions Judges differ from two different juries, and on the reference, [219] under s. 307, the two Judges of the High Court differ, and at length a third Judge decides the matter. (The Judge then read from report of *Gethin* v. *Gethin*.)

In the present case the Judge and jury were agreed that the prisoner Devji killed his wife Bai Lakshmi, who was then eight months with child. The question whether he intended to kill her was not asked, but as the medical witness deposes to fracture of the skull and many cutting and

(1) 10 B. 497. (2) 2 B. 525. (3) 2 S. and T. 560.

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punctured wounds, and that these injuries could not have been self-inflicted, it is easy for this Court to hold that the prisoner had an intention to kill. The difference between the Judge and the jury was on the question whether some provocation given by Lakshmi was grave and sudden. The answer in the complete absence of any witnesses has to be gathered from the various statements made by the prisoner to the tribunals. The Judge read them over to the jury and pointed out that in his opinion the provocation alleged by the prisoner was not grave nor sudden; and that whatever it was, he had provoked it himself by misbehaviour with his mother-in-law, which we think cannot be treated in the evidence as an incident forming part of the homicidal transaction, as it belongs to quite a different time and place. I exclude from consideration as evidence some statements made by the prisoner to the police that he was the murderer, as inadmissible under the ruling in *Queen-Empress* v. *Nana* (1), as conduct or otherwise. I think the Judge rightly states the effect of the evidence to be that some time about 4 P.M. on the 11th May last, Lakshmi was heard crying inside their house, where between 5 and 6 P.M. the prisoner Devji was found by the police alone and in bloody clothes with her dead body, the front door being locked from the inside. On the 12th May, he made a confession that just before the police came he had struck his wife on the head with a pound weight, a knife, and a sickle, and that he was caught in his bloody clothes after the police had got the door opened, which he had locked from the inside. He said he had given these deadly injuries, because he was enraged at some *foul abuse* Lakshmi gave him at the time. He accounts for the abuse by a long story. He and his wife had paid a visit to Visnagar; he sent his wife home and stayed with **[220]** her mother. He was taunted with insinuations that he had there misbehaved with the latter. When he got home to Ahmedabad and on some occasion, two days before the killing, a third person openly taunted him with the same charge and went on doing so for two days—singing a ribald refrain. Prisoner goes on: "I heard it patiently for two days. My wife said that he had been saying this for two days. It was true. I said that I would write a letter to her mother. She replied that if a letter were written, her mother would be disgraced. My wife began to give me foul abuses, so I was enraged." It is not easy to understand fully what the prisoner means. Under the circumstances the wife had a good right to ask him if the charge was true. Possibly his reply was adding insult to injury, and on his own showing it enraged the wife. On the 20th May, the prisoner made another statement to the Magistrate. From that it appears that the wife was at first angry with the man that made the charge. "For about one and a half day I persuaded my wife to believe that I had not misbehaved, but she was not satisfied and began to abuse me much. She said that she would either kill herself or kill me. We quarrelled much for one and a half day. I then smoked a chillam of ganja. She abused me in the name of my mother and sister, and I then slapped her on the face. She then lifted up the hatchet from the ground and struck it on her head. She was striking this on her head and, therefore, I took up an iron weight and struck her with it in the head. She then took up a knife and came to strike me with it. I gave her a push, and she fell down on the cot. While she was on the point of death, I put water into her mouth." Afterwards on the 24th May, the prisoner denied the killing and said he knew nothing about the matter; he had

(1) 14 B. 260.

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been taking liquor and ganja ; and the defence at the trial was similar. It is not impossible that he had smoked ganja. I think the prisoner's two confessions to be on the whole a tolerably true story. But to what do they amount? They show that the quarrel was not sudden, but had been going on for two days at least. The wife's feelings were probably lacerated by the prisoner's misbehaviour. She may very likely have given him some words of abuse, and he slapped her face. But even if she did, an unprejudiced juryman could not call this abuse, which is a very [221] common habit, a grave provocation : to kill a wife under such circumstances by the use of deadly weapons is an act out of all proportion to the abusive words. The prisoner probably got angry as he says : but, in the absence of proof and of any distinct finding by the jury, I will not believe that the power of self-control was lost. She appears to have threatened to kill herself with the hatchet, whereupon he says he struck her on the head with the iron weight. Now the Penal Code makes provocation a question of fact more distinctly one from the jury, than in England, where Judges have modelled the law ; and s. 299 of the Procedure Code shows this distinctly; it was for the jury to believe or disbelieve the confessions, and to accept or reject any part thereof as true or false. But they have, in my opinion, gone further, and without any reason treated the usual angry language of a quarrel between husband and wife as grave provocation to the use of deadly weapons. It is not clear whether they found that the power of self-control was lost. If this unanimous verdict of acquittal of murder had been given in Bombay, the Judge would have been bound to accept it, and no responsibility for it as a judgment on the facts could be cast on him. It is otherwise in the Mofussil in cases under s. 307, where the Judge has a severer duty.

I have given my views sitting as a jury, and now turn to some considerations as a Judge. If a verdict like the present were allowed to stand there would be a precedent in the High Court for acquitting of murder any husband or wife who kills the other with a deadly weapon and then explains that anger was caused by bad language in a domestic quarrel, and that the result was a sudden stop of moral and religious restraint and the fear of the gallows : so that all power of self-control was gone. This would be contrary to *Queen-Empress* v. *Sakharam* (1), where we say that the fear of the punishment for murder is meant to hold in check these irritable vagabond ganja-smoking husbands, the exception about grave provocation was not meant to supply them with excuses. I am clear that as Judges we cannot give our sanction to the view taken by the jury, which is either an evasion or a new view of the law. Like the killing of the [222] unoffending and unresisting boy by the starving sailors in the *Queen* v. *Dudley* (2), the killing is murder unless extenuated by *some well-recognized excuse admitted by the law.* We cannot as Judges tolerate any mere suggestion which would lessen the security the law throws round human life. For some reason or other, fallacious excuses are often debated here where cases come from so many Courts, and it is one of our highest functions as the *sacerdotes legum*, the *leges loquentes*, to uphold the ancient and settled doctrines of the law, *e.g.*, where a man was killed under torture by a policeman, to lay down that the maxim *respondeat superior* had no application in favour of the prisoner, so in another case that mere jealous suspicion of a wife, however strong, does not reduce the murder to anything less. I regret that when the jury first announced their

(1) 14 B. 564.

(2) 14 Q.B.D. 273.

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findings on fact in the special form, it was not ascertained whether they found that words spoken by Bai Lakshmi had destroyed the prisoner's power of self-control. I do not think that a reasonable set of men would have found that those mere words used in a long quarrel had reduced him to an irrational state entirely forgetful of the law and its terrors, something like a spoiled child or an animal. All our training as Judges, all the great decisions make us look with dislike on any theory which makes crime easy and excuses atrocious acts. Many people are angry on serious provocation, yet they do not slay the man or woman who has given it: it is not a necessary consequence of anger or other emotion that the power of self-control should be lost. The use of such a phrase shows that the law takes no notice of those metaphysics which assume that the human will is not free. Except where unsoundness of mind is proved, or real fear of instant death is proved, the burden being on the prisoner, the pressure of temptation is not an excuse for breaking the law. In *Reg.* v. *Dudley*, the Judges would not allow any theory about "necessity" to be made "the legal cloak for unbridled passion and atrocious crime." Since Lord Hale condescended to refute the Jesuits of France, that theory has hardly been mooted in the High Courts of Justice until *Reg.* v. *Dudley*, where Lord Coleridge hints at a Satanic origin :—

> "So spake the Fiend, and with necessity,
> The tyrant's plea, excused his devilish deeds."

[223] In this Presidency the metaphysical question has been debated several times. The leading case is *Queen-Empress* v. *Maganlal* (1), where an inferior tribunal had acted on some rhetorical expressions of Sir Raymond West in a printed minute of the Government of Bombay, which excuses some corrupt Judges and Magistrates, who had volunteered to pay bribes for promotion, on the ground that they were under some coercion of circumstances or the desire to get on in the world, and, therefore, did not act of free will, p. 130. The report shows how strenuously the Judges, at least Mr. Justice Bayley and myself, denounced that sort of philosophy as bad law. It was impossible to retain a corrupt Judge in the service of the Crown; and the specious argument of supposed philosophy did not prevail, and those persons were removed, for Magna Charta will tolerate no purchase of a Judge's office, and will recognise no superior. But since we uttered that deliverance on the law, we have had pointedly to enforce it again at sundry times and in divers manners as appears from the published criminal rulings. So deeply do wrong theories about human free will, if admitted as maxims of law, affect the people. In one of these cases this Court had to uphold the verdict of the jury convicting two persons of murder whom the Judge, whose attention was afterwards drawn to that leading case, would have acquitted. The decisions on the law are clear, and they are guides for the Courts to follow. Our Courts have no duty cast on them of discussing the varying motives to crime as a matter of metaphysics—of sitting as did the fallen angels reasoning high of

> "Providence, foreknowledge, will and fate.
> Fixed fate, free will, foreknowledge absolute,
> And found no end in wandering mazes lost."

Unless the jury were influenced by these things, the Oriental notion of fixed fate, they were not bound to assume, if they ever did, that the prisoner had lost his power of self-control. The law puts on him the burden of proving

(1) 14 B. 115.

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this loss of power—of proving that the act was not a mere result of natural ferocity, perhaps roused by drink or ganja. I think this theory accounts for what happened better than the theory that the power of self-[224] control was lost by the trivial provocation. As Sir James Stephen remarks, "the moral character of homicide must be judged of principally by the extent to which the circumstances of the case show on the one hand brutal ferocity, whether called into action suddenly or otherwise, or on the other inability to control natural anger, excited by serious cause"—3 Stephen's History of the Criminal Law, 71.

I am, therefore, of opinion that the learned Sessions Judge was in the present case required by his duty to express complete dissent with the unanimous verdict. To conclude, my judgment on the case sitting both as a jury and a Judge is that the verdict is manifestly wrong and unreasonable, and that the prisoner is guilty of murder and nothing less. As my brother Ranade comes to the same conclusion, the Court now assumes all the responsibilities of a jury and convicts the prisoner of murder and sentences him to death. But on consideration not so much of the jury's verdict by itself as of the obscurity of the evidence and of some indications that the prisoner had been probably excited by drink or ganja, we will ask the Governor in Council to consider whether the sentence may not be commuted.

RANADE, J.—I concur. The Sessions Judge in his charge to the jury appears to me to have too emphatically expressed his opinion in favour of the conviction of the accused on the charge of murder, and discredited the two pleas set up in defence, one of grave and sudden provocation, and the other of intoxication. The questions suggested by both these pleas were matters of fact, and as such the jury, and not the Judge, had to decide them. Clause (*d*) of s. 298 no doubt contemplates a certain extent of liberty to the Judge to express his view on questions of fact, but when a Judge lays down that there is not *sufficient* evidence to establish the plea, he in fact trenches upon the peculiar province of the jury to decide upon the sufficiency or otherwise of the evidence to prove allegations of fact (s. 299). The charge, indeed, concluded with an admonition to the jury, that it was for them to decide, whether, from the facts proved and the statements made by the accused, they could come to the conclusions that the accused caused the death of his wife, and did so [225] with the intention of causing her death, but it also asked them to state that the prisoner did not do so in consequence of grave and sudden action or intoxication. The Sessions Judge after setting forth the evidence for and against the prisoner, should have left it to the jury to decide whether it was murder pure and simple, or culpable homicide not amounting to murder, as was alleged by the defence. The jury in the first instance returned a verdict of guilty of murder under grave and sudden provocation. As the degree of intensity of this provocation was not mentioned in the verdict, it was certainly open to the Sessions Judge under s. 303 to put a question on that point with a view to ascertain what was the true character of the verdict. The Sessions Judge, however, informed the jury that he could not accept a qualified verdict, and he required them to find the prisoner either guilty or not guilty of murder. He told the jury that if the grave and sudden provocation was of the kind which the law allows, they should acquit the prisoner. In this there was certainly a misdirection, for it was open to the jury on a charge of murder to bring in a verdict stating circumstances which might reduce the murder to culpable homicide not amounting to murder

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(s. 238). The Sessions Judge next read over the evidence again, and pointed out that the provocation was not grave and sudden, and, being the result of his own conduct, it could not be pleaded in extenuation, even if held to be proved. Under the stress of such a reiterated charge, the jury brought in a second verdict of *not guilty* which the Sessions Judge has characterized as perverse, and which it no doubt is on the face of the record, when taken by itself. Reading it in connection with what had preceded it, it is plain that the jury in this case intended really not to acquit the prisoner altogether, but to bring in a verdict of culpable homicide not amounting to murder. The apparent perverseness was to a great extent due to the emphasis laid by the Sessions Judge in his charge on their duty to find the accused guilty of murder, and murder alone If, instead of calling upon the jury to return an unqualified second verdict, the Sessions Judge had asked them a question as to whether the grave and sudden provocation was of a sort to deprive the prisoner of all self-control, the jury would in all probability have returned a verdict which [226] would have satisfied the Sessions Judge—a verdict of guilty of murder. The unusual procedure followed by the Sessions Judge was thus to some extent responsible for the apparent perverseness of the final verdict. This irregularity is, however, not of a sort which has been prejudicial to the prisoner, and this brings us to the consideration of the question of fact as to how far the alleged provocation was grave and sudden so as to deprive accused of self-control. Both the jury and Judge found that the death was caused by an act of the accused, and the only question is whether there was grave and sudden provocation. The accused in his first statement made on the next day after the murder, after giving a long rigmarole story which was not very relevant to the charge, stated that his wife abused him because somebody said that he had committed incest with her mother, and he got enraged and struck her three times with a seer weight, and by a knife eight or nine times, and with a hoe eight or nine times. No amount of abuse could under the circumstances be held sufficient provocation for such cruelty to a pregnant wife. In his second statement made nine days after, he added that he had taken ganja that day, and that his wife had, besides the abuses she gave, threatened to kill herself, and he, therefore, struck her a blow with the seer weight. She then threatened to strike him with a knife, and he gave her a push which made her fall down. Later on, on 24th May, he retracted this statement, and stated that he was drunk and did not know. Of course this second statement of 20th May is not borne out by the numerous wounds found on the body of the deceased in the *post-mortem* examination. In his third statement he admitted that he had taken both *majum* and drink, and that God only knew if he killed her or she killed herself. He would not venture on positive denial. He in fact abandoned the plea of provocation. This is all the evidence on the point. The evidence about his movements in the house before he was captured shows that the accused was not then quite in his senses, and this excitement was due either to intoxication or was the effect of the madness which horrible crime such as this engenders. The plea of intoxication cannot help accused, as it was voluntary intoxication. The other plea was virtually abandoned by him, and even at its best it did not constitute any provocation for the [227] crime committed. We accordingly agree with the Sessions Judge in finding that the accused was guilty of murder, and not of the lesser offence of culpable homicide as found by the jury in their first verdict. The second verdict was perverse and must be set aside.

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For the above reasons, the Court found the accused guilty of murder and sentenced him to be hanged, but as there were reasons that he had been probably excited by drink, their Lordships said they would ask the Governor in Council whether the sentence might not be commuted.

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TESTAMENTARY JURISDICTION.

Before Mr. Justice Starling.

IN THE MATTER OF THE WILL OF TULSIDAS VARAJDAS. DAYABHAI TAPIDAS (*Applicant*) *v.* DAMODAR TAPIDAS (*Respondent.*) [7th September, 1895].

Probate—Will—Executor who has acted required to lodge will and obtain probate.

One Tulsidas Varajdas died in 1883, and by his will appointed his brother Tapidas sole residuary legatee and also his executor, and he directed that in case of Tapidas' death, Damodar (Tapidas' son) should be executor. Tapidas accordingly acted as executor until his death in May, 1886, and then his son Damodar continued to administer the estate, but neither of them obtained probate of the will. Tapidas left a will whereby he appointed his two sons Damodar and Dayabhai (the applicant) his executors and also his residuary legatees. In June, 1895, Dayabhai, stating that he was one of the residuary legatees of Tapidas, who was the sole residuary legatee of Tulsidas Varajdas, applied for a citation to be issued to Damodar directing him to bring in and prove the will of Tulsidas Varajdas. In reply, Damodar submitted that there was no necessity to prove the will; that the estate was fully administered, and that he had no funds left in his hands out of which to pay the costs of probate.

Held, that the executor Damodar must lodge the will in Court, and that, on the applicant Dayabhai paying half the estimated costs of obtaining probate (including probate duty), the executor Damodar should take out probate of the will.

CITATION to an executor to bring in and prove the will of his testator.

One Tulsidas Varajdas died at Bombay on 21st January, 1883, possessed of considerable moveable and immoveable property in Bombay. He left a will dated the 8th November, 1882.

[228] By this will he appointed his brother Tapidas Varajdas his executor, and directed that, in the event of Tapidas' death, his son Damodar Tapidas (step-brother of the applicant Dayabhai Tapidas) should act as executor. Tapidas Varajdas was the sole residuary legatee under the will.

Tapidas acted as executor until his death on the 31st May, 1886, and Damodar Tapidas then acted and continued to administer the estate, but probate of the will was not obtained either by Tapidas or Damodar.

Tapidas left a will dated the 26th May, 1885, which was duly proved by his sons the executors thereof, *viz.*, Damodar Tapidas and Dayabhai Tapidas (the applicant), on the 27th November, 1886. The said two executors were the residuary legatees under the said will.

On the 29th June, 1895, Dayabhai Tapidas applied for a citation to be issued to his step-brother Damodar Tapidas requiring him to bring in and prove the will of Tulsidas Varajdas. In his affidavit he stated as follows:—

"5. The said will of Tulsidas Varajdas was not proved by the said Tapidas Varajdas during his lifetime, and the said Damodardas Tapidas

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has not yet proved the same although I repeatedly called upon him so to do, and in answer to my inquiry whether he would prove it or not he says that it is not necessary for him to do so.

"6. As one of the residuary legatees of the said Tapidas Varajdas the sole residuary legatee under the said will of Tulsidas Varajdas, I am anxious that the original will of the said Tulsidas Varajdas should be produced and deposited in the office of the Registrar, and that the said Damodardas Tapidas should be called upon to prove the same, he having already elected to act thereunder.

"7. Under the aforesaid circumstances I pray that this Honourable Court will be pleased to issue a citation addressed to the said Damodardas Tapidas to produce and deposit the said original will of the said Tulsidas Varajdas into the office of the Registrar, and to prove the same."

In reply, Damodar Tapidas filed an affidavit in which he stated that the testator's estate had been administered without probate by his father Tapidas and himself with the knowledge and consent of the applicant (Dayabhai); that Dayabhai had never before required the will to be proved; that Dayabhai was trustee of various trusts created in pursuance of the will; that the estate had been completely administered, and that he had now no funds out of which to pay the costs of obtaining probate; and that the [229] application was now made merely for the purpose of annoyance. The last paragraph of his affidavit was as follows:—

"10. I say that I have no objection to produce the original will of the abovenamed deceased in the Honourable Court; but having regard to the fact that the estate of the testator has already been fully and completely administered as aforesaid, and the residue paid, I submit there is no necessity of proving the said will. I also submit, that under the events which have happened, the said Dayabhai Tapidas had no justification to obtain the present citation to call upon me to deposit and prove the said will. I say that no funds are left from which I can pay the heavy costs of obtaining probate, as the residue of the said testator's estate has already been paid off as aforesaid. Should, however, this Honourable Court be of opinion that it is now necessary to obtain probate of the said will, I am ready and willing to carry out the Court's direction. In that case, the said Dayabhai Tapidas ought to be made to pay all the costs of obtaining probate, as it is he who, for reasons best known to himself, desires that this expenditure should be incurred, which said expenditure is otherwise entirely unnecessary.

Inverarity, for the applicant in support of the citation. He referred to Williams on Executors (8th Ed., pp. 226-7.)

Scott, for the executor, showed cause.

JUDGMENT.

STARLING, J.—The respondent in this matter, Damodardas Tapidas, is the executor of the will of one Tulsidas Varajdas, but he has not proved the will which is in his possession, and has paid away or set apart the estate which came into his hands. The applicant Dayabhai Tapidas, the brother of the respondent, asks for an order that the respondent should bring the will into Court and prove the same, or else renounce probate. The respondent is unwilling to renounce probate, as that would enable his brother to take out letters of administration *cum testamento annexo* and claim possession of the estate of the deceased which has not been distributed, and also to interfere in the management of certain charitable trusts provided for by the will. At the same time the respondent does not desire

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to take out probate, although, since his father's death he has been acting as executor, because he would have to pay the whole of the probate duty, and he has in his hands no portion of the estate which can apparently be devoted to that object, and consequently he would have to pay it out of his own pocket.

The question I have to decide is, whether I can order the respondent to prove the will.

[230] The Indian Succession Act, 1865, and the Probate and Administration Act, V of 1881, do not provide for a case like this. Similar cases have, however, occurred in the Ecclesiastical and Probate Courts in England,

In *Pytt* v. *Fendall* (1) Sir George Lee held that an executor having acted as executor could not renounce probate, and ordered him to take out probate before a certain day. In *Jackson* v. *Whitehead* (2) Sir John Nicholl said he found no case where the Court had refused to dismiss an executor except on the ground of the party having intermeddled with the effects, and that the reason was obvious; that where a party had intermeddled, he had taken upon himself the burden and acquired the responsibility of an executor. In *Long* v. *Symes* (3) the same learned Judge said that if intermeddling would render a man *executor de son tort*, it would also render an executor compellable to take probate, and assigned the executor in that case to take probate before a certain day. See also *Mordaunt* v. *Clarke* (4), where the same principle was followed. This course of proceeding is in no way inconsistent with the provisions of the Indian Acts already referred to, and I think it should be followed in the present case.

The will of Tulsidas Varajdas must, therefore, be lodged by Damodar Tapidas with the Testamentary Registrar of this Court, and he must take out probate thereof; but I will not, under the peculiar circumstances of this case, order him to do so unconditionally. A portion of the administration was carried out by Tapidas Varajdas, the original executor, and for his acts Damodar is not responsible personally. All the legacies under the will except two seem to have been paid, and those two seem to have been set apart in a way which is not apparently improper, and the apparent residue was settled in a more or less formal manner between Damodar and his bother Dayabhai (the applicant), and the same has been divided between them. It is apparent, therefore, that the only reason for the present application is that Dayabhai desires to bring a suit against Damodar in respect [231] of his administration of the estate of Tulsidas, which he cannot do until some one has been recognised as the personal representative. Dayabhai, having quarrelled with Damodar, wants to make Damodar pay out of his own pocket all the costs of obtaining probate, and then to have the gratification of bringing the estate into Court. I do not think he should have this double gratification, as I am doubtful whether there is any necessity for probate, except for the purpose of enabling one brother to compel the other to render an account of the estate, and his application thereof to the Court. If he wants probate taken out, he must pay one-half the costs including probate duty.

The order I shall, therefore, make is that Damodar do lodge the will in Court, and that on Dayabhai paying to Damodar or his attorneys half the estimated costs of applying for and obtaining probate (including probate

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(1) 1 Ca. Temp. Lee. 553.
(2) 3 Phillim. 577.
(3) 3 Hagg. 774.
(4) 1 P. and M. 592.

duty), such estimate to be settled, if necessary, by the Taxing Master, but without prejudice to Dayabhai's right to have the same debited against the estate, Damodar do as soon as practicable thereafter apply for and take out probate of the will of Tulsidas Varajdas, deceased. Each party to bear his own costs of this citation and order.

Order accordingly.

Attorneys for applicant.—Messrs. *Chitnis, Motilal and Malvi.*
Attorneys for executors.—Messrs. *Thakordas Dharamsi and Cama.*

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[232] ORIGINAL CIVIL—FULL BENCH.

Before Chief Justice Farran, Mr. Justice Starling and Mr. Justice Tyabji.

FAZULBHOY MEHRALI CHINOY (*Plaintiff*) *v.* THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED (*Defendant*).*
[9th September, 1895.]

Civil Procedure Code (Act XIV of 1882), s. 523—Agreements to refer within the section—Arbitration—Agreement to refer future differences to arbitration—Naming of arbitrators.

A general agreement to refer future difference to arbitration comes within s. 523 (1) of the Civil Procedure Code (Act XIV of 1882), and may be filed under that section. The section is not confined to cases in which a dispute actually existing at date of agreement is agreed to be referred to arbitration.

But the agreement must name the arbitrator or arbitrators, and an agreement which provides for the future appointment or election of arbitrators does not fall within the section.

The effect of the last clause of s. 523 is to give the parties to such an agreement power to nominate the arbitrator, even when they have agreed that he shall be appointed by the Court. In such cases the Court must appoint their nominee.

[R., 9 Ind. Cas. 655=35 P.R. 1911=85 P.L.R. 1911=70 P.W.R. 1911.]

APPLICATION by the plaintiff under s. 523 of the Civil Procedure Code (Act XIV of 1882) for an order that the matter in dispute between the parties should be referred to arbitration.

[233] By a charter-party dated the 6th October, 1894, the defendants agreed to carry salt for the plaintiff in the S. S. "Nadiri" from Calcutta to

* Suit No. 282 of 1895.

(1) Section 523 of the Civil Procedure Code (Act XIV of 1882) :—

"When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

"The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

"On such an application being made, the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring such parties to shew cause within the time specified in the notice why the agreement should not be filed.

"If no such cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon and may also nominate the arbitrator when he is not named therein, and the parties cannot agree as to the nomination.

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Mombasa, thence to Zanzibar, and thence to Muscat, delivering part of the cargo at each intermediate place and the last portion thereof at Muscat. The voyage was duly performed as far as Zanzibar, but instead of going thence to Muscat the ship deviated to Bombay and, after some delay there, proceeded to Muscat, arriving there (as the plaintiff alleged) at a date later than the date at which, but for the deviation, she would have arrived. The plaintiff consequently claimed damages from the defendants.

The charter-party contained a clause providing for reference to arbitration in case of dispute between the parties. The clause was as follows :—

"Any disagreement arising between the contracting parties as to the proper interpretation or meaning of any of the clauses of this charter-party or any other disputes or objections being raised by the parties, such disputes, objections, disagreements and matters shall be referred to two arbitrators duly elected by them. In case of dissidence between the arbitrators, an umpire shall be named by them, and his decision shall be final and without appeal. Such disagreements, &c., if any, incurred at any ports be only settled through arbitrators in Bombay and by the owners and charterers only."

The plaintiff desired that the matter in dispute should be referred to arbitration, but the defendants objected. The plaintiff accordingly applied by petition to the Court under s. 523 of the Civil Procedure Code (Act XIV of 1882) praying for a direction that the charter-party should be filed, and that an order of reference should be made regarding the said dispute.

The application was in the first instance heard by Starling, J., who, on the 4th July, 1895, gave judgment for the plaintiff and ordered the charter-party to be filed, and an order of reference made thereon. Subsequently on the application of the defendants His Lordship withdrew his judgment, and the question now came before a Full Bench.

Macpherson (Acting Advocate-General), for the defendants.—The agreement in question is not one that comes within s. 523 of the Civil Procedure Code (Act XIV of 1882), and it ought not to be filed. General agreements to refer differences to arbitration **[234]** are not within this section. The agreements contemplated by the section are only those (1) which refer to disputes which at the time of the agreement to refer have actually arisen and (2) in which arbitrators are named. There must be a specific controversy in existence. Until Statute 3 and 4 Will IV, c. 42, there was a distinction between a general agreement to refer such as this is, and an agreement to refer existing disputes : see per Mellish, J., in *Randell* v. *Thompson* (1). In India, general agreements to refer were provided for by the Contract Act (IX of 1872), s. 28, and see s. 21 of the Specific Relief Act (I of 1877). The Civil Procedure Code deals only with agreements to refer existing disputes : see ss. 506 to 522. So also s. 525 refers to existing disputes. It is improbable that ss. 523 and 524 were intended to refer to a different class of agreements. He referred to Stat. 53 and 54 Vic., c. 49, s. 27 ; *Adhibai* v. *Cursandos* (2) ; *Smith* v. *Nelson* (3).

Inverarity and *Lowndes*, for the plaintiff.—This agreement ought to be filed. It comes within s. 523 of the Civil Procedure Code. The words of that section are wide enough to include such an agreement as this. The arbitrator is sufficiently named in this agreement. He is to be a

(1) 1 Q. B. D. 748 (758). (2) 11 B. 199 (212, 213). (3) 25 Q. B. D. 545.

person elected by both parties. That is a sufficient naming or indication of who the arbitrator is to be. Counsel referred to the English Common Law Procedure Act, 1854, ss. 11 and 17; Act VIII of 1859, s. 326.

JUDGMENT.

FARRAN, C. J.—This is an application to this Court to file an agreement of reference under s. 523 of the Civil Procedure Code. It was made in the first instance to Mr. Justice Starling in chambers. That learned Judge entertaining doubts as to his jurisdiction to grant the application, and considering the question involved to be an important one, has referred it to this Bench. It was argued before us on the 20th instant. I read the judgment of Mr. Justice Tyabji and myself.

The agreement to refer, which it is sought to file, is contained in a charter-party and is in the following terms: "Any [235] disagreement arising between the contracting parties as to the proper interpretation or meaning of any of the clauses of this charter-party or any other disputes or objections being raised by the parties, such disputes, objections, disagreements and matters shall be referred to two arbitrators duly elected by them. In case of dissidence between the arbitrators, an umpire shall be named by them, and his decision shall be final and without appeal. Such disagreements, &c., if any, incurred at any ports (shall) be only settled through arbitrators in Bombay and by the owners and charterers only."

The dispute which has arisen between the parties is, we are informed, as to the liability of the steamer owners for not landing goods belonging to the applicants at Muscat. It is contended that the above agreement does not fall within the purview of s. 523 of the Code (Act XIV of 1882), inasmuch as it is an agreement to refer future differences, and not a present existing dispute or present existing disputes, to arbitration; and also because (it is said) the parties have not agreed that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates. We are unable to accede to the contention of the Advocate General that s. 523 of the Civil Procedure Code is confined to cases in which a dispute actually existing at the date of the agreement is agreed to be referred to arbitration. The section doubtless does not contemplate an agreement to refer future differences being filed until differences have actually arisen. Its concluding paragraph directs the Court in imperative language, upon the agreement being filed, to make an order of reference thereon, which could not be done if no present difference had arisen. It appears to us, however, that when a difference has arisen it is immaterial whether the agreement to refer is contained in a previously existing contract between the parties, or whether it is an agreement entered into for the purpose of determining the existing dispute. Each equally falls within the scope of the section. The words "any difference" embrace alike, we think, any present difference and any future difference arising out of the contract. They appear to us to be a comprehensive mode adopted by the draftsman of [236] the Civil Procedure Code to express the same idea as the draftsman of the Common Law Procedure Act expressed in the words "any then existing or any future differences" which are found in the 11th section of the statute (17 and 18 Vict., c. 125) from which the 523rd section of the Code was probably adapted. We do not think that the position of s. 523 in Chap. XXXVII of the Code, which

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was relied upon by the Advocate General in his learned argument, between ss. 503 and 527, which are conversant with the reference of existing matters of dispute, is sufficient to show that the Legislature used the expression "any difference" in the restricted sense for which he contends.

It is not, however, necessary for us actually to decide this point, as we think that the second objection raised by the Advocate-General must prevail. It is clear, if we construe the words of the section in their plain ordinary grammatical sense, that the parties here have not agreed in writing that their differences shall be referred to the arbitration of any person named in the agreement. They have left the appointment of arbitrators to a future election by them, and this election has not taken place. Mr. Inverarity contends that the election of arbitrators by the parties to be thereafter made is equivalent to a naming of them in the agreement. "Named" in the s. (523) must, he argues, be read as "designated, or described;" but even giving to the word its widest meaning which we should be anxious to do in order to bring within the scope of the section cases in which the arbitrator, though not actually named, is designated, as for example, by the office which he holds, we feel unable to hold that arbitrators who are left for future election are "named" in the agreement within the meaning of the section. To do so would be to alter the language of the section and not to interpret its existing language according to its plain ordinary meaning. We cannot vary the language which the Legislature has used in order to make the law accord with preconceived notions of what it might be. We can, however, in this case see reasons why the Legislature should have framed the enactment in the restricted form which in our view it has adopted.

It is, however, argued that the context of this section renders it necessary for us to give the extended meaning contended for to the [237] expression. This argument is based upon the last clause of the section, which directs that the Court may also nominate the arbitrator when he is not named in the agreement, and the parties cannot agree as to the nomination. This clause of the section is, it must be admitted, not happily worded, nor does it adapt itself readily to, or fit in with, the provisions of its earlier clause. It appears to us inferentially to give the parties power by agreement to nominate their arbitrator, even when they have agreed that their difference shall be referred to an arbitrator to be appointed by the Court. In such case the Court must appoint their nominee, which is not unreasonable. This seems to us to be the only mode of reading the section so as to make it harmonious throughout. The first clause cannot, we think, be read so as in effect to strike out the words "of any person named in the agreement," from the opening clause and to make it apply to agreements to refer generally when it is in terms restricted to agreements to refer of a special or limited class, *viz.*, those in which the arbitrators are named, or in which it is agreed that they are to be appointed by a Court. The Common Law Procedure Code allowed of any agreement to refer being made a rule of a Court; but the practice under it seems to have been not to make such an agreement a rule of Court until arbitrators were appointed. Per Bowen, L. J., in *Re Smith* (1). The section with which we are now dealing needs, in any view of the law intended to be enacted, redrafting. Similarly, the parties here have not agreed that their difference shall be referred to a person to be appointed by the Court. Even if an open agreement of reference could be

(1) 25 Q. B. D. 545 (554).

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construed as a reference to an arbitrator to be appointed by the Court—a question upon which it is unnecessary for us to give an opinion in this case—the parties here by indicating the manner in which their arbitrators are to be elected have inferentially excluded an appointment by a Court.

The agreement cannot, therefore, be brought within the scope of s. 523 of the Code, and no order for its filing can be made.

B. TYABJI, J., concurred.

[238] STARLING, J.—I agree with the judgment just delivered so far as it decides that the words "any difference" include differences which may arise in the future as well as those which have already arisen, and that "naming" of the arbitrator in the agreement is sufficiently effected by his being described by an official title. I also agree that in the present case it cannot be said that the arbitrators are in any way named in the agreement. With regard to the main point in this case, whether the agreement in question can be filed under s. 523 of the Civil Procedure Code, I had written a judgment deciding that question in the affirmative, but the perusal of the judgment just delivered has made me doubt the correctness of the arguments in support of my decision. At the same time it has not convinced me of the correctness of the judgment on this point, and I am in doubt as to how the judgment ought to go. As, however, this is a point of practice, and two members of the Bench agree as to the order to be passed, I do not intend to occupy the public time by going into the grounds of my doubts.

Attorneys for the plaintiff:—Messrs. *Payne, Gilbert and Sayani.*

Attorneys for the defendants:—Messrs. *Crawford, Burder and Bayley.*

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TESTAMENTARY JURISDICTION.

Before Mr. Justice Candy.

GHELLABHAI ATMARAM (*Plaintiff*) *v.* NANDUBAI (*Defendant*).*
[21st and 26th September, 1895.]

***Probate**—Application for probate—Executor—Arbitration—Reference by executor to arbitration—Award—Power of executor to refer to arbitration—Effect of award—Jurisdiction—Jurisdiction of Testamentary Court to decide question of award.*

An executor having propounded a will and applied for probate, a caveat was filed denying the execution of the alleged will, and the master was duly registered as a suit. The executor and the caveatrix subsequently referred "the dispute" to arbitration, and an award was made that the alleged will had not been executed. The executor nevertheless subsequently continued the suit. At the hearing the caveatrix pleaded the award and contended that it was binding on the plaintiff (executor). The plaintiff (executor) contended that the Court as a Court of Probate had no jurisdiction to try any question as to the award, but was limited only to the question of the execution of the will.

[239] *Held*, that the Court had jurisdiction to determine the question as to the award.

Held, also, that the award was binding on the executor.

APPLICATION for probate. The plaintiff on the 23rd September, 1893, applied for probate of the will, dated the 3rd April, 1890, of one

* Suit No. 21 of 1893 (Testamentary).

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Godawaribai, widow of Bhowan Dewa Dave, of Bombay, alleging that he was the sole executor according to the tenor of the said will.

The petition stated that the deceased left a daughter named Ambabai, who was an imbecile and unmarried, and the petitioner, who was a paternal cousin of the husband of the testatrix, as her next of kin according to Hindu Law.

By the alleged will the testatrix appointed the said Ghellabhai Atmaram to be her heir and to have the management of all her property and "after him the whole caste shall carry on the same."

On the 26th October, 1893, the defendant, who was the sister of the deceased Godawaribai's husband, filed a caveat, and the matter was registered as suit No. 21 of 1893 (see s. 83 of Act V of 1881). She alleged that the property referred to in the alleged will was the ancestral property of the husband of the deceased, and had come to the deceased as his widow, and she denied that Godawaribai had executed any will.

While the above suit was pending, the parties thereto, on the 30th October, 1893, by a writing duly signed, referred their dispute to arbitration. The caveatrix consequently did not take any steps to proceed with the caveat and did not file her affidavit in support thereof, (as required by the rules of Court), within eight days. The caveat was accordingly dismissed on the 14th December, 1893. The "submission" to arbitration was as follows:—

"To Bhangsali Kalidas Ramji. Written by us the undersigned. By this instrument we give to you in writing as follows: In the matter of an application presented by Ghellabhai Atmaram Tambuwala to obtain 'power' (probate) from the High Court for the administration and enjoyment between us two persons of the property of Bai Godawari, the widow of Darji (tailor) Bhowan Dewa Dave. I, Nandubai, the wife of Mulji Mala, having raised an objection have got a caveat registered in the High Court. In the matter thereof we the said plaintiff (and) defendant have appointed you an arbitrator to bring about a settlement of the said dispute. As to whatever 'award' you may make and give on arriving at a decision, the same is to be agreed to and abided by us two persons. In this matter we each other agree and consent to **[240]** act according to your 'award.' This submission paper we of our free will and pleasure and in sound mind and consciousness have made and delivered after having read and got read and understood the same. It is agreed to and approved by us and our heirs and representatives in Court (and) the Darbar, Bombay, the English date the 30th of October in the year 1893."

The arbitrator duly proceeded with the arbitration, both parties appearing before him by their solicitors. After hearing the evidence he, on the 18th April, 1894, made and published his award, whereby he found that the alleged will was not executed by Godawaribai. The following was the award:—

"To all to whom these presents shall come I, Bhangsali Kalidas Ramji, of Bombay, send greeting. Whereas by a suit in the High Court of Judicature at Bombay, being suit No. 21 of 1893, wherein one Ghellabhai Atmaram, who had applied to the said High Court on its Testamentary Side for probate of the will of Bai Godawaribai, widow of Bhowan Deva Dave, dated the 3rd day of April, 1890, was plaintiff and applied for probate of the said will, and one Nandubai, wife of Mulji Mala, who had filed a caveat to the said application for probate, was defendant and disputed the said will; and whereas by an instrument in writing dated the 30th day of October, 1893, and under the respective

hands of the said Ghellabhai Atmaram and Nandubai it was referred to me as a single arbitrator to bring about a settlement of the said dispute. Now know ye that I, the said Bhangsali Kalidas Ramji, having taken upon myself the burthen of the said reference, and having heard what was alleged by or on behalf of the said parties respectively, and having heard and considered all such evidence, oral and documentary, as hath been produced before me, and having duly weighed and considered all and singular the matters and things to me referred as aforesaid, do make and publish this my award in writing of and concerning the matters as follows. That is to say, I do award and determine that Bai Godawaribai, widow of Bhowan Deva Dave, did not execute the said will dated the 3rd day of April, 1890, which was produced and put in evidence before me by the said Ghellabhai Atmaram. In witness, &c."

The defendant subsequently applied to the arbitrator for the award, in order to get it filed, but was informed by him that he had already handed it over to the plaintiff.

On the 27th April, 1894, the defendant through her solicitor applied to the plaintiff for the award, in order that it might be filed in Court. But the plaintiff took no notice of the said letter and retained the award in his possession.

The defendant alleged that she was consequently unable to apply, under s. 525 of the Civil Procedure Code (Act XIV of 1882), to have the award filed. She, therefore, applied for letters of administration, which, however, could not be granted to her, as the plaintiff's application and suit (No. 21 of 1893) was still [241] undisposed of. Her caveat in that matter had been dismissed as already mentioned. She, therefore, on the 7th December, 1894, obtained a rule *nisi* to set aside the order of dismissal, and on the 28th January, 1895, that rule was made absolute, and leave was given to her to file the necessary affidavits.

The suit accordingly now came on for hearing, and the defendant contended (*inter alia*) that the award was binding on the plaintiff, and that he was not, therefore, now entitled to maintain the suit.

Counsel for the defendant raised the following issues:—

1. Whether by an award dated 18th April, 1894, made and published by one Kalidas Ramji, the arbitrator duly appointed by the parties in that behalf, it was not declared that the will propounded by the plaintiff was not executed by the said Godawaribai?

2. Whether the said award is not binding on the plaintiff?

3. Whether the plaintiff is entitled to the relief claimed?

Counsel for the plaintiff raised the following additional issue:—

4. Whether this Court has jurisdiction to try the question of the award?

5. Whether the will propounded by the plaintiff is not the last will of the said Godawaribai?

It was agreed that the fourth issue should be first argued and decided.

Macpherson (Acting Advocate-General) and *Inverarity*, for plaintiff.—This case is now before the Testamentary Side of the High Court, and as a Testamentary Court this Court has only to decide whether or not the will propounded by the plaintiff is the will of the testatrix. That is a question not affected by questions as to the award, and these latter questions are not for this Court. The procedure of this Court is limited—Sections 238 and 261 of the Succession Act (X of 1865). This is not an ordinary civil suit. It is a suit to obtain probate, and the Court has merely to decide whether the alleged will was duly executed or not The jurisdiction of the Court

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in such a suit is limited to that question. There is nothing in the Probate Act (V of 1881) which empowers an executor to submit that question to arbitration. This Court cannot recognize such submissions. Counsel referred to s. 47 of the Charter of the Supreme Court—Brown on Probate, p. 1.

[242] *Kirkpatrick* and *Mankar*, for the defendant.—No question of jurisdiction arises. The question is merely one as to the capacity of parties. We do not dispute that the only question in the suit is as to the execution of the will. But this Court, like every Court, has inherent jurisdiction to determine, and must first determine, whether the parties to the suit are entitled to raise the question which they ask it to try. We say that by the submission and award this suit has been decided, and the executor is now precluded from continuing it and raising the question again. As between him and this defendant the award is binding. No doubt, as between other parties, the will may be again propounded and the same question raised. They cited *Salig Ram* v. *Jhunna Kuar* (1).

JUDGMENT.

CANDY, J.—The preliminary question is the fourth issue, *viz.*, whether this Court has jurisdiction to try the question of the award; in other words, whether in any suit on the Testamentary side of this Court the parties can agree to refer the matter in dispute to arbitration, and whether in such a case this Court can recognize such a reference.

It is admitted that the proceedings of the Court in such a case must be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure (s. 55 of Act V of 1881); but the contention, as I understand it, is that this provision is confined to the form of the suit (*idem* s. 83), and that the present question is not one of form but of jurisdiction.

It was pointed out by the learned Advocate-General for the plaintiff that by the Charter of 1823 the Supreme Court on its Testamentary Side was a Court of Ecclesiastical Jurisdiction administering the ecclesiastical law (art. 47 of the Supreme Court Charter), and that the same powers have been confirmed to the High Court by the Letters Patent of 1862 and 1865 subject to the provisions of any law made by competent legislative authority. These propositions are correct; and they establish what is not denied, that this Court has jurisdiction to try the present suit. But they do not establish that the parties to such a suit are incapable of referring to arbitration the matters in dispute between them.

[243] The argument of the learned Advocate-General, if pressed to its logical conclusion, amounts to this, that when once an executor of a will has asked the Court to grant probate of a will he cannot under any circumstances recede from that position, but he must leave it to the Court to grant or refuse probate. Suppose an applicant for probate finds subsequently to his application that the will of which he asked probate is manifestly not the last will of the testator, can he not withdraw from the suit? Can he not elect to have the suit dismissed in default? If Chap. XXXVII of the Civil Procedure Code (Act XIV of 1882) is not applicable to testamentary suits, is Chap. XXII equally inapplicable? In a word, what the parties are said to have done here does not affect the jurisdiction of the Court. That remains untouched. In what they are said to have done they have exercised the right which belongs to every litigant, a right

(1) 4 A. 546.

which must be recognized by every Court whether it be ecclesiastical or not. I find, therefore, on the fourth issue in the affirmative.

The learned Advocate-General contended that, if this were the finding, then the suit should be adjourned, to enable the defendant to apply under s. 525 of the Civil Procedure Code (Act XIV of 1882) to have the award filed. I hold that this is not necessary. A party is not, under s. 525, compelled to apply. He may, if he wishes. Here the defendant does not so wish. He prefers to rely on the award as his defence to the suit. In my opinion he can do so. The case must proceed.

The submission and award were then proved and put in evidence. The plaintiff called evidence (objected to by the counsel for the defendant) to show that the question which the parties really intended to submit to the arbitration was what sum of money should be paid to Nandubai for the purpose of buying off her opposition to the plaintiff's application for probate of the alleged will.

Inverarity with *Macpherson* (Acting Advocate-General), for the plaintiff.—The award was not an honest one. We say that the parties never really intended to submit to arbitration the question as to the validity of the will. The parties had arranged beforehand that the arbitrator should award a sum of money **[244]** to Nandubai if she withdrew her opposition to Ghellabhai's obtaining probate of the will, and the only question was as to the amount. That was the question upon which the parties intended the arbitrator to find—Russell on Arbitration, p. 563. The executor could not refer the question of the execution of a will to arbitration—*Hargreaves* v. *Wood* (1).

Kirkpatrick and *Mankar*, for the defendant.—*Hargreaves* v. *Wood* (1) does not apply. There it was sought to make a rule of the Probate Court an agreement to renounce the executorship of a will which, by the agreement itself, was admitted. That Court refused, as it would not enforce such an agreement; but suggested that, if the agreement to renounce were made a rule of another Court, that rule would be recognized and acted upon by the Probate Court. Here the will and the executorship are both denied, and have been found against by the award of the tribunal agreed to by the parties. We do not apply to enforce this award. We merely contend that until it is set aside it binds the parties to it, and that the plaintiff, who falsely pretends to be executor, cannot raise the question of its validity by way of replication—*Thorburn* v. *Barnes* (2); *Bache* v. *Billingham* (3); *Feret* v. *Hill* (4); *Rani Bhagoti* v. *Rani Chandan* (5). We must assume that the parties intended to refer what is stated in the submission paper. They cannot give evidence that they meant something else.

JUDGMENT (*continued*).

CANDY, J.—I now proceed to consider the remaining issues in the above case.

I find the following facts. By petition filed on 27th September, 1893, Ghellabhai applied for probate of the will of a widow by name Godawaribai who died on 28th May, 1891, the alleged will being dated 3rd April, 1890. Ghellabhai was executor according to the tenor of the will. The usual citations were issued, and on 27th October, 1893, Nandubai, sister of the deceased husband of Godawaribai, filed a caveat through her solicitor

(1) 2 Sw. and Tr. 602. (2) L.R. 2 C. P. 384. (3) L.R. (1894) 1 Q.B. 107.
(4) 15 C.B. (O. S.) 207. (5) 11 C. 386.

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20 B. 238.

Mr. Mantri. In the meanwhile negotiations were going on for a settlement of the dispute between Ghellabhai and Nandubai. Kalidas was appointed by both sides to be arbitrator to settle the matters in dispute. [245] Kalidas says that the first interview with him on the subject was on 28th October, 1893; but it is clear from the deposition of Tribhowan Jetha, brother-in-law of Ghellabhai (who lives at Surat), and of Tribhowan's son Jivraj, supported as these are by the post cards (Exs. A, B, F) and by the telegrams, that negotiations for a settlement must have been commenced as far back as 19th October, 1893.

It is equally clear, notwithstanding Kalidas's denial, that the idea of Ghellabhai and his relatives Tribhowan and Jivraj, who looked after Ghellabhai's affairs in Bombay, was that Nandubai was to be bought off by payment to her of a lump sum of money. She wanted Rs. 5,000. Ghellabhai says that when Tribhowan and Kalidas came to Surat on 31st October bringing the stamped agreement already signed by Nandubai by which Kalidas was appointed arbitrator to settle the matters in dispute, Kalidas then told him he would settle Nandubai's claim for Rs. 2,000, and that he would want Rs. 200 for his own trouble. It is clear from the telegrams that Tribhowan wanted his relative Ghellabhai to come down from Surat on 25th October, 1893, bringing Rs. 200, but Ghellabhai refused to do this, and apparently he did not pay the Rs. 200 or any other sum to Kalidas when the latter with Tribhowan came to Surat and obtained his (Ghellabhai's) signature to the agreement to refer the dispute to the arbitration of Kalidas. This agreement had been signed by Nandubai in Bombay on 30th October, 1893, (the date the document bears) and by Ghellabhai at Surat on the following day. Nandubai's man Narayan instructed her solicitor Mr. Mantri to withdraw the objection to the grant of probate to Ghellabhai (see Mr. Mantri's letter of 2nd November, 1893, to Mr. Malvi, Ghellabhai's solicitor).

The case was thus left in the hands of the arbitrator. Though Mr. Mantri had been instructed by Narayan to withdraw the objection to Ghellabhai's obtaining probate, yet it is clear that Ghellabhai's solicitor Mr. Malvi took no further steps at that time to obtain probate. No affidavit having been filed by Nandubai in support of her caveat, the caveat was dismissed on 14th December, 1893. No further steps, however, were taken in Court. [246] and the solicitors of both parties applied themselves to the duty of appearing before the arbitrator and arguing the genuineness of Godawari's will. It is clear that neither Mr. Malvi nor Mr. Mantri had any idea that the only question between the parties was as to how much money should be paid to Nandubai. Both solicitors *bona fide* believed that the question at issue was whether Godawaribai had duly executed the will propounded by Ghellabhai. Mr. Malvi for Ghellabhai adduced the evidence of the attesting witnesses to the will, and on that evidence the arbitrator Kalidas came to the conclusion (so he says) that due execution of the will by Godawari was not satisfactorily established. His award to that effect was dated 18th April, 1894. Ghellabhai says that Kalidas falsely told him that the award was in his (Ghellabhai's) favour, and so induced him to pay the aribitrator's costs (Rs. 297) and take out the award. Kalidas denies this. It is impossible to say which man is speaking the truth. But, even if Kalidas did do as alleged by Ghellabhai, the fact would not invalidate the award.

The parties then remained *in statu quo* for some months. Nandubai made no attempt to file the award (s. 525 of the Civil Procedure Code,

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(Act XIV of 1882), and Ghellabhai took no step to have it cancelled. After some time, Nandubai applied for letters of administration of Godawari's estate, but found that the present testamentary suit was an obstacle to her obtaining them. She, therefore, on 7th December, 1894, obtained a rule to set aside the former dismissal of her caveat. This was made absolute on 28th January, 1895.

On 21st September, 1895, the case came on for hearing, the preliminary question argued being whether this Court had jurisdiction to try the question of the award, that is, whether this Court on its Testamentary Side could recognise an agreement to refer to arbitration the question as to the due execution of a will. On 21st September, 1895, I decided that this Court had jurisdiction; and the case came on again for hearing on 26th and 30th of September. Mr. Inverarity for Ghellabhai referred to the case of *Hargreaves* v. *Wood* (1) as a case which he could have quoted on 21st September had it then been brought to his notice. **[247]** I merely allude to the case now, as I think it right to state that it does not, in my opinion, support the argument which was on 21st September put forward on behalf of Ghellabhai. In that case the Court directed the issue between the parties (as to due execution of the will) to be tried before the Judge of Assize; the question came on for trial, and a verdict was taken by consent upon terms agreed upon, that a verdict should be entered for the plaintiffs (four executors who expounded the will), and that two of the defendants who were also executors of the will should renounce probate and disclaim the trusts of the will and codicil. Counsel then moved the Probate Court to direct that the said order of *nisi prius* be entered and made a rule of the Court of Probate, and counsel for the defendant dissented thereto. But Sir C. Cresswell said that there was by the practice of the Court of Probate an objection to granting this motion: "I am not aware of any instance in which this Court or the Ecclesiastical Courts have recognised a bargain or agreement made by an executor to renounce probate ..... I should have a difficulty in enforcing an agreement to renounce probate. I do not want to make a rule of this Court binding executors to renounce probate." So counsel at the suggestion of the Judge altered the form of his motion and moved for probate of the will and codicil to be granted to the four executors, and probate was decreed accordingly.

In this case there has been no agreement to renounce probate. There was simply an agreement to refer to arbitration the matter in dispute, and solicitors for both parties before the arbitrator treated the matter in dispute to be the due execution of the will. As I said before, I see no reason why any Court, whether Ecclesiastical or not, should not recognise such an agreement.

Mr. Kirkpatrick quoted the case of *Thorburn* v. *Barnes* (2) as authority for his contention that Ghellabhai could not object to the award by replication in the present suit, but that he must, if he wishes to avoid the award, make a separate motion to set it aside. But that case was in 1867. Now, in England, as all equitable defences may be relied on, the conduct or mistake of **[248]** the arbitrator might probably be pleaded as a defence (Russell on Awards, (7th Ed., page 550). This is, in effect, what Ghellabhai pleads in his replication. Nandubai sets up the award and pleads that it is binding on Ghellabhai, and that thus he is barred from propounding the will in question. Ghellabhai replies that he would be bound by the award if it

(1) 2 Sw. and Tr. 602.

(2) L.R. 2 C.P. 384.

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had been an honest one, but he contends that the intention of the parties really was that Nandubai should receive a sum of money and withdraw all objection to the probate of the will being granted.

Can he, on the facts which I have found, so plead and avoid the award? I think not. Whatever may have been the original intention of the parties when they signed the submission paper, it is impossible to ignore the proceedings before the arbitrator. The parties before him were represented by solicitors who insisted on the question as to the genuineness of the will being tried. The evidence may have been all one way in favour of the will. The arbitrator deposes that it did not satisfy him, and so he found against the genuineness of the will. Unless actual misconduct or mistake can be proved against the arbitrator it is impossible to avoid the award. The finding may have been perverse and in the teeth of the evidence. But, unless there is some direct evidence from which we can deduce actual misconduct on the part of the arbitrator, we should, by holding the award to be not binding on the parties, be really reviewing in appeal the decision of the judge whom the parties themselves have chosen, and the risks attending whose judgment they have taken on themselves.

Mr. Inverarity relied on the fact that the arbitrator was positive when giving his deposition that he had examined Nandubai as a witness in the presence of the solicitors of both the sides. When Mr. Inverarity called for the arbitrator's notes of evidence, and Kalidas brought them, I thought it right that Kalidas should have the opportunity of looking at them and correcting his statement if necessary. He did so. I cannot from this fact assume that Kalidas did really examine Nandubai behind the backs of the parties and that in this respect he was guilty of misconduct.

[249] Let us suppose that the arbitrator had really decided what apparently Ghellabhai, Tribhowan and Jivraj thought he was going to decide *viz.*, how much money should be paid to Nandubai. I doubt whether an award to that effect would have been a lawful award. For the main question in dispute between the parties as raised by Ghellabhai's petition for probate and by Nandubai's caveat was the due execution of Godawaribai's will. If the parties secretly agreed that the genuineness of the will should not really be contested, but that an arbitrator should be appointed so as to give colour to the arrangement by which Nandubai was to receive a sum of money, I doubt whether the Court could recognise such an arrangement (see *Maule* v. *Maule* (1) and Russell on Awards, 7th Ed., p. 517). Here—holding, as I do, that Ghellabhai was under the impression, when he signed the submission paper, that the result of the arbitration would be simply the payment of a sum of money to Nandubai—had the case rested at this point I might well have decided that Ghellabhai was entitled to avoid the submission paper. But his solicitor brought the matter before the arbitrator as one resting solely on the genuineness of the will. It is impossible to suppose that Tribhowan and Jivraj were ignorant of what was going on before the arbitrator. Mr. Inverarity argued that the question of the genuineness of the will was pertinent to the real question as to how much money should be given to Nandubai. If so, then it was open to the arbitrator to find that the will was not genuine, and, therefore, nothing should be given to her. Whatever may

(1) 2 Dow. 363.

have been the object of the parties in not telling their solicitors of the negotiations which resulted in the submission to the arbitration, the Court must, I think, be guided by the fact of what took place before the arbitrator. There may be some ground for suspecting that official of corruption. But mere suspicion is not enough. The parties, knowing the risk they ran, chose their tribunal, and they must abide by the result.

I find on the issues :—

1. In the affirmative.

2. In the affirmative.

3. Plaintiff is entitled to no relief. Suit dismissed with costs.

[250] I ought to add (at the request of Mr. Kirkpatrick) that counsel for defendant objected to plaintiff's adducing any evidence with a view to explain or contradict the written submission paper or award (s. 92, Evidence Act). In the view which I have taken of the case it is unnecessary for me to make any remarks on this point.

Suit dismissed.

Attorneys for the plaintiff :—Messrs *Chitnis, Motilal and Malvi.*
Attorney for the defendant :—Mr. *K. J. Mantri.*

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20 B. 250.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

SHRI DHARNIDHAR (*Original Plaintiff*), *Appellant v.* CHINTO (*Original Defendant*), *Respondent.** [24th January, 1895.]

***Hindu** law—Adoption—Adoption by a daughter-in-law—Adoption divesting an estate which had already vested in another person—Consent of such person to adoption.*

One Shri Dharnidhar, a separated Hindu, died in 1852 childless, leaving three widows and a daughter-in-law Venubai, the widow of a predeceased son Chintaman. Dharnidhar's estate was taken, on his death, by his widows and ultimately became vested in Laxumibai, the survivor of them. In 1871, while she was in possession, Venubai adopted the plaintiff. In 1874 a decision was passed against Laxumibai, in execution of which a large portion of her deceased husband's property passed into the possession of one Chinto. In 1886 the plaintiff filed this suit against Chinto, claiming, as the adopted son of Venubai, to be entitled to all the estate of his adoptive grandfather Shri Dharnidhar (Venubai's father-in-law).

Held, that he could not recover. His adoption by Venubai, which could only be to her husband Chintaman, could not divest Laxumibai of the estate which had come to her as heir of her husband Shri Dharnidhar.

On Dharnidhar's death the estate had vested in his widows with remainder to his collateral heirs, and even if Laxumibai had assented to the subsequent adoption of the plaintiff by Venubai, his claim would not stand against the rights of Dharnidhar's collaterals who would succeed on Laxumibai's death.

From the moment that Dharnidhar died, and his estate vested in his widows, the right of his daughter-in-law Venubai to adopt for the purposes of representation was at an end.

[**Expl.**, 16 Bom.L R. 663 ; **R.**, 22 B. 416 (420) ; 22 B. 551 ; 23 B. 250 (255) ; 23 B. 327 (334) ; 25 B. 306 (311,312) ; 29 B. 410 (412) = 7 Bom. L. R. 436.]

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* Appeal No. 9 of 1890.

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[251] APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona.

Shri Moraya Gosavi was the founder of a religious and charitable institution called the "Chinchvad Savasthan," which was afterwards managed by his descendants in the male line.

In 1852, Shri Dharnidhar, the then manager, died leaving surviving him three childless widows, *viz.*, Bayabai, Bahinabai and Laxumibai, and the widow (Venubai) of a predeceased son named Chintaman.

On his death disputes arose as to the right to the management of the savasthan. The claimants were (1) Ganesh, who alleged himself to be the adopted son of Shri Dharnidhar, and (2) Bajaji, who was Shri Dharnidhar's nearst kinsman and reversionary heir.

In 1863 Bajaji filed a suit to recover possession of the savasthan property from Laxumibai, the survivor of the three widows. Pending the suit he died, and his son and heir Chinto continued the suit and ultimately succeeded in obtaining a decree in his favour. In accordance with this decree, Chinto took possession of the savasthan property in August, 1874.

In the meantime, however, Venubai, the daughter-in-law of Shri Dharnidhar, adopted the plaintiff, who was the second son of Chinto. This adoption took place in December, 1871, when Laxumibai was still in possession of the estate and before Chinto had taken possession.

In 1883 a suit was filed with the consent of the Advocate-General under s. 539 of the Code of Civil Procedure (Act XIV of 1882)—known as the "Charity Suit"—for the removal of Chinto and his eldest son Appaji from the management of the savasthan.

In 1886, while the Charity Suit was pending, the plaintiff filed the present suit against his father Chinto to recover possession of the savasthan property as well as the private estate of Shri Dharnidhar, alleging that, as the adopted son of Venubai, he was entitled to succeed to Shri Dharnidhar's property.

[252] In 1888 the "Charity Suit" was finally decided on appeal by the High Court, which ordered the removal of Chinto and his eldest son Appaji from the management of the savasthan, and the appointment of new trustees in their place (1).

Shortly after this decision of the High Court Chinto died, and the plaintiff continued this suit for possession of the savasthan property against the new trustees appointed by the Court.

Both Laxumibai and Venubai died pending this suit.

The Court of first instance rejected the plaintiff's claim, holding that his adoption could not divest the estate which had already vested in Laxumibai, the surviving widow of Shri Dharnidhar.

Against this decision the plaintiff appealed to the High Court.

Shamrao Vithal, with him *P. P. Khare*, for appellant (plaintiff).—The plaintiff was adopted by Venubai with the consent of her mother-in-law Laxumibai, who attested the adoption-deed. At the time of the adoption Shri Dharnidhar's estate was fully represented by Laxumibai.

(1) 15 B. 612.

She was, therefore, competent to authorize her daughter-in-law Venubai to adopt the plaintiff. She could have herself adopted a son to her deceased husband Shri Dharnidhar and thereby divested herself of the estate in favour of the son so adopted. She could, therefore, authorize her daughter-in-law to adopt the plaintiff. Her consent renders the adoption valid. Even without such consent, the adoption by the daughter-in-law would not be wholly invalid. Adoption is essentially a religious act, and it is valid for all spiritual purposes, such as performing her husband's *shrad*, &c. And as a matter of fact, ever since his adoption the plaintiff has been performing all the religious duties which devolve on the spiritual head of the Chinchwad Savasthan. He has acted as the chief ministrant at the shrine of Shri Mangal-Murti from 1871 to 1890. Laxumibai and other members of the family have recognized his status as the legally adopted son of Venubai. It is now too late to dispute his adoption. Laxumibai died shortly after the institution of the suit. On her death Shri Dharnidhar's estate passed to her daughter-in-law Venubai—*Vithaldas* v. *Jeshubai* (1). Venubai, too, has recently died. The plaintiff as her adopted son is now the only person who can **[253]** inherit Dharnidhar's property, being now nearer in descent than any other of his kinsmen deceased. Lastly, there is evidence to show that it was the intention of Dharnidhar that his daughter-in-law Venubai should adopt, and that he had given his permission to her to make an adoption. Adoption by her made with the previous consent and authority of her father-in-law is valid: see West and Bühler (3rd Ed.), 987.

Ganpat Sadashiv Rao, for the respondent (trustees).—It is not proved that Laxumibai gave her consent to the plaintiff's adoption, or that she attested the adoption-deed. Even if she attested the deed, her mere attestation would not necessarily imply her concurrence in the act of adoption—*Rajlukhee Debia* v. *Gokool Chunder* (2). In the absence of such consent, the adoption is invalid. It is settled law that an adoption which has the effect of divesting an estate already vested in a third person is invalid unless such third person has given his assent to the adoption —*Rupchand* v. *Rakhmabai* (3); *Keshav Ram Krishna* v. *Govind Ganesh* (4); *Chandra* v. *Gojrabai* (5); *Dhoromoyee* v. *Shama Churn* (6). Plaintiff's adoption by Venubai cannot, therefore, divest the estate which was already vested in Laxumibai. It is urged that Laxumibai is now dead, and that upon her death, at all events, plaintiff is entitled to succeed to Dharnidhar's estate. But plaintiff's adoption was void *ab initio*. It cannot become valid after Laxumibai's death. If it was invalid before, it is invalid after her death. It cannot affect the right of reversionary heirs who come in on the widow's death.

JUDGMENT.

CANDY, J.—This is one of the numerous suits which have been filed in the litigation connected with the Chinchwad Savasthan: see *Chintaman* v. *Dhondo* (7); *Shri Ganesh* v. *Keshavrav* (8); *Shri Dhundiraj* v. *Ganesh* (9).

Taking the "tree" given by the District Judge in the appendix to his judgment in what is known as the "Charity Suit" (7), the position of the parties may be thus shown:—

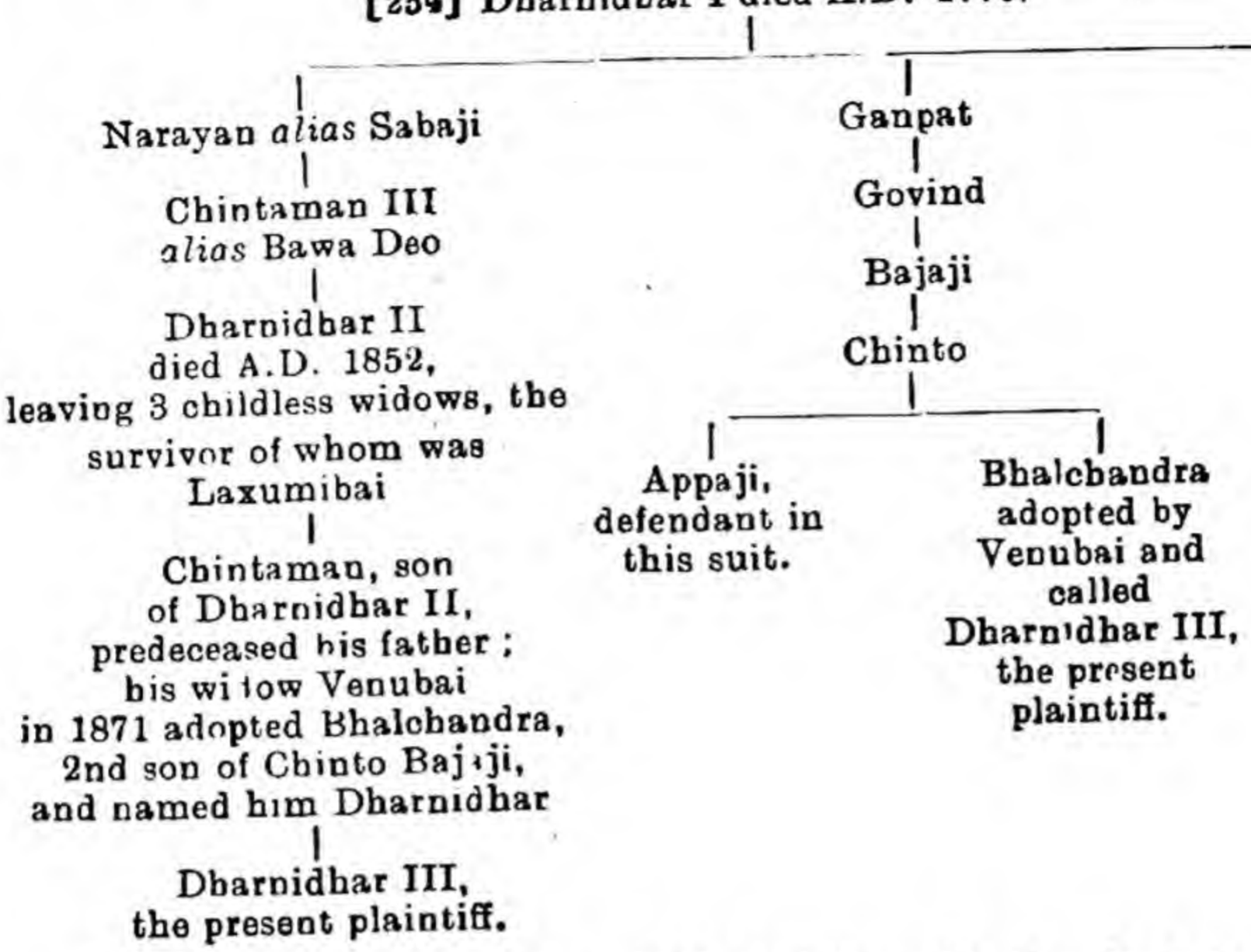
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(1) 4 B. 219. (2) 12 W.R. P.C. 47. (3) 8 B. H. C. R. A. C.J. 114.
(4) 9 B. 94. (5) 14 B. 463. (6) 12 C. 246.
(7) 15 B. 612. (8) 15 B. 625. (9) 16 B. 721.

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On the death, in 1852, of Dharnidhar II, the last representative of the eldest branch of the founder's family, disputes arose regarding the right to manage the savasthan and to succeed to the whole estate. One Ganesh claimed to have been adopted by Dharnidhar II; but Bajaji, and after Bajaji his son Chinto, the nearest collaterals, succeeded in establishing their title, and in 1874 obtained possession of the whole, or nearly the whole, of the estate.

In 1871 Ganesh had sued Chinto and Venubai, the widow of Dharnidhar's son Chintaman, who had predeceased his father, for a declaration of his title as adopted son of Dharnidhar. He succeeded in obtaining a decree in his favour from the Subordinate Judge; but on Chinto appealing to the District Court, Ganesh was persuaded to withdraw his suit without obtaining leave to bring a fresh one; and up to the present time he has never succeeded in removing this bar. In 1881, while he was endeavouring by other proceedings to establish his title against Chinto, he and Chinto came to terms, and made [255] an amicable settlement, by which Ganesh was put in possession of part of the savasthan property, Chinto remaining as the recognised trustee and manager.

To return to Dharnidhar's death in 1852—at first the widow Laxumibai after the death of her co-widows succeeded in retaining possession of the whole estate for several years; and the way in which Chinto obtained possession from her was this. In 1863 Chinto's father Bajaji sued her to recover the estate. This suit, after several decisions and remands, eventually became suit No. 12 of 1873 in the Court of the Agent for Sardars, and was decided by the Agent on 31st July, 1874, in favour of Chinto and against Laxumibai, on the ground that as she claimed to hold the estate for the adopted son Ganesh, but Ganesh had on 20th July, 1874, withdrawn his suit to establish his title as Dharnidhar's adopted son, it followed that Laxumibai's title also failed. Accordingly in 1874 Chinto obtained possession of all the estate.

But while the litigation had been proceeding, and before Chinto had prevailed on Ganesh to withdraw his suit for a declaration of title as adopted son, Chinto had prepared a second string to his bow, and in

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December, 1871, he had given his second son in adoption to Venubai, the widow of Chintaman, who had predeceased his father Dharnidhar II. The *factum* of that adoption was not seriously contested before us at the hearing of the present appeal; and as between the present parties it may be taken as proved. At the time of that adoption (December, 1871) Laxumibai was in possession of all the savasthan property. At that time there was no distinction recognised between the religious and the private estate. That distinction was first brought out in the "Charity Suit." That suit (No. 2 of 1883) was filed in 1883 under s. 539 of the Civil Procedure Code (Act XIV of 1882) with the sanction of the Advocate-General by certain kinsmen of the Dev family against Chinto and his son Appaji to have them removed from their position as managers and trustees of the savasthan. A preliminary issue, decided by the District Judge on 2nd January, 1886, in the affirmative, was whether the property in suit constituted a public [256] charitable or religious trust within the meaning of s. 539, and whether plaintiffs had any direct interest therein. That issue having been decided in the affirmative against Chinto and his son Appaji, Chinto's second son at once brought the present suit against his natural father Chinto and against the kinsmen, who were plaintiffs in the Charity Suit, to recover the whole savasthan estate on the ground that, having been adopted by Venubai, he, as grandson of Dharnidhar, was entitled to succeed to Dharnidhar's property.

By consent the hearing of the present suit was postponed till the final decision in the Charity Suit. The decision of the High Court in that case was given in 1888; Chinto and his eldest son were removed from the management, and the case was sent to the District Judge to take accounts and to frame a scheme for the future management of the devasthan. That scheme has been framed; and the present trustees of the savasthan have now been brought on the record of the present case as respondent-defendants with Chinto's eldest son Appaji, Chinto having died subsequently to the filing of the suit. But the present plaintiff does not now seek to recover the whole of the savasthan property, religious and private. In the "Charity Suit" the High Court reserved to Chinto and Appaji the right, in execution of the decree in that suit, to show that certain of the lands mentioned in the plaint in that suit as belonging to the savasthan were not included in the property appropriated to the savasthan by the Peshwa's award or in subsequent grants. In short, it permitted Chinto and Appaji to remain in possession of Dharnidhar's private estate; and it is in regard to this only that the present plaintiff now urges his claim.

But it is clear that in 1871, when the present plaintiff was adopted by Venubai, Laxumibai was in possession of the private estate of her husband Dharnidhar. It is true that in the suit brought against her by Chinto she rested her right to retain possession on the ground that Ganesh had been adopted by Dharnidhar. That ground, which would be fatal to the present plaintiff as Venubai's adopted son, failed in the litigation in 1874; and it has failed in the present case; for we sent back the case for a finding on the issue—"Was Ganesh adopted by [257] Dharnidhar?"—and the kinsmen of the Dev family and the trustees of the savasthan and Chinto's son Appaji who are the defendants on the record apparently do not care to attempt to defeat Venubai's son by asserting that Ganesh is Dharnidhar's legally adopted son. The finding on the issue was, therefore, returned in the negative. So far, then, as regards the alleged adoption of Ganesh there is no obstacle to plaintiff's claim.

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But though Laxumibai, being a female, and thus unable in her own right to be manager and trustee of the savasthan, resisted Chinto's claims between 1863 and 1874, on the ground that she was acting for the adopted son Ganesh, it does not follow that, failing the adopted son, she would not have claimed in her own right to hold the private estate of her husband Dharnidhar, had the distinction between the religious and private estate been then clearly recognised. It is clear that, as regards the private property, Dharnidhar died separated from his kinsmen, and on his death, no son of his loins having survived him, and no adoption by him being proved or by his widows being asserted, the private property of Dharnidhar at once became vested in Dharnidhar's three childless widows with remainder to his kinsmen. Two of the widows died many years ago, without having made any adoption. The whole of the private estate was, therefore, vested in Laxumibai alone in 1871. No adoption by Venubai (which must have been to Venubai's husband Chintaman) could possibly divest Laxumibai of the estate, which had come to her by inheritance from the last owner Dharnidhar. It is unnecessary to quote at length the authorities for this proposition which is now well established. They are all set out by Mr. Mayne in his work on Hindu Law and Usage. We entirely agree with the conclusion at which he arrives (3rd Ed., s. 179, p. 210) that, except under certain circumstances, which have not arisen in the present case, an adoption made to one person will not divest the estate of any one who has taken that estate as heir of another person. Here the adoption made by Venubai to Chintaman will not divest the estate of Laxumibai who took that estate as heir of Dharnidhar. The same principle is to be found in the judgment of this Court in *Chandra* v. *Gojarabai* (1), in which it was laid [258] down that adoption by a widow, even under her husband's authority, does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband. Here Venubai, even if she had the authority of her husband to adopt (which admittedly she had not), could not divest the estate of Laxumibai which came to her as heir of Dharnidhar. If Venubai had adopted with Dharnidhar's consent before his death in 1852, then the adopted son would have been Dharnidhar's heir. But whatever Dharnidhar may have intended, the plaintiff's case is that Dharnidhar died without anything being carried out. The adoption by Venubai nineteen years after Dharnidhar's death could not divest Dharnidhar's widows of the estate which then became vested in them with remainder to Dharnidhar's collaterals. Strictly speaking (to adopt the language of the judgment of this Court in *Chandra* v. *Gojarabai* (quoted above, see p. 471), according to the view taken by our Courts, there was at Dharnidhar's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption. Therefore, even if Laxumibai assented to the adoption of plaintiff by Venubai, the plaintiff's claim would not stand against the rights of Dharnidhar's collaterals who come in now that Laxumibai has died. (She died in 1886 and Venubai died in 1891 or 1892). It is not, even the question whether Laxumibai could have divested herself of the estate by adopting a son; for she is not the person who has made any adoption; and though she may have assented to Venubai taking a son in adoption for spiritual purposes, and agreed to recognise him as the principal ministrant at the Chinchwad shrine, whether as Venubai's adopted son, or as the son of Chinto, who established his title as trustee, it is clear that these facts could not validate for the purposes

(1) 14 B. 463 (469).

of inheritance an adoption which as regards the right to property was *ab initio* invalid. But we may remark that we agree with the Subordinate Judge that it is not proved that Laxumibai did assent to the adoption. Her "mark" on the deed of adoption, which was not exhibited as it was not registered, and the document, Ex. 156, said to have been executed by her "mark" on the same day, which latter document was not produced till a very late stage of the case, are quite insufficient to establish the assent, which would [259] show that she recognised plaintiff as the heir succeeding to Dharnidhar's estate.

It was ingeniously contended that as Laxumibai died in 1886 and Venubai in 1891 or 1892, the plaintiff, who was actually adopted in 1871, has now no obstacles in his way, and being nearer in decent to Dharnidar than Appaji or the other kinsmen, is now entitled to succeed. But the contention is bad. Supposing that the assumptions on which it is founded are good, still the plaintiff must fail. Either his adoption in 1871 was good or it was bad. If good, he succeeded at once to his grandfather's estate: if bad, he cannot now succeed any more than he could have succeeded before. There is no suspension of the right to adopt (see remarks of this Court in *Krishnarav* v. *Shankarrav* (1)). From the moment that Dharnidhar died, and his estate was vested in his widows, the right of his daughter-in-law Venubai to adopt, for the purposes of inheritance, was at an end. (See judgment of West, J., in *Keshav* v. *Govind* (2)). In whatever way the case is regarded, the plaintiff is not entitled to succeed, and we must, therefore, confirm the decree of the Subordinate Judge with costs.

Decree confirmed.

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20 B. 260 (F.B.).

[260] FULL BENCH—APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran and Mr. Justice Fulton.

GOMA AND OTHERS (*Original Defendants*), *Applicants v.* NARSINGARAO (*Original Plaintiff*), *Opponent.** [28th January, 1895.]

Mamlatdars' Act (Bom. Act III of 1876), ss. 4, 15, cl. (a), and 18†—Landlord and tenant—Dispossession of tenant—Possessory suit by landlord—Possession on behalf of landlord.

A landlord who has let out his land to tenants cannot, on the tenants being dispossessed, bring a possessory suit in the Mamlatdar's Court under the provisions of the Mamlatdars' Act (Bombay Act III of 1886). The tenants cannot be said to be in possession "on behalf" of the landlord under s. 15, cl. (*a*) of the Act.

[R., 25 B. 478 (492); 16 C.P.L.R. 154.]

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(1) 17 B. 164 (168). (2) 9 B. 94.

* Application No. 123 of 1894 under the extraordinary jurisdiction.

† Sections 4, 15, cl. (*a*), and 18 of the Mamlatdars' Act (Bombay Act III of 1876) are as follows:—

4. Every Mamlatdar shall preside over a Court, which shall be called a Mamlatdar's Court, and which shall have power within such territorial limits as may from time to time be fixed by the Governor in Council to give immediate possession of lands, premises, trees, crops, or fisheries, or of any profits of the same, or to restore the use of water from wells, tanks, canals or water-courses to any person who shall have been

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[261] APPLICATION under the extraordinary jurisdiction of the High Court, s. 622 of the Civil Procedure Code (Act XIV of 1882) against the decision of Rao Saheb Bapurav Janardhan Shrotri, Mamlatdar of Koregaum in the Satara District.

This was a possessory suit brought by the opponent (plaintiff) Narsingrao against the applicants (defendants) under the Mamlatdars' Act (Bombay Act III of 1876). He alleged that he had let the land in dispute to his tenants under a rent-note executed by them to him for ten years; that the defendants took wrongful possession of the same from his tenants; that as it was inconvenient for the tenants to file the suit he himself filed it, and that the tenants were cited as witnesses on his behalf.

The following is the translation of a portion of the rent-note:—

"This land we took in our possession about fifteen days ago agreeing to cultivate it for ten years from this year. So we shall till the land and take all the crop in it. We shall pay you rupees forty-five in cash by two Government instalments (that is, at the time when the instalments of assessment are paid to Government without remission. We shall take your receipt. We shall keep in repairs the boundaries and the boundary marks. You shall pay the *judi* and the local fund for the land.

"* There are two mango trees and three babul trees on the land. We shall take care of them. If the mango trees bear fruit, we shall take one-third part of them and give a two-thirds part. We will not cut any tree, &c. We shall thus cultivate the land for ten years and in the eleventh year we shall restore it to you."

The Mamlatdar found that the land was in the plaintiff's possession and that the defendants wrongfully obtained possession within six months before the institution of the suit. He, therefore, passed a decree for possession in plaintiff's favour.

The defendants applied under the extraordinary jurisdiction on the grounds (*inter alia*) that the Mamlatdar had no jurisdiction to entertain

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dispossessed or deprived thereof otherwise than by due course of law, or who shall have become entitled to the possession or restoration thereof by reason of the determination of any tenancy, or other rights of any other person in respect thereof.

The said Court shall also have power within the said limits, when any person is disturbed or obstructed, or when an attempt has been made to disturb or obstruct any person, in the possession of any lands, premises, crops, trees or fisheries, or in the use of water from any well, tank, canal or water-course, or of the use of roads or customary ways to fields, to issue an injunction to the person causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction.

But no suit shall be entertained by a Mamlatdar's Court unless it be brought within six months from the date on which the cause of action arose.

* * * * *

15. On the day appointed the Mamlatdar shall proceed to hear all the evidence that is then and there before him, and to try the following issues, *viz.*:—

(*a*) If the plaintiff avers that he has been unlawfully dispossessed of any property or deprived of any use:—

(1) Whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed.

[261] (2) Whether the defendant is in possession at the time of the suit, and if so whether he obtained possession otherwise than by due course of law.

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18. The party to whom the Mamlatdar shall give immediate possession, or restore a use, or in whose favour an injunction has been granted, shall continue in possession or use until ousted by a decree or order of a Civil Court.

* * * * *

the suit, and that the plaint itself having disclosed that [262] persons other than the plaintiff were in actual possession the suit ought to have been dismissed. A rule *nisi* was issued calling on the plaintiff to show cause why the decision of the Mamlatdars should not be set aside.

Macpherson (with *Gangaram B. Rele*), appeared for the opponent (plaintiff) to show cause.

Lang (Advocate-General) with *Balaji Abaji Bagavat*, appeared for the applicants (defendants) to support the rule.

The Court (Sargent, C. J., and Fulton, J.) referred to a Full Bench the point as to the Mamlatdar's jurisdiction to entertain the suit at the instance of the plaintiff who was not in possession. The case now came on for argument before Sargent, C. J., Farran and Fulton, JJ.

Macpherson.—We submit that the Mamlatdar had jurisdiction to entertain the suit, and that his decision is correct. When a tenant is dispossessed it is virtually the landlord who is dispossessed, because a tenant derives possession through his landlord. The first paragraph of s. 4 of the Mamlatdars' Act is that in the case of a possessory suit the plaintiff need not be in actual possession at the time of dispossession, the language used being "give immediate possession of lands, premises, trees, crops, fisheries, or of any profits of the same." Rent is profit of the land; and even supposing that rent is not profit, still under our rent-note we are to get the fruits of the mango trees standing on the land. We are thus entitled to the profits of the land, and that being so, our suit was clearly within the Mamlatdar's cognizance.

[FARRAN, J.—The first paragraph of s. 4 empowers the person who is entitled to immediate possession to bring the suit. You are not entitled to possession, because under the terms of the rent-note the tenants are to remain in possession for ten years.]

Our connection with the land is not wholly severed because under the rent note we are entitled to the profits of the land in the shape of mango fruits. It is our interest to see that the tenants continue in possession of the lands and also give us the produce or profit in addition to the rent. Our contention is further strengthened by the second paragraph of the section. That [263] paragraph relates to suits for injunctions, and therein the words "any profits of the same" are omitted. The omission indicates that in a suit for injunction the plaintiff must be in actual possession—*Desai Malabhai* v. *Keshavbai* (1).

Section 15 of the Mamlatdars' Act has laid down certain sets of issues to be raised in cases of possession and in cases of injunction. The issues which relate to suits for possession also contemplate the case of plaintiff who is not in actual possession because the words are "whether the plaintiff or any person on his behalf or through whom he claims."

We contend that possession of the tenant is possession on behalf of the landlord, and that a suit instituted by the landlord for recovery of possession when his tenant is wrongfully ousted can be maintained in the Mamlatdar's Court under the provisions of the Mamlatdars' Act.

Lang (Advocate-General).—A possessory suit in the Mamlatdar's Court at the instance of a person who was not in actual possession at the time of dispossession cannot lie. A mortgagor out of possession cannot

(1) 12 B. 419 (421).

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bring a suit to recover possession of the property when the mortgagee in possession is ousted by a third party. It has been held that the possession of the mortgagee is not possession on behalf of the mortgagor—*Khanderao* v. *Narsingrao* (1). Similarly, possession of tenants cannot be possession on behalf of the landlord within the requirements of the Mamlatdars' Act. A person in possession on behalf of the plaintiff means a person who is in possession with plaintiff's permission such as his servant or agent. The question whether the landlord can bring a suit for possession when his tenant is ousted, has been decided, and it has been held that he cannot—*Vohra Uka Dada* v. *Bai Jivi* (2).

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C. J.—The Mamlatdar has found that the plaintiff was in possession of the land in dispute by his tenants to whom he alleged he had let it for ten years. The question referred to us is whether such constructive possession is sufficient to give the **[264]** plaintiff the power to invoke the aid of the Mamlatdar's Court in the event of the tenants being dispossessed.

The issue which the Mamlatdar has to try where the plaintiff avers that he has been dispossessed, is, as provided by s. 15, cl. (*a*), of the Mamlatdars' Act III of 1876, "whether the plaintiff or any other person on his behalf or through whom he claims was in possession." The real question, therefore, for consideration is, whether the tenants can be said to be in possession on behalf of their landlord. Now, no doubt, the owner is deemed to be constructively in possession through his tenants for certain purposes. But the tenants cannot be properly said to be in possession "on behalf" of their landlord. The expression in its plain and natural meaning refers to actual possession by a servant or agent, such as a steward or bailiff, and that this was the meaning in which it was intended to be used, derives confirmation from s. 4, which shows that the object of creating the Mamlatdar's Court was to give "immediate" possession, and also from the language of s. 18 which implies that the plaintiff, if successful, is to be put into immediate possession which is to continue until the plaintiff is ousted by a decree of the Court. The policy of the Act seems to have been to afford summary relief to the same persons as would have been entitled to sue in ejectment, that is, the persons legally entitled to the actual possession. We must, therefore, hold contrary to what would appear to have been held in civil application No. 81 of 1892 (3), that the plaintiffs were not entitled to sue in the Mamlatdar's Court.

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(1) P. J. (1894) 130 = 19 B. 289. (2) P.J. (1894) 217.

(3) Civil Application (under the extraordinary jurisdiction) No. 81 of 1892 :—

This was an application under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Saheb Janardan Eknath, Mamlatdar of Niphad in the Nasik District.

Plaintiff Gopala Mahadu Sali brought a possessory suit in the Mamlatdar's Court under the Mamlatdars' Act (Bombay Act III of 1876) against one Bhimaji Jayaji Patil and three others. In order to prove that he was in possession of the lands in dispute the plaintiff produced three rent-notes, Exs. A, B, C, passed to him by the tenants to whose possession obstruction was caused by the defendants. The Mamlatdar found that the possession of the tenants was the possession of the landlord (plaintiff). and that obstruction to the tenant's possession was obstruction to the landlord's possession. He, therefore, allowed the claim.

[265] We must, therefore, make absolute the rule *nisi*, reverse the decree of the Mamlatdar, and dismiss the plaintiff's suit, with costs on plaintiff throughout.

Rule made absolute. Decree reversed.

20 B. 265.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IBRAHIMJI ISSAJI AND OTHERS (*Original Defendants*), *Appellants v.* BEJANJI JAMSEDJI AND ANOTHER (*Original Plaintiffs*), *Respondents.** [28th January, 1895.]

Valuation of suit—Suit for account—Suit Valuation Act (VII of 1887), s. 8—Court Fees' Act (VII of 1870), s. 7 (IV), cl. (f), and s. 11—Appeal—Bombay Civil Courts Act (XIV of 1869), s. 26—Practice.

In a suit for an account of partnership dealings, the plaintiffs valued the claim approximately at Rs. 600. The Subordinate Judge passed a decree awarding to the plaintiffs a sum of Rs. 30,830-9-2. The plaintiffs thereupon paid an additional Court fee of Rs. 900 under s. 11 of the Court Fees' Act (VII of 1870). The defendants appealed to the High Court from the decree of the Subordinate Judge. The plaintiffs objected that the appeal lay to the District Judge, and not to the High Court.

Held, that the value of the subject-matter of the suit exceeded Rs. 5,000; the appeal, therefore, lay to the High Court under s. 26 of Act XIV of 1869.

[**R.**, 15 Ind. Cas. 347=83 P.R. 1912=170 P W.R. 1912; 20 Ind. Cas. 928=9 N.L. R. 112; 6 O.C. 255 (258); 58 P.R. 1902; 23 T.L.R. 123; **Doubted**, 22 B. 963 (965).]

APPEAL from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in suit No. 237 and 1888.

The plaintiffs sued for an account of partnership transactions from 1886 till the date of its dissolution on 13th December, 1887, and to recover what might be found due to them as their share of the profits.

[266] The plaintiffs valued their claim at Rs. 600, alleging that it was impossible for them to state the exact amount of their share of the profits before the accounts were taken, and undertaking to pay additional Court fees if more were found due to them.

The suit was filed in the Court of the First Class Subordinate Judge of Poona.

The Subordinate Judge passed a decree awarding to the plaintiffs a sum of Rs. 30,830-9-2.

The plaintiffs thereupon paid an additional Court fee of Rs. 900 under s. 11 of the Court Fees' Act (VII of 1870).

The defendants then appealed to the High Court from the decree of the Subordinate Judge.

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[265] The defendant preferred an application under the extraordinary jurisdiction, and obtained a rule *nisi* requiring the plaintiff to show cause why the order of the Mamlatdar should not be set aside on the ground (*inter alia*) that the Mamlatdar had no jurisdiction to entertain the suit, as the plaintiff was not in actual possession of the lands within six months before the institution of the suit.

Vasudeo G. Bhandarkar appeared for the opponent (plaintiff) to show cause.

Nagindas T. Marphatia appeared for the applicant (defendant) in support of the rule.

The Court (Parsons and Telang, JJ.) passed an order discharging the rule with costs. 13th September 1892.

* Appeal No. 6 of 1893.

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The respondents (plaintiffs) took a preliminary objection to the appeal, contending that the appeal lay to the District Court and not to the High Court.

Ganpat Sadashiv Rao, for the respondents (plaintiffs).—The appeal in this case lies to the District Court, and not to the High Court—Act XIV of 1869, s. 26. This is a suit for an account. The claim was valued at Rs. 600 for purposes of Court-fees. That valuation must, therefore, be taken to be the valuation of the suit for purposes of jurisdiction also. Section 8 of Act VII of 1887 applies to this case; under that section the valuation for purposes of jurisdiction is the same as the valuation for purposes of Court fees; see *Kushalchand* v. *Nagindas* (1); *Bhagvantrai* v. *Mehta Bajurao* (2); *Gulabsingji* v. *Lakshmansingji* (3); *Bai Varunda* v. *Bai Manegavri* (4).

P. P. Khare, for appellants.—The suit was no doubt valued in the Court below at Rs. 600. But that was merely a nominal valuation of the subject-matter of the suit. The real valuation was Rs. 30,830-9 2, which was the sum ultimately found due to the plaintiffs, and upon which they have paid additional Court fees under s. 11 of Act VII of 1870. That being so, the value of the subject-matter of the suit is more than Rs. 5,000, and the appeal lies to this Court.

JUDGMENT.

[267] JARDINE, J.—The plaintiffs sued for an account in the Court of the Subordinate Judge of the First Class. Under the Court Fees' Act, VII of 1870, s. 7 (iv), cl. (*f*), they valued the relief sought at Rs. 600. This valuation is subject to the provision of s. 11—*Govindas* v. *Dayabhai* (5) —Which section distinguishes the "fee actually paid" on the plaint and "the fee which would have been payable had the suits comprised the whole of the profits or amount" decreed. The decree obtained by the plaintiffs was for Rs. 30,830 9-2, and they have paid the additional fees under s. 11 in the Court of the Subordinate Judge. On the defendants appealing to this Court, objection is taken that s. 26 of Act XIV of 1869 does not apply, and that the appeal lies to the District Court.

This objection is urged in the following argument. The case comes under the Suits Valuation Act (VII of 1887), s. 8, being one to which these words apply; "where in suits * * Court fees are payable *ad valorem* under the Court Fees' Act, 1870, the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same." The valuation, however, insufficient, stated by the plaintiffs at their option on the plaint governs the valuation of the defendants' appeal, s. 11 of the Court Fees' Act being ignored. By parity of reasoning the optional valuation of the plaint, no matter what greater amount may be awarded them by the decree, determines the forum of the appeal by the defendants, because that optional and preliminary valuation must be treated as the only value of the subject-matter in interpreting the words of s. 26 of Act XIV of 1869, which gives an appeal to the High Court "in all suits * * of which the amount or value of the subject-matter exceeds Rs. 5,000." The cases of *Khushalchand* v. *Nagindas* (1), *Bhagvantrai* v. *Mehta Bajurao* (2), *Gulabsingji* v. *Lakshmansingji* (3), where the Subordinate Judge had dismissed the suit, and *Bai Varunda* v. *Bai Manegavri* (4), where he rejected the plaint, were cited in support of the above propositions.

(1) 12 B. 675 (677). (2) 18 B. 40. (3) 18 B. 100.
(4) 18 B. 207. (5) 9 B. 22.

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[268] We are of opinion that those authorities do not touch the present case, where the plaintiffs have been successful. The argument that the first optional and uncertain valuation is to determine the Court fee in appeal, and thereby the jurisdiction of appeal, is not supported by any authority. Section 7 (iv), cl. (*f*), of the Court Fees' Act refers to the relief sought in the memorandum of appeal as well as to that sought in the plaint, while s. 8 of the Suits Valuation Act deals only with suits. The word "determinable" in s. 8 of the Suits Valuation Act applies as much to the final and exact and judicial determination made under s. 11 of the Court Fees' Act as it does to the inexact and *ex parte* valuation in the plaint. "What *prima facie* determines the jurisdiction is the claim, or subject-matter of the claim, as estimated by the plaintiff"—*Lakshman* v. *Babaji* (1). But on principle as there explained this determination *prima facie* may, if unreasonable, be rejected. If, *e.g.*, the present plaintiffs had been awarded Rs. 6,000, and then appealed on the ground that Rs. 30,000 were due to them, it would be unreasonable of them to value the relief sought in the memorandum of appeal as only Rs. 600, the valuation in the plaint.

The jurisdiction of appeal is determined by Act XIV of 1869, and depends on the amount or value of the subject-matter, which last term is treated in the above decision as meaning the amount demanded: which, as we have seen, is, even in a *suit*, not necessarily commensurate with the amount of Court-fees paid on the plaint. What the plaintiffs in this account-suit demanded was the amount that might be found due to them; and so long as they claim the Rs. 30,830-9-2 decreed to them, they cannot be allowed to say that the subject-matter is only Rs. 600 in value. The relief now sought by the defendants in their memorandum of appeal is more in value than Rs. 5,000. The Court of appeal is not bound by the decision of the Court below as to the stamp on the plaint—*Motigavri* v. *Pranjivandas* (2), and under any view of the circumstances, the judicial valuation for Court-fee purposes under s. 11 of the Court Fees' Act is the best valuation of the subject-matter of the suit. The Court, therefore, holds that this appeal lies here.

[269] RANADE, J.—I concur. The preliminary objection raised by the respondents' pleader as to the jurisdiction of this Court to entertain the appeal appears to me not to be supported by the record of the case. The plaint in this case stated that as the exact sum due to the plaintiffs on account of their share of the profits could not be ascertained until the accounts were properly taken, plaintiffs valued the relief claimed by them at a nominal figure of Rs. 600, and they offered to pay additional Court-fees on whatever sum might be found due. The Court of the First Class Subordinate Judge alone had jurisdiction in the matter of this suit, whether the claim was valued at Rs. 600, or whether it was valued at a higher figure than Rs. 5,000. There was, therefore, no occasion to value the claim at any particular figure for purposes of jurisdiction. A nominal valuation was made of the subject-matter, and plaintiffs expressly undertook to supply the deficient stamp duty. Plaintiffs evidently claimed a far larger sum than Rs. 5,000, for it appears that for the first two years for which accounts were made, they had received Rs. 17,000 as their share of the profits. As a matter of fact, the Subordinate Judge found that plaintiffs were entitled to recover more than Rs. 30,000 for their share of the profits for the two years covered by the suit. The judgment was pronounced on 22nd December, 1892, about the time that

(1) 8 B. 31 (33).

(2) 6 B. 302.

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the Court was to close for the Christmas holidays. When the Court opened again, plaintiffs paid up on 3rd January, 1893, the deficient Court-fees, and the decree taxed plaintiffs' costs including the additional Court-fee of Rs. 900 paid on 3rd January, 1893. A further supplemental order about costs was made on 23rd January, 1893.

It is plain from these details that the suit was treated all along by the parties and the Court as a suit the subject-matter of which exceeded Rs. 5,000 in value, and an appeal from a decree awarding Rs. 30,830 in such a suit obviously lay to the High Court under s. 26 of Act XIV of 1869. The authorities relied upon by the respondents' pleader in support of his contention have, therefore, no application in the particular circumstances of the present case. It is only in certain classes of suits, and even in those cases where Court-fees are charged *ad valorem*, [270] that the valuation for the computation of Court-fees is the sāme as the valuation for purposes of jurisdiction. This rule does not apply to account suits such as the present, where the subject-matter of the claim admittedly exceeded Rs. 5,000 in value.

The appeal in such cases lies to this Court, and not to the District Court.

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20 B. 270.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

KRISHNACHARYA (*Original Defendant No. 2*), *Appellant v.* LINGAWA (*Original Plaintiff*), *Respondent.**

[28th January, 1895.]

Possession—Ejectment—Title by possession—Mamlatdar—Finding by Mamlatdar as to possession—Subsequent contrary finding by civil Court—Mamlatdar's order not conclusive—Suit by party against whom Mamlatdar's order made—Limitation.

The plaintiff brought this suit to recover possession of certain land which had belonged to her nephew, and of which after his death in 1878 she had assumed the management. In 1881 she brought a possessory suit against the first defendant in the Mamlatdar's Court, which suit was dismissed in January, 1885, the Mamlatdar holding that she had not been in possession. In a civil suit, however, which (pending the proceedings in the Mamlatdar's Court) she had filed against the first defendant in the Court of the Subordinate Judge of Haveri, the Judge found that she had been in possession since 1880, and awarded her damages against the first defendant (who was held to be her farm servant) for crops which had been taken away by him. In 1887 the second defendant as mortgagee from defendant No. 1 obtained a decree against plaintiff in the Mamlatdar's Court awarding him possession of the land, and in execution of that decree the plaintiff was dispossessed in December, 1887.

In 1890 the plaintiff filed this suit to recover possession and for mesne profits since 1887. The defendant pleaded that the plaintiff had no title to the land and that the suit was barred by limitation, inasmuch as the plaintiff had not brought a suit to establish her right within three years after the Mamlatdar's order in 1885 dismissing her possessory suit.

Held, that the Mamlatdar's order of January, 1885, had no conclusive effect and was rendered ineffectual by the subsequent decree of the civil Court; and as the plaintiff continued in possession, notwithstanding that order, down to 1887, the present suit was not barred by limitation, and neither her remedy nor her right to the land was extinguished.

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* Second Appeal No. 327 of 1893.

[271] *Held*, also, that the plaintiff's possession prior to 1887, confirmed as it was by the decree of the civil Court in 1885 and by the finding of the lower Court of Appeal in the present case, must prevail against the defendant, who claimed through plaintiff's farm servant only and whose possession commenced with the disturbance which compelled the plaintiff to bring the suit.

Possession is *prima facie* evidence of title and is primarily exclusive, and it is for him who impugns this exclusive title to show that the possession originated in a way not to affect his own right.

[R., 3 Bom. L.R. 246 (249); 78 P.R. 1902=137 P.L.R. 1902.]

SECOND appeal from the decision of Rao Bahadur V. V. Wagle, First Class Subordinate Judge, A. P.

Suit to recover land. Neither the plaintiff nor the defendant could prove any title to the land other than that of possession. The plaintiff's claim arose under the following circumstances:—

The plaintiff was the maternal aunt of one Fakirappa to whom the land originally belonged. He died in 1878 and the plaintiff subsequently assumed the management of his property. The first defendant was her nephew and a cousin of Fakirappa, and the plaintiff filed a possessory suit against him (defendant No. 1) in the Mamlatdar's Court, which suit, however, was dismissed in January, 1885, the Mamlatdar holding that she (the plaintiff) had not been in possession of the property.

In a civil suit, however, (No. 14 of 1885) which (pending the proceedings in the Mamlatdar's Court) she had filed in the Subordinate Judge's Court at Haveri, it was held that she had been in possession since 1880, and a decree was passed in her favour against the first defendant (who was found to be her farm servant) for the value of certain crops which had been taken away by him.

There was thus the order of the Mamlatdar of January, 1885, holding that the plaintiff had not been in possession, and the later order of the Subordinate Judge holding that she had been in possession

The second defendant had taken a mortgage of the property from the first defendant, and as a mortgagee he obtained a decree in 1887 against the plaintiff in the Mamlatdar's Court awarding him possession of the land and in execution of this decree the plaintiff was dispossessed on the 20th December, 1887.

[272] In 1890 the plaintiff filed this suit against defendants Nos. 1 and 2 to recover possession of the land with mesne profits from 1887 to 1890.

The first defendant did not appear. The second defendant pleaded that the plaintiff had no title, and that the suit was barred by limitation.

The Court of first instance dismissed the plaintiff's suit, holding that the plaintiff had no title to the land, and that as she had not brought a regular suit in the civil Court within three years from the date of the Mamlatdar's order of January, 1885, the suit was barred under art. 47, sch. II, of the Limitation Act (XV of 1877).

This decree was reversed on appeal by the District Judge. He held that the suit was not barred by limitation, and that as the plaintiff was in possession up to 1887, when she was dispossessed under the Mamlatdar's order in the second defendant's suit, she was entitled to eject the defendants, who had no right whatsoever to the land in dispute. He, therefore, awarded the plaintiff's claim.

The following extract from his judgment gives his reasons:—

"The Subordinate Judge has held that this suit is barred by limitation, as the plaintiff failed to bring a regular suit within three years

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of the Mamlatdar's decree of 1885 against her. But the plaintiff has based the present claim on a new cause of action which accrued in 1887 when she was dispossessed by the defendants under the Mamlatdar's order of 1887 till which she is found to have been in possession. Moreover, it may also be said that the aforesaid decisions in suit No. 14 of 1885, which was instituted during the pendency of the dispute in the Mamlatdar's Court, virtually rendered the Mamlatdar's order ineffectual. I, therefore, hold that the present suit founded upon a cause of action in 1887 is not time-barred by the Mamlatdar's order of 1884. The respondent's vakil objected, in appeal, that the plaintiff ought to have sought for the recovery of possession in suit No. 14, and that she having failed to do so, the present suit must be held to be barred by s. 43 of the Civil Procedure Code. This objection also must fail for the same reasons."

Against this decision the defendant No. 2 preferred a second appeal to the High Court.

Balaji A. Bhagvat, for appellant.—The plaintiff brought a possessory suit in the Mamlatdar's Court in 1884. That suit was dismissed. She did not bring any suit in the civil Court **[273]** within three years from the date of that order of dismissal. Her present suit is, therefore, barred under s. 21 of the Bombay Mamlatdars' Court's Act (III of 1876). It is also barred under art 47, sch. II, of the Limitation Act (XV of 1877). Under these Acts not only is her remedy barred, but her title too became extinct after the lapse of three years from the date of the Mamlatdar's order—*Nilo* v. *Rama* (1) ; *Bapu* v. *Baji* (2) ; *Chinto* v. *Vishnu* (3) ; *Annaji* v. *Daji* (4) ; *Badri Prasad* v. *Muhammad Yusuf* (5). The lower appellate Court holds that the plaintiff's cause of action accrued in 1887, when she was dispossessed under the second order of the Mamlatdar. But limitation began to run from the date of the first order of the Mamlatdar of 1885. See *N Ga Tha Yah* v. *Buru* (6). The first order, not having been set aside within three years, became final and conclusive between the parties, and had the effect of extinguishing the plaintiff's title, if she had any. It is found that she had none, apart from her possession, which was not sufficiently long to give her even a prescriptive title.

Narayan V. Chandavarkar, for respondent (plaintiff).—The present case is distinguishable from the cases cited in this, namely, that shortly after the Mamlatdar's order in the possessory suit of 1884 the plaintiff obtained a decree in the civil Court awarding her damages for the crops taken away by defendant No. 1. This decree was based on the fact that the plaintiff was found to be in possession of the land at the time the proceedings in the Mamlatdar's Court were instituted. This finding renders the Mamlatdar's order ineffectual. Section 18 of the Mamlatdars' Courts Act (Bombay Act III of 1876) expressly provides that the Mamlatdar's decision on the question of possession is not conclusive ; see also *Lillu* v. *Anaji* (7) ; *Basapa* v. *Lakshmapa* (8) ; *Mudkapa* v. *Ningapa* (9). It is found as a fact by the lower appeal Court that notwithstanding the Mamlatdar's order, plaintiff continued in possession down to 1887, when she **[274]** was dispossessed by defendant No. 2. It is this dispossession which constitutes our cause of action. And as it accrued within three years before suit, the suit is not time-barred. And neither our remedy nor our

(1) 9 B. 35.
(2) P.J. (1889), 305.
(3) P.J. (1883), 131.
(4) P.J. (1889), 161.
(5) 1 A. 381.
(6) 2 B.L.R. F.B. 91.
(7) 5 B. 387.
(8) 1 B. 624 (625).
(9) P.J. (1877), 115.

title is extinguished. Our title is founded on possession, and we can bring an action of ejectment against every person other than the rightful owner—*Pemraj* v. *Narayan* (1). The defendants have not established any title to the land. We are, therefore, entitled to eject them.

JUDGMENT.

RANADE, J.—The contest in this case turns entirely upon the decision of the question of possession, both parties to the suit having failed to prove any other title.

The land in dispute admittedly belonged to one Fakirappa, who died in 1878, leaving his sister Nandyava as his heir. Nandyava is also dead, but has left a son and a daughter, the last being the wife of the original defendant No. 1. Defendant No. 1, however, did not claim any interest in the land in right of his wife, but he set up an adoption of himself by Fakirappa, which both Courts have held to be not proved. Defendant No. 2, who is appellant before us, claims only under a mortgage-bond from defendant No. 1, executed in 1885. The respondent is maternal aunt of Fakirappa, and as such, she has no claim to succeed as heir of Fakirappa.

Both parties have thus failed to prove any other title save possession, confirmed in the case of defendant No. 1 by a decision of the Mamlatdar, passed in January, 1885, in his favour, and adverse to the respondent, while respondent claims that her possession was confirmed by the decree of a civil Court in her favour in a suit which she brought for the value of the crops raised by her in the land in dispute in 1884, about the same time that she applied, in November, 1884, to the Mamlatdar to remove defendant No. 1's obstruction to the land. The respondent brought no suit in a civil Court to establish her right to recover possession within three years from the date of the Mamlatdar's order of January, 1885, but in the civil suit for damages, her claim was allowed, on the ground that she had possession, and that defendant No. 1 was only her farm servant.

[275] As a matter of fact, the lower Court of appeal has found in this case that the respondent (plaintiff) continued in possession till 1887, in which year she was unsuccessful in a second application to the Mamlatdar to remove the present appellant's obstruction. The present suit was brought by respondent within the time allowed by law from the date of this second order of the Mamlatdar, but the Court of first instance rejected the claim, on the ground that the suit was not brought within three years from the date of the first order of January, 1885. The lower Court of appeal held that the first order of the Mamlatdar was rendered ineffectual by the decision of the civil Court in the suit for damages, and that as respondent was proved to have been in possession down to 1887, she was entitled to succeed as against defendant who had no right whatsoever to the land, and whose possession was obtained solely under the Mamlatdar's order of 1887.

This statement of the respective contentions of the parties raises two questions—(1) How far respondent's failure to bring a suit within three years from the date of the Mamlatdar's order of January, 1885, barred not only her remedy, but destroyed her right, even if she was found never to have as a matter of fact lost possession till 1887;—and (2) how far respondent's possession down to the date of the Mamlatdar's second order

(1) 6 B. 215.

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would avail to dispense with the proof of any other title as against the present appellant, and defendant No. 1 through whom he claims as mortgagee.

Both these points are not free from difficulties, as the case presents certain peculiar features not found in the authorities cited on both sides. On the one hand, the appellant's pleader Mr. Bhagvat argued that as the respondent failed to bring a suit within three years from the first order of the Mamlatdar, her right, as well as her remedy, became extinct under the combined effect of the provisions of the Mamlatdars' Act and the Limitation Act (XV of 1877). Mr. Bhagvat cited the following authorities in support of his contention:—*Nilo* v. *Rama* (1); *Badri Prasad* v. *Muhammad Yusuf* (2); *Bapu* v. *Baji* (3) and *Chinto* v. *Vishnu* (4). The decisions [276] in *Nilo* v. *Rama* and *Badri Prasad* v. *Muhammad Yusuf* had reference, however, to the provisions of s. 278 of Act XIV of 1882, and are not direct authorities on the point now in issue. The case of *Annaji* v. *Daji*(5) was also decided on another ground. It is true that in *Bapu* v. *Baji* this Court held that the principles which governed the decision in *Nilo* v. *Rama* were equally applicable to orders passed by Mamlatdars in possessory suits under the Revenue Courts' Act of 1838, which on this point is at one with the Mamlatdars' Act of 1876. The same point was more expressly decided in *Chinto* v. *Vishnu*, where it was held that a suit not brought within three years from an adverse order of the Mamlatdar was barred under art. 47 of Act XV of 1877. Mr. Bhagvat contended that limitation began to be operative from the date of the first order of January, 1885, and not from the date of the second order of 1887, and cited *N Ga Tha Yah* v. *Buru* (6) in support of his contention.

Mr. Chandavarkar for the respondent, however, argued that the present case was distinguishable from those referred to as authorities by the appellant in that, in this case, the respondent was found by the lower appellate Court not to have lost possession till 1887, and there was a civil Court's decree in respondent's favour in the suit for damages brought about the same time that she applied to the Mamlatdar's Court to remove defendant No. 1's obstruction, and in this suit respondent was held to have been in possession in 1884, thereby virtually rendering ineffectual the Mamlatdar's finding on the point of possession in defendant No. 1's favour. Mr. Chandavarkar further argued that the law has expressly provided that a Mamlatdar's order is not conclusive on the point of possession.

In *Lillu* v. *Annaji* (7) it was held that a Mamlatdar's order is not conclusive on the point of possession, and that it was open to the party in subsequent proceedings to show that possession was not delivered or lost, notwithstanding the order.

In *Basapa* v. *Lakshmapa*(8) and *Mudkapa* v. *Ningapa* (9) the reasons are stated why the orders of the Mamlatdar in [277] possessory suits were not intended by the Legislature to have a conclusive effect. The possession which is brought in issue in proceedings before the Mamlatdar is immediate possession, and the party thus dispossessed within six months is to be put in possession till the questions of possession and title are adjudicated upon in a regular suit. The purpose of the Act is temporary, and its procedure summary, and there is no appeal.

(1) 9 B. 35. (2) 1 A. 381. (3) P. J. (1889), p. 305.
(4) P. J (1883), p. 131. (5) P.J. (1889) p. 161. (6) 2 B.L.R. F. B. 95.
(7) 5 B. 387. (8) P. J. (1877), p. 58=1 B. 624 (625).
(9) P. J. (1877), p. 115.

In the present case, there were. as a matter of fact, two almost contemporaneous adjudications, one by a civil Court in the suit for the value of the crops, and the other by the Mamlatdar. Respondent succeeded in the civil Court on the strength of a finding in her favour on the point of her possession of the land, and her failure to remove defendant No. 1's obstruction in the possessory suit before the Mamlatdar was thus remedied by the decree of the civil Court, more especially when she is proved to have not lost possession till 1887. Section 28 of the Limitation Act (XV of 1877) does not apply to parties who rely on actual possession which has never been disturbed—*Hargovandas* v. *Dajibhai* (1) followed in *Orr* v. *Sundra* (2). Article 47 only applies to ejectment suits, and there was no occasion to the respondent to bring such a suit if she continued in possession notwithstanding her failure in the possessory suit. On the whole, therefore, we must hold that the Mamlatdar's order of January, 1885, had no conclusive effect, and was rendered ineffectual by the decree of the civil Court, and that as respondent continued in possession notwithstanding that order down to 1887, the present suit was not time-barred, and neither her remedy nor her right was extinguished.

The next question relates to the point as to how far respondent's possession entitles her to succeed in this suit as against defendants.

The leading case on this subject is the Full Bench decision in *Pemraj* v. *Narayan* (3), in which it was held that possession was a good title against all persons except the rightful owner, and entitled the claimant to maintain an ejectment suit against any other person than such owner who dispossessed him. In the [278] language of Westropp, C. J., the title of possession is good as against a person who seeks to disturb that possession, and who has not a colour of title to the land in dispute, and never had possession of it. The decision in this case has been followed in many subsequent cases, in which it was held that possession was *prima facie* evidence of title, and is primarily exclusive, and it is for him who impugns this exclusive title, to show that the possession originated in a way not to affect his own right—*Sakalchand* v. *Sundarlal* (4); *Vithu* v. *Bapu* (5); *Vithoba* v. *Narayan* (6). It is true Melvill, J., doubted the correctness of the Full Bench decision, which was in conflict with his own ruling in *Dadabhai* v. *The Sub-Collector of Broach* (7). That case was certainly not noticed in the judgment of the Full Bench, but the Judges who made the reference to the Full Bench noticed another unreported judgment of Sargent and Melvil, JJ., which was on the same lines as the decision in *Dadabhai* v. *The Sub-Collector of Broach* (7). The defendants in this case might indeed have pleaded an outstanding title in a third person, and if they had succeeded in doing so, they might have defeated the respondent-plaintiff. They, however, raised no such defence, and they set up a title by adoption, which they failed to prove. This title of a third party was successfully pleaded in the case of *Wise* v. *Ameerunissa* (8), to which Mr. Justice Melvill has referred in *Trimbak* v. *Baji* (9).

In the present case the respondent is distantly related to the last owner, and she is shown to have been in possession of the land for at least seven years before she lost it in 1887. Defendant No. 1 was held in the civil suit of 1885 to have been her farm servant, and he did not obtain possession of the land. His mortgagee, the present appellant, obtained possession in 1887 under the second order of the Mamlatdar. Under

(1) 14 B. 222. (2) 17 M. 255. (3) 6 B. 215.
(4) P. J. (1889), 309. (5) P. J. (1875), 289. (6) P. J. (1883), 262.
(7) 7 B.H.C.R. A.C.J. 82. (8) 7 I.A. 73. (9) P. J. (1882), 162.

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these circumstances, respondent's previous possession, confirmed as it is by the decree of a civil Court, and by the finding of the lower Court of appeal in this case, must prevail against the appellant who claims through respondent's farm servant only, and whose possession commenced with the disturbance which compelled the respondent to bring this suit.

[279] On a careful consideration of all the authorities, we feel satisfied that the decision of the lower Court of appeal must be upheld. We accordingly reject the appeal and confirm the decree with costs on appellant.

Decree confirmed.

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20 B. 279.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

CHENNAYA (*Original Plaintiff*), *Appellant v.* MALKAPA (*Original Defendant*), *Respondent.** [29th January, 1895.]

Mortgage—Redemption—Decree for payment and redemption within six months—Application for execution of decree after six months had expired—Transfer of Property Act (IV of 1882), *s.* 93.

Section 93 of the Transfer of Property Act (IV of 1882), under which a plaintiff mortgagor who has obtained a decree for redemption may show cause for extending the time allowed by the decree for redemption, does not apply to decrees made before the Act was put in force.

[R., L.B.R. (1893—1900), 420.]

SECOND appeal from the decision of J. L. Johnstone, District Judge of Dharwar, in appeal No. 273 of 1893.

On the 30th August, 1892, the plaintiff obtained a decree for redemption of certain property on payment of Rs. 703-0-7½ within six months.

The plaintiff did not apply for execution of this decree until after the six months had expired.

This *darkhast* was rejected by the Subordinate Judge as being made too late.

On appeal, the District Judge confirmed the order of rejection, on the ground that the Court in execution had no power to enlarge the time mentioned in the decree.

The plaintiff thereupon preferred a second appeal to the High Court.

Shivram Vithal Bhandarkar, for appellant (plaintiff).—The plaintiff may redeem although the six months have expired under s. 93 of the Transfer of Property Act (IV of 1882) [280] he has that right until a final order for foreclosure is made. Under the last clause of that section the Court has the power to enlarge the time for redemption for any sufficient reason. The cases of *Mahant Ishwargar* v. *Chudasama Manabhai* (1) and *Chudasama Manabhai* v. *Mahant Ishwargar* (2) are no longer applicable since the Transfer of Property Act was extended to this Presidency.

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* Second Appeal, No. 604 of 1894.

(1) 13 B. 106.

(2) 16 B. 243.

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B. N. Bhajekar, for respondents.—The decree sought to be executed was passed before Act IV of 1882 was applied to this Presidency. It was extended to this Presidency on the 1st January, 1893, while the decree was passed in August, 1892. The Act is not retrospective. Section 93 of the Act does not, therefore, apply in the present case.

JUDGMENT.

JARDINE, J.—It is urged that s. 93 of the Transfer of Property Act (IV of 1882) applies to decrees made before that Act was put in force, and that the procedure in the second clause of that section required the defendant-mortgagee to apply for an order debarring redemption on which, and not till then, the plaintiff would have opportunity to show good cause for extending the period fixed for payment. We are of opinion that as s. 93 relates only to proceedings to which s. 92 relates, the present decree is not governed by the Transfer of Property Act, the words in the first sentence of s. 92—"the Court shall pass a decree ordering"—clearly referring to uturity. We notice also that the effect of this Act does not appear to have been pleaded in the Courts below; nor any intimation given to either of those Courts that there was good cause for extending the time. The decree is confirmed with costs.

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20 B. 281.

[281] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

RAMCHAMDRA NARAYAN KULKARNI (*Original Defendant* NO. 2), *Applicant v.* DRAUPADI KOM NARAYAN (*Original Plaintiff*), *Opponent.**

[29th January, 1895.]

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Special Judge—Ex parte order—Review—Reasonable exercise of discretion.

The Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879) has power to review an *ex parte* order made by him.

[R., 34 C. 677 = 6 C.L.J. 84 = 11 C.W.N. 803; 26 Ind. Cas. 46 = 27 M.L.J. 605.]

THIS was an application under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of C. H. Jopp, Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The opponent (plaintiff) brought a redemption suit against the applicant Ramchandra Narayan Kulkarni (defendant No.2) and two others in the Court of the Second Class Subordinate Judge of Madha in the Sholapur District. The Subordinate Judge having dismissed the suit, the opponent-plaintiff applied for revision to the Special Judge under the Dekkhan Agriculturists' Relief Act, who, without issuing notice, reversed the decree of the Subordinate Judge and remanded the case for retrial. The applicant, having learnt after the remand that the decree of the Subordinate Judge had been reversed, applied to the Special Judge for a review of his order on the ground that the order was *ex parte*. The Special Judge accordingly ordered a notice to issue to the opponent (plaintiff) to show cause why the order reversing the Subordinate Judge's decree should not be set aside.

* Application No. 107 of 1894 under the extraordinary jurisdiction.

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The application came on for hearing before the Special Judge (C. H. Jopp, who had in the meanwhile succeeded Rao Bahadur Ranade), who rejected it with the following remarks :—

"The decision in Printed Judgments for 1887, p. 116 (1), may perhaps be reconciled [282] with that in Printed Judgments for 1886, p. 11 (2), by supposing that though the Special Judge is not obliged by law to issue notices at all, if he issue notices to one party he is bound to do so to the others. It may be, therefore, that when notices were issued and served on the other parties, a notice should have been served on defendant No. 2. But even if this is granted. I do not see what power I have to act in this matter. No power is given by the Dekkhan Agriculturists Relief Act to the Special Judge to set aside any order or decree passed *ex parte* by him. It has frequently been ruled that the provisions of the Civil Procedure Code do not apply to the proceedings of the Special Judge. I have, therefore, no power to set aside the decree in this case under s. 108 of the Civil Procedure Code, and I see no reason for holding that the power to set aside a decree passed *ex parte* against a defendant or opponent is one inherent in every Court of justice."

Against this decision the applicant applied under the extraordinary jurisdiction and obtained a rule *nisi* calling upon the opponent to show cause why the decision should not be set aside on the ground that the Special Judge erred in holding that he had no jurisdiction to set aside the *ex parte* decree passed by his predecessor and to restore the case to the file.

[283] *Gangaram B. Rele* appeared for the applicant in support of the rule.—He relied on *Vishvanath* v. *Aba* (3), *Badaricharya* v. *Ramchandra* (4) and *Ramsing* v. *Babu Kisansing* (7).

Daji Abaji Khare appeared for the opponent to show cause.

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(1) Decision in Printed Judgments for 1887, p. 116 :—

The Acting Special Judge issued a notice to the defendants to attend his Court at Sangola on the 18th or 19th February, 1886. This was served on the evening of the 18th, and on the 19th the defendants went 24 miles to attend the Special Judge's Court. The *raznama* (or journal) says they did attend it; but this is plainly wrong and is contradicted by the judgment. The Court was closed when the defendants arrived on the 19th, and the Acting Special Judge went away the next morning. He ordered the Subordinate Judge to get extracts from the first defendant's books. These were sent, but no new notice was sent to the defendants. The plaintiffs were heard on the review, but the defendants were not. It cannot, we think, be said that they failed to attend the Court through any neglect, and the Acting Special Judge ought to have given them a hearing before he, on the 31st March, 1886, reversed the decision of the Subordinate Judge in their favour, a decision with which his own Assistant agreed. Justice required that, when the plaintiffs were heard against the judgment of the Subordinate Judge approved by the Assistant Special Judge, the defendants should be heard in support of it, unless there was a default of attendance on their part. We, therefore, set aside the decree of the Acting Special Judge and direct him to re-hear the review, giving an opportunity to both sides to be heard.

(2) Decision in Printed Judgments for 1886, p. 11 :—

Section 53 of Act XVII of 1879 does not expressly provide for notice being given to the parties; and having regard to the very special nature of the Act, we cannot, we think, assume on general principles that such notice was necessary before the power of revision could be exercised under that section. It is to be remarked that s. 74 only makes the Civil Procedure applicable to suits and proceedings before the Subordinate Judge; and, in the absence of any rule, regarding notice, made by the local Government under s. 75 of the Act of 1879, the conduct of the proceedings before the Special Judge must, we think, be deemed to be entirely in his own discretion. This was, apparently, the opinion of the Division Court, consisting of West and Nanabhai, JJ., in petition No. 89 of 1884, in which the same point was raised.

(3) P. J. (1886), p. 11.

(4) *Ibid* p. 575=19 B. 116.

(5) P. J. (1893), p. 35=19 B. 113

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JUDGMENT.

SARGENT, C. J.—The Special Judge considers that a Special Judge has no power to set aside an *ex parte* order made by him, because no such power is given him by the Act, and it is not, he considers, a power inherent in every Court. We have already held in *Vishvanath* v. *Aba* (1) followed in *Badaricharya* v. *Ramachandra* (2) and *Ramsing* v. *Babu Kisansing* (3) that "the conduct of the proceedings before the Special Judge must be deemed to be in his own discretion; and in the last two cases it was held that the granting a review of judgment may be a most reasonable exercise of such discretion. Similarly the setting aside an *ex-parte* decree or order may well be a most reasonable exercise of discretion on the part of the Court.

For these reasons we think that the Special Judge was wrong in holding he had no power to entertain the application, and must, therefore, make the rule absolute, discharge the order of the Special Judge, and send back the application for his consideration on the merits. Costs to follow the result.

Rule made absolute.

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20 B. 283.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE HAUSAMBHAI ABDULABHAI.* [31st January, 1895.]

Provincial Small Cause Court Act (IX of 1887), s. 27, and art. 35, cl. (i), sch. II—Suit for damages—Cognizable by Small Cause Court—Jurisdiction—Registration of plaint which has been ordered to be returned.

A suit to recover damages for injury to a wall caused by the diversion of a water-course is cognizable by a Provincial Small Cause Court Such a suit does not fall within the exception of art. 35 (*i*) of sch. II to Act IX of 1887.

[F., 10 M.L.J. 313; R., 19 Ind. Cas. 759=9 N.L.R. 54.]

THIS was a reference under s. 617 of the Code of Civil Procedure (Act XIV of 1882) by Rao Bahadur Krishnamukh [284] Atmaram, Judge of the Provincial Court of Small Causes at Ahmedabad.

The reference was in the following terms:—

"The plaintiff sues to recover from the defendant Rs. 150 as damages owing to certain tortuous acts of the defendants in preventing the water of the plaintiff's house from going in a certain cesspit and thereby causing damage to his (plaintiff's) wall and house.'

"Rao Bahadur Lalshanker Umyashanker, who acted for me during my absence as Fourth Judge of the Bombay Court of Small Causes, returned the plaint to the plaintiff for presentation to proper Court. He does not give in his order any reasons for returning the plaint. The plaintiff presented the plaint to the First Class Subordinate Judge's Court. Then it was filed and registered and sent to the Joint Subordinate Judge for trial. The Joint Subordinate Judge returned it to the plaintiff, holding

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* Civil Reference, No. 16 of 1894.

(1) P. J. (1886), p. 11.
(2) P. J. (1893), p. 35=19 B. 113.
(3) *Ibid* p. 575=19 B. 116.

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that the suit was one cognizable by a Small Cause Court. Thereupon it was presented to me. I am myself of opinion that a suit like this is cognizable by a Small Cause Court, as it cannot be said to be a suit relating to immoveable property. Incidentally questions relating to immoveable property will arise in the case but the suit is really one for damages, and does not come under any of the clauses given in sch. II of Act IX of 1887. But as this same Court presided over by my predecessor once returned this plaint to the plaintiff, I doubt if I can admit it. I, therefore, submit the following questions for the determination of the Honourable the Chief Justice and Judges of Her Majesty's High Court :—

"1. Whether a suit like this is cognizable by a Small Cause Court ?

"2. Whether I can register the plaint unless the High Court sets aside the order of my predecessor ?

"My opinion on No. 1 is that the suit is cognizable by this Court, and on No. 2 is that I cannot register it until the previous order of this Court is set aside by the High Court."

The reference was heard by a Division Bench (Jardine and Ranade, JJ.).

[285] *Sitanath Gopinath Ajinkya* (*amicus curiæ*) for plaintiff.—The present is a suit for damages for injury caused to immoveable property. There is no question of title directly involved in the suit. If a question of title be incidentally raised, that does not oust the jurisdiction of a Small Cause Court—*Manappa Mudali* v. *McCarthy* (1); *Alagirisami* v. *Innasi*(2); *Shumbhoo Chunder Mowlick* v. *Pran Kristo Mowlick* (3) ; *Radha Churn* v. *Gudadhur* (4). The present case does not fall within any of the excepted cases given in sch. II to Act IX of 1887. The suit is, therefore, cognizable by a Small Cause Court.

Vishnu K. Bhatvadekar (*amicus curiæ*) for the defendant.—A Small Cause Court has no jurisdiction to entertain a suit like the present. A question of title is directly involved in the suit. The plaintiff is not entitled to the relief he claims without proving his title to immoveable property, which the Court cannot finally determine. The plaint was, therefore, rightly returned under s. 23 of Act IX of 1887 for presentation to the proper Court. The suit falls under art. 35 (*i*), sch. II to the Act.

JUDGMENT.

PER CURIAM.—The Court answers the questions as follows :—(1) The suit is cognizable by the Court of Small Causes as one for damages caused by injury to a wall. The fact that the injury was caused by diversion of a water-course or obstruction of an easement is an accidental circumstance which does not bring the plaint within the exception of art. 35 (*i*) of Second Schedule to Act IX of 1887.

(2) The order returning the plaint being final under s. 27 of the Act, the Judge cannot register the plaint while that order is in existence.

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(1) 3 M. 192. (2) 3 M. 127. (3) 13 W. R. 105. (4) 15 W. R. 166.

[286] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

MURARI (*Original Defendant*), *Appellant v.* TAYANA (*Original Plaintiff*), *Respondent.** [4th February, 1895.]

Hindu law—Minor—Minor's estate—Power of mother of minor to sell her deceased husband's estate—Mother—Omission of the minor's name in the sale-deeds—Son bound by sale.

Under Hindu law, the mother as guardian of her minor son has authority to sell her husband's estate in order to pay off his debts, and the omission of any reference to the minor in the deed of sale does not render it ineffectual if it is proved that it was her intention to deal with the son's interest, and not merely with any interest which she might have herself.

[F., 1 N.L.R. 66.]

THIS was a second appeal from the decision of A. S. Moriarty, Assistant Judge of Satara, reversing the decree of Rao Saheb G. G. Soman, Subordinate Judge of Tasgaon.

The plaintiff sued the defendant to recover possession of a part of a field, alleging that it was his property and that the defendant had been in wrongful possession for ten or twelve years during the plaintiff's minority, which had terminated about a year prior to the institution of the suit.

The defendant replied (*inter alia*) that the field in dispute had been purchased by him from the plaintiff's mother during the plaintiff's minority under two deeds, one for Rs. 100 dated the 8th February, 1876, and the other for Rs. 18, dated the 14th February, 1879, and he contended that the sales being made by the plaintiff's mother for his benefit were binding on him.

The Subordinate Judge dismissed the suit, holding that the sale to the defendant had been made for a necessary purpose by the plaintiff's guardian during his minority.

On appeal by the plaintiff the Judge reversed the decree of the lower Court, holding that the plaintiff was not bound by the sale during his minority. He found also that the sale of the plot for Rs. 100 had been effected to satisfy a debt due to the defendant by the plaintiff's father which the plaintiff was bound to pay. He passed a decree directing that the plaintiff should recover [287] possession of the property on payment of Rs. 100 to the defendant. The defendant preferred a second appeal.

Mahadeo B. Chavbal, for the appellant (defendant).—The plaintiff's mother was *de facto* manager during his minority. The sale-deeds do not mention the name of the plaintiff; but from the documents it is clear that the defendant purchased the land for value, believing that he got the whole property. The plaintiff does not allege that his mother was not *de facto* manager during his minority. Further, the sale was effected in order to pay off a debt contracted by plaintiff's father Under these circumstances the sale is binding on the plaintiff—*Succaram Morarji* v. *Kalidas Kallianji* (1).

Ghanasham N. Nadkarni, for the respondent (plaintiff).—The sale-deeds do not say that the sale was effected by the plaintiff's mother in her representative capacity as *de facto* manager. The mother purported to sell

* Second Appeal No. 409 of 1893.

(1) 18 B. 631.

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20 B. 286.

the land as her property, and that being so, the sale cannot stand, as the mother had no saleable interest.

[SARGENT, C. J.—She sold the property to pay off her husband's debt.]

The plaintiff is totally ignored in the documents. What she sold was her right, title and interest in the property, and, therefore, the plaintiff acquired only those rights which she could sell and not the absolute estate—*Gadgeppa Desai* v. *Apaji* (1); *Jatha Naik* v. *Venkatapa* (2); *Subbanna* v. *Venkatakrishnan* (3).

JUDGMENT.

SARGENT, C. J.—The Assistant Judge has found that the plaintiff's mother during her son's minority sold to the defendant two plots of land for Rs. 100 and Rs. 18 respectively. The item of Rs. 100 was applied towards payment of the plaintiff's father's debts. It does not appear for what purpose the item of Rs. 18 was required. The deeds of sale dated the 8th February, 1876, and the 14th February, 1879, contained no mention of the minor's name, but purported to deal with the land as if it were the property of the mother.

As it has not been found that there was any necessity for the sale, for Rs. 18, of the second bit of land, the transaction is not [288] binding on the minor, who is entitled to recover the property in question.

But in regard to the first sale, which was effected in order to pay off the father's debts, we have to determine whether the omission of any reference to the minor in the sale-deed renders it ineffectual against him. For the respodent Mr. Ghanasham drew our attention to one passage in the deed in which the vendor said that she had sold whatever right, interest or inheritance she had, and contended that these words limited the conveyance to the mother's interest; but the earlier part of the document shows that she purported to sell the land itself, and it is clear that such must have been her intention, inasmuch as at the time of the sale she personally had no interest in the property excepting a charge for maintenance over the whole of her husband's estate.

It was not denied that by Hindu law the mother as guardian of her minor son had authority to sell the land in order to pay off her husband's debts. Such being the case, it appears to us that she had both the authority and the intention to sell at the time when she purported to do so, her act effectually conveyed the property to the defendant notwithstanding that it was not correctly described as belonging to her son. In arriving at this conclusion we are but adopting the opinion expressed in *Judunath Chuckerbutty* v. *James Tweedie* (4) by Peacock, C. J., who pointed out that a sale by a manager with necessity may be valid although the vendor does not describe himself as manager. The decision of Mahmood, J., in *Makundi* v. *Sarabsukh* (5) was to the same effect; for, though it is true that in that case the minor's name was incidentally mentioned in the deed, the judgment was based, not on this circumstance, but on the fact that it was clear from the deed that it was the share of the minor which formed the subject of the sale. In each case the language of the deed and the circumstances in which it was executed have to be considered. In the present case, as above pointed out, remembering that the mother had no proprietary interest in the land, it is certain, from the

(1) 3 B. 237.
(2) 5 B. 14.
(3) 11 M. 408.
(4) 11 W.R. 20.
(5) 6 A. 417 (419).

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wording of the deed, that it was the land itself, and not merely any interest which she might be supposed to have, which formed the subject of the sale.

[289] The learned Assistant Judge has relied on three cases, *Kuvarji* v. *Moti* (1), *Gadgeppa* v. *Apaji* (2) and *Bahur Ali* v. *Sukeea Bibee* (3), but they do not seem to support his decision. In the first of these cases—*Kuvarji* v. *Moti*— the conclusion that the deed did not bind the minor was founded, not on the omission of his name, but on the fact that the mother had not obtained a certificate under Act XX of 1864, a defect which cannot now be held to affect the validity of the deed having regard to the more recent decisions of this Court in *Manishankar* v. *Bai Muli* (4) and *Honapa* v. *Mhalpai* (5). The second case—*Gadgeppa* v. *Apaji*—referred to has no bearing on the question under consideration, for the cause of action was a money bond executed by a mother, which did not purport to charge her son's estate. In the third case noticed—*Bahur Ali* v. *Sukeea Bibee*—the parties were Mahomedans, amongst whom the mother has not the same power of alienation of her minor sons' property as amongst Hindus, and as the defendant had merely alleged that the vendor was herself the owner of the property, the High Court on special appeal confined its attention to the question whether she had been in possession on her own account or as guardian of her children.

Under these circumstances, we must now vary the decree of the Assistant Judge by rejecting so much of the claim as relates to the land sold for Rs. 100 by the deed of 8th February, 1876, and by awarding the remainder of the claim in respect of the land purporting to be sold for Rs. 18 by the deed of the 14th February, 1879. The plaintiff must pay the defendant's costs throughout on the portion of the claim rejected, and will recover his costs throughout on the portion awarded.

Decree varied.

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20 B. 290.

[290] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

DHONDO BALKRISHNA KANITKAR (*Original Plaintiff*), *Appellant v.* RAOJI VALAD DADU (*Original Defendant*), *Respondent.**

[4th February, 1895.]

Mortgage—Registration—Notice—Sale of mortgaged property in execution of a money decree without express notice of mortgage—Right of mortgagee to enforce mortgage against the property in hands of purchaser—Civil Procedure Code (Act XIV of 1882), s. 287.

A mortgagee under a registered mortgage-deed obtained a money decree against the mortgagors in some matter other than the mortgage, and sold the mortgaged property in execution of the decree. The mortgagee lien was not announced in the proclamation of sale as required by s. 287 of the Civil Procedure Code (Act XIV of 1882), and the auction-purchaser had no actual knowledge of the mortgage. In a suit brought by the mortgagee against the mortgagors and the auction-purchaser to recover the mortgage debt by sale of the mortgaged property,

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* Second Appeal, No. 272 of 1893.

(1) 3 B. 234. (2) 3 B. 237. (3) 13 W. R. 63.
(4) 12 B. 686. (5) 15 B. 259.

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Held that, except in a case of fraudulent concealment, the registration of the mortgage was notice to subsequent purchasers. The property was, therefore, liable under the mortgage, and the auction-purchaser was bound by it.

Held, further, that the omission to declare the mortgage at the time of the sale could not be treated as an estoppel.

[R., 22 B. 686 (691); 11 O.C. 206 (207); 134 P.L.R. 1901; 1 S.L.R. 44.]

SECOND appeal from the decision of G. C. Whitworth, District Judge of Nasik, confirming the decree of Rao Saheb L. K. Nulkar, Subordinate Judge of Sinnar.

Suit by a mortgagee for sale of the mortgaged property, &c. By a registered mortgage-deed dated 23rd June, 1886, the first and second defendants mortgaged the property in question to the plaintiff with possession. Subsequently the plaintiff obtained a money decree against them, not for the mortgage-debt, but in some other matter, and in execution of this decree the house was sold and purchased by the third defendant.

The plaintiff's *darkhast* for execution had stated that the house was to be sold subject to his mortgage lien, but in the proclamation of sale the lien was not mentioned, nor was anything said about it at the auction-sale.

The third defendant having purchased the property was put into possession by the Court. Thereupon the plaintiff applied to be restored to possession, and his application being rejected he filed [291] the present suit to establish his right as mortgagee and to recover the amount due on the mortgage by sale of mortgaged property and from the first and second defendants.

Defendants Nos. 1 and 2 did not appear.

Defendant No. 3 replied (*inter alia*) that he did not admit the plaintiff's mortgage lien; that the plaintiff did not reserve his lien upon the property when it was sold in execution; and he contended that he being a *bona-fide* purchaser for value without notice of the lien, the claim as against him should be rejected.

The Subordinate Judge found that the third defendant purchased the house without notice of the plaintiff's mortgage lien; that he was entitled to retain possession; and that the plaintiff should recover the mortgage-debt from the first and second defendants.

On appeal by the plaintiff the decree was confirmed.

The plaintiff preferred a second appeal.

Daji Abaji Khare, for the appellant (plaintiff).—The plaintiff is entitled to enforce his lien upon the property in the hands of the third defendant who bought it with notice of the mortgage. For the mortgage was registered, and registration is notice—*Motiram* v. *Hari* (1). The lower Courts have held that because the mortgage was not mentioned in the proclamation of sale or at the auction sale, it is not binding on the purchaser. But the only question is whether the purchaser had notice, and he had notice by the fact of registration. In our *darkhast* for execution we prayed that our lien should be declared.

Gangaram B. Rele, for the respondent (defendant No. 3).—The mere fact that the mortgage was mentioned in the *darkhast* cannot be considered to be equivalent to notice. Unless the mortgage was mentioned in the proclamation of sale, or proclaimed at the auction sale, it cannot effect the purchaser. It was incumbent on the plaintiff to announce the lien, because it was his own lien and not that of a stranger—*Dullab Sirkar* v. *Krishna Kumar Bakshi* (2); *Agarchand* v. *Rakhma* (3).

(1) P.J. (1877), p. 4. (2) 3 B.L.R. A.C.J. 407. (3) 12 B. 678.

[292] [JARDINE, J.—In the last case the lien was fraudulently concealed, and, therefore, it was held not binding.]

In the present case, though there is no finding that the lien was fraudulently concealed, still the very fact that it was not proclaimed, and that we purchased the property *bona fide* in the belief that we purchased an absolute estate, estops the plaintiff setting up the lien. We should not be made to suffer for the plaintiff's omission.

JUDGMENT.

JARDINE, J.—The plaintiff, being mortgagee of the property under a registered deed of 1886 executed by the defendants Nos. 1 and 2, obtained a decree against them in some other matter, and in execution thereof had the property put up for sale at a Court sale, where it was bought by the defendant No. 3. In the present suit the Courts below have refused to make the property liable on the mortgage. It is found as a fact that the defendant No. 3 had no actual knowledge of the mortgage. This incumbrance had not been stated in the proclamation as s. 287 of the Code of Civil Procedure requires. Laying stress on this fact, the District Judge held that the defendant No. 3 had no notice at all.

But although *Dullab* v. *Krishna* (1) is cited to support the decision, it has long been settled in this Presidency that registration is notice to subsequent purchasers—*Hasha* v. *Ragho* (2); *Lakshmandas* v. *Dasrat* (3); *Radhabai* v. *Shamrav* (4); *Dundaya* v. *Chenbasapa* (5). In *Agarchand* v. *Rakhma* (6), a fraudulent concealment was held to create an exception; but in the case before us there is no fraud, but only omission. The case is thus on all fours with *Motiram* v. *Hari* (7) and resembles also *Nanabhat* v. *Lakshman* (8) discussed without disapproval by the Full Bench in *Lakshmandas* v. *Dasrat*. Mr. Rele has urged the Court to treat the omission of the plaintiff to declare his incumbrance at the time of sale as creating an estoppel. But this would be contrary to the decisions, *e.g.*, *Baswuntapa* v. *Ranu* (9) and see also *Sobhagchand* v. *Bhaichand* (10). It would have been otherwise if the [293] decree in execution of which the Court sale occurred had been obtained on the mortgage—*Khevraj* v. *Lingaya* (11); *Sheshgiri* v. *Salvador Vas* (12).

We, therefore, amend the decree by adding to the relief thereby given a declaration that the plaintiff has a right to recover the amount due on the mortgage by sale of the property in suit, and a direction that the amount be recovered therefrom if he fails to recover it from the defendants Nos. 1 and 2; the defendant No. 3 to pay his own costs throughout and the costs of both appeals.

Decree amended.

(1) 3 B.L.R. A.C.J. 407. (2) 6 B. 165. (3) 6 B. 168.
(4) 8 B. 168. (5) P. J. (1883), 83. (6) 12 B. 678.
(7) P. J. (1877), 4. (8) P.J. (1877), 83. (9) 9 B. 86 (92).
(10) 6 B. 193 (206). (11) 5 B. 2. (12) 5 B. 5.

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APPEL-
LATE
CIVIL.

20 B. 293.

20 B. 293.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

SHIVDAYAL RAMCHARAN (*Original Defendant No.* 2), *Applicant v.* KHETU GANGU AND ANOTHER (*Original Plaintiffs*), *Opponents.**

[5th February, 1895.]

Practice—Procedure—Civil Procedure Code (*Act XIV of* 1882), *s.* 39—*Pleader—Pleader duly appointed by a party to a suit cannot delegate his authority to another pleader* —Ex parte *decree.*

The applicant (defendant No. 2) was one of two defendants in a suit in the Court of Small Causes in Bombay. He and his co-defendant (defendant No. 1) appointed separate pleaders (K. and W.) to conduct their case. On the day of hearing the applicant was unavoidably unable to be present, and his pleader (K.) being also engaged elsewhere requested W., the pleader of the other defendant in the suit, to hold his brief and to conduct the case for both defendants. W. did so. A decree was passed against both defendants. The applicant subsequently applied to the Full Court under s. 37 of the Presidency Small Causes Court Act (XV of 1882) for a new trial on the ground that he had not been represented at the hearing and that the decree had been passed against him *ex parte*. The Full Court refused the application, holding that the applicant had been represented by a pleader, and that the decree against him was not *ex parte*. The appellant then applied to the High Court in its extraordinary jurisdiction.

Held, discharging the order of the Full Court, that the decree against the applicant was an *ex parte* decree. K., who was the applicant's duly appointed pleader, could not delegate his authority to W., and as the applicant was not himself present, the decree was *ex parte*. W. was not the duly appointed pleader of the applicant and could not, therefore, represent him at the hearing: see s. 39 of the Civil Procedure [294] Code (Act XIV of 1882). The High Court sent back the case to the Small Causes Court to deal with the application for a new trial on its merits.

[R., 22 B. 654 (656); 9 O C. 65 (68); U.B.R. (1897—1901) 240; D., U.B.R. (1902), 2nd Qr., Power of Attorney, p. 2.]

THIS was an application under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of the Full Court (consisting of C. W. Chitty, First Judge, and M. H. Hakim, Fifth Judge) of the Bombay Court of Small Causes.

The applicant (defendant No. 2) was one of two defendants who were sued by the plaintiffs in the Court of Small Causes at Bombay. The hearing of the case was fixed for the 8th June, 1894. On that day the applicant was unable to appear, as he was obliged to attend in the Presidency Magistrate's Court, in which one of the plaintiffs had instituted criminal proceedings against him. The applicant and his co-defendant had instructed separate pleaders to appear for them in Small Causes Court, but when the case was called on for hearing on the 8th June the applicant's pleader (Mr. Kapadia) being engaged elsewhere, asked Mr. Warden, who appeared as pleader for the other defendant, to hold his brief and conduct the case on behalf of the applicant. Mr. Warden accordingly did so, and on behalf of both the defendants contested their liability to the plaintiffs' claim. The Court, however, passed a decree for the plaintiff. Against this decree the defendant applied to the Full Court under s. 36 of the Presidency Small Cause Court Act (XV of 1882) for a new trial and for a re-hearing of the suit, but the Court rejected the application on the ground that the decree was not an *ex parte*

* Application No. 119 of 1894 under the extraordinary jurisdiction.

decree, as Mr. Warden held Mr. Kapadia's brief on behalf of the defendant.

The defendant now applied to the High Court under its extraordinary jurisdiction, contending that the Full Court erred in law in holding that the decree was not an *ex parte* decree, and that he had no proper opportunity of cross-examining the plaintiffs' witnesses, nor of adducing his evidence. A rule *nisi* was granted calling on the plaintiffs to show cause why the order of the Full Court should not be set aside.

Sitanath G. Ajinkya appeared for the applicant (defendant No. 2) in support of the rule :—Mr. Kapadia was the pleader duly appointed by us to conduct our case. On the appointed day we **[295]** could not attend personally in Court, because we were obliged to appear in the Police Court to answer a complaint lodged against us by one of the plaintiffs. Mr. Kapadia, being engaged elsewhere, transferred his brief to Mr. Warden, who was engaged by our co-defendant to conduct his case. We had not given a vakalatnama to Mr. Warden and had not engaged him ; therefore he could not properly represent us in the suit, nor had he received any instructions from us in connection with the case. Under these circumstances the decree against us is an *ex parte* decree—*Bhimacharya* v. *Fakirappa* (1) ; *Hira Dai* v. *Hira Lal* (2) ; *Ramtahal Ram* v. *Rameshar Ram* (3); *Doyal Mistree* v. *Kupoor Chund* (4).

Jehangir Dorabji appeared for the opponents (plaintiffs) to show cause.—The defendant was properly represented by Mr. Warden. It is an old and established practice in the Bombay Court of Small Causes for one pleader to hold the brief of another pleader, and the practice is allowed by the Judges of that Court. An inveterate practice amounts to a rule of law—*Assur Purshotam* v. *Ruttonbai* (5) ; *Joyner* v. *Weeks* (6).

JUDGMENT.

SARGENT, C. J.—Mr. Warden was admittedly not the duly appointed pleader of the defendant, and, therefore, had no authority, as required by s. 39 of the Civil Procedure Code, to represent him at the hearing. Mr. Kapadia, who was the duly appointed pleader, could not delegate his authority to Mr. Warden, and as the defendant was not himself present, the decree passed against him was an *ex parte* one. The Court below was, therefore, wrong in rejecting the defendant's application to set aside the decree on the ground that it was not an *ex parte* decree.

We think that under these circumstances we ought to exercise our extraordinary jurisdiction and make the rule absolute, discharge the order of the Small Cause Court, and send back the case for the Court to deal with the application on its merits. Costs to follow the result.

Rule made absolute.

(1) 4 B.H.C.R. A.C.J. 206.
(2) 7 A. 538.
(3) 8 A. 140.
(4) 4 C. 318.
(5) 16 B. 152 (157).
(6) L.R. (1891) 2 Q.B. 31 (43).

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APPEL-LATE CIVIL.

20 B. 296.

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[296] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

SADASHIV ABAJI BHAT AND ANOTHER (*Original Defendants, Nos.* 5 *and* 4), *Appellants v.* VYANKATRAO RAMRAO SHINDE (*Original Plaintiff*), *Respondent.** [7th February, 1895.]

Mortgage—Usufructuary mortgage—Sale of the mortgaged land—Regulation V of 1827, *s.* 15, *cl.* (3).

Where a mortgage provided that the mortgagee was to take possession of the land and enjoy the profits in lieu of interest, and the mortgagor was at liberty to recover possession in any year on payment of the principal amount.

Held, that the mortgage was a usufructuary mortgage, and under the circumstances of the case it was not the intention of the parties that the property should be sold, and that the mortgage-deed contained a special agreement which took the case out of the provisions of cl. (3), s. 15 of Reg. V of 1827 which was the law in force at the time the mortgage was effected.

[D., 21 B. 267 (272); 34 B. 128=11 Bom. L.R. 1315=4 Ind. Cas. 595; 5 Bom. L.R. 119.]

SECOND appeal from the decision of C. E. G. Crawford, District Judge of Thana, confirming the decree of Rao Saheb K. S. Bodas, Subordinate Judge of Mahad.

The plaintiff sued to recover a sum due to him on a mortgage.

The following is a translation of the mortgage-deed :—

"We have taken from you for our own purposes Surti Rupees 700 in cash of Company's currency, in letters rupees seven hundred, and in security for this amount have mortgaged the following property :—" (Sets forth the property). "You should (therefore) carry on the *vahivat* of the said land by right of ownership (and) in accordance with the deed of partition in the same manner as we have (hitherto) done by right of ownership, and take every year the produce of the land whatever the land may yield in the dry season and in the rainy season (that is, throughout the year); and you should pay the Government assessment. Your money is not to run at interest, and as to the profits of our *takshim*, which you will take, you are not to pay any rent (to us) in respect of the same. At the harvest season in the month of Margashirsh (or) Poush in the year in which we may (offer to) pay your money (*viz.*,) Rupees seven hundred, you should accept the payment and deliver into our possession our mortgaged share as per deed of partition. Should any one cause obstruction to your *vahivat* we will answer for the same and will get the *vahivat* continued to you without interruption, in accordance with the terms stated above. Should an obstruction be caused to your *vahivat*, and should you (in consequence) sustain loss, we will make good the same. We have duly passed this deed of mortgage of our free will. * * * *

Signatures."

[297] The defendants pleaded that the mortgage-deed did not provide for a sale of the property, and that the plaintiff was, therefore, not entitled to have it sold. The lower Courts allowed the claim. The defendants appealed to the High Court.

* Second Appeal, No. 66 of 1893.

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APPELLATE CIVIL.

20 B. 296.

Macpherson (with *Daji Abaji Khare*), for the appellants.—The mortgage is a usufructuary mortgage and does not give to the mortgagee the power of sale. There is no period fixed in the deed for the repayment of the debt. The mortgagee is to remain in possession and is to take the produce in lieu of interest. Under the terms of the deed he is bound to restore the property to the mortgagor on receipt of the principal to be paid by the mortgagor at his pleasure. It is, therefore, clear that the power of sale is not reserved to the mortgagee—*Shaik Idrus* v. *Abdul Rahiman* (1). Rupees 700 have been awarded for interest. The mortgage was with possession, and the mortgagee could recover possession if he was dispossessed. If by his own laches he has not got produce by way of interest, he cannot claim damages in the form of interest from us. He may have his remedy against his mortgagors.

Manekshah J. Tuleyarkhan, for the respondent (plaintiff).—The transaction in dispute cannot be said to be a usufructuary mortgage, because in a usufructuary mortgage the principal as well as the interest is paid out of the usufruct. Possession must, therefore, remain with the mortgagee till the principal and interest are paid off. In the present case we are not in possession. The transaction in dispute is, no doubt, a mortgage, and we as mortgagee are entitled to recover the debt by selling the mortgaged property. We should not be left to the mercy of the mortgagor, and should not be asked to receive the debt whenever the mortgagor may choose to pay. At present we do not get any produce or interest, and there is no chance of our recovering the debt if it be held that we are not entitled to sell the property.

JUDGMENT.

SARGENT, C.J.—The mortgage in question is a usufructuary one under which the mortgagee was to take possession of the land and enjoy the profits in lieu of interest, and the mortgagor **[298]** was to be at liberty to recover possession in any year on payment of the sum of Rs. 700. There was no promise by the mortgagor to pay the money. It was simply provided that until he did pay the amount, the mortgagee was to retain the property. Under these circumstances, we think it was not the intention of the parties that the land should be sold, and that the deed contained a special agreement which took the case out of the provisions of cl. 3 of s. 15 of Reg. V of 1827, which was the law in force at the time the mortgage was effected.

We must, therefore, reverse the decrees of the Courts below and reject the claim, with costs on the plaintiff throughout.

Decree reversed.

(1) 16 B. 303.

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APPEL-
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20 B. 298.

20 B. 298.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

PREMJI JIVAN BHATE, DECEASED, BY HIS HEIR AND EXECUTRIX OF HIS WILL HIS WIDOW MANEKBAI *(Original Plaintiff)*, *Appellant* HAJI CASSUM JUMA AHMED (*Original Defendant*), *v. Respondent.** [13th February, 1895.]

Encroachment—Stranger building on land of another - Acquiescence of owner—Standing by—Delay of owner in suing for possession—Form of decree where owner succeeds in suit.

It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building.

Delay by the owner in bringing a suit is not in itself sufficient to create an equity in favour of the person spending money on the land so as to deprive the owner of his strict rights.

The decree made by the High Court was that the plaintiff should recover the land with liberty to the defendant forthwith to commence to remove his building and to restore the property to the condition in which it was when he took possession, the same to be completed within one year from date of decree. In default, the plaintiff to be at liberty to remove the building at the expense of the defendant.

[F., 28 B. 298 = 6 Bom. L.R. 86 ; 9 Bom. L.R. 401 (408) ; 2 N L.R. 4 (5); **R.**, 18 Ind. Cas. 799=63 P.R. 1913=113 P.L.R. 1913=112 P.W.R. 1913 ; **D.**, 32 B. 32=9 Bom. LR.1181 ; 10 A.L.J. 118=16 Ind. Cas. 633.**]**

[299] THIS was a second appeal from the decision of W. H. Crowe, District Judge of Poona, amending the decree of Rao Saheb Vaman M. Bodas, Subordinate Judge of Havli.

Suit for the recovery of certain land and for the removal of a building which the defendant had erected upon it. The plaintiff complained that, by the building, 116 yards of his land had been appropriated by the defendant in October, 1888, and February, 1889. The suit was brought in 1890. Notice of encroachment was given to the defendant in March, 1889.

The defendant answered that the ground in dispute belonged to him and had been in his *vahivat* (management); that the suit was time-barred; and that the plaintiff had not objected to the building during the progress of the work.

The Subordinate Judge passed a decree for plaintiff directing the defendant to remove that part of his building which stood on the land in dispute and to deliver the land to the plaintiff. He also issued an injunction restraining the defendant from in any way interfering in future with the plaintiff's enjoyment of the land.

On appeal by the defendant the District Judge, relying on *Benode Coomaree Dossee* v. *Soudaminey Dossee*(1) and *Navalchand* v. *Amichand*(2), held that as the plaintiff failed to explain the delay of a year between the notice of encroachment to the defendant and the institution of the suit, she was entitled only to recover damages and not to have the building

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* Second Appeal, No. 397 of 1893.

(1) 16 C. 252.

(2) P.J. (1889), 259.

removed. He, therefore, remanded the case to the Subordinate Judge for the determination of the amount of damages, and the Subordinate Judge having fixed the amount at one hundred rupees, the Judge amended the decree by ordering the defendant to pay that amount to the plaintiff.

The plaintiff preferred a second appeal.

Macpherson (with *Gangaram B. Rele*), for the appellant (plaintiff).—There was no unreasonable delay on the plaintiff's part, and the defendant had notice of our objection to the encroachment. This is not a case for damages. The defendant intentionally **[300]** encroached on our land; therefore, he is not entitled to any consideration from the Court. His building should be removed and our land should be restored to us—*Dattatraya* v. *Shridhar* (1); *Narayan* v. *Bholagir* (2); *Jamnadas* v. *Atmaram* (3); *Rama* v. *Raja* (4); *Ramsden* v. *Dyson* (5).

Shivaram V. Bhandarkar, for the respondent (defendant).—The plaintiff ought to have brought the suit within a reasonable time after our encroachment began. It was not necessary for her to wait for one year after the second encroachment in 1889. Our building was completed before the suit was filed, and the plaintiff stood by during all that time. She having delayed to file the suit, there is now no equity in her favour. The decree for damages is the proper decree under the circumstances of the case—*Benode Coomaree Dossee* v. *Soudaminey Dossee* (6); *Navalchand* v. *Amichand* (7).

JUDGMENT.

SARGENT, C.J.—It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land—*Ramsden* v. *Dyson* (5); *Plimmer* v. *Mayor &c., of Wellington* (8); and see *Dattatraya* v. *Shridhar* (1). This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building—*Narayan* v. *Bholagir* (2).

As to delay in bringing a suit, we agree with the Madras High Court that it is not in itself sufficient to create an equity in favour of the person spending money on the land and to deprive the owner of his strict rights —*Rama* v. *Raja* (4). In the present case there are no circumstances creating such an equity, but on the contrary the plaintiff's notice to the defendant in March, 1889, informed him that he (the defendant) was laying the **[301]** foundations of his new chawl on his (the plaintiff's) land and required him to remove them. The cases relied on by the District Court are all light and air cases and have no bearing on the present question. As the removal of the building is optional with the defendant, and is for his benefit, a mandatory injunction to the defendant is not the right order to make.

The decree of the Court below must be, therefore, reversed, and an order made that the plaintiff do recover the land in question with liberty to the defendant forthwith to commence to remove his building on the said land and to restore the property to the condition in which it was when

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(1) P.J. (1892), 348.
(2) 6 B. H.C.R. A.C.J. 80.
(3) 2 B. 133.
(4) 2 M.H.C.R. 114.
(5) L.R. 1 H.L. 129 (170).
(6) 16 C. 252.
(7) P.J. (1889), 259.
(8) L. R. 9 App. Ca. 699 (710).

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he took possession. The same to be completed within one year from the date of this decree. In default, the plaintiff to be at liberty to remove the same at the expense of the defendant. Plaintiff to have his costs throughout.

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ORIGINAL CIVIL.

Before Mr. Justice Starling.

THE ADVOCATE GENERAL OF BOMBAY (*Plaintiff*) *v.* MOULVI ABDUL KADUR JITAKER AND OTHERS, (*Defendants*).*

[27th July, 1895.]

Taxation—Charity suit—Defendants' costs as between attorney and client ordered out of the charity estate—Charges allowed and disallowed as against estate—Discretion of Taxing Master.

In a suit brought by the Advocate General at the instance of relators for the purpose of removing the defendants from the position of directors of a Mahomedan mosque, and for administration of the property of the mosque, &c., the decree ordered that the defendants should have their costs taxed as between attorney and client out of the charity funds. The attorneys of the defendants accordingly brought in their bill of costs, and in taxation it was contended that they should be allowed out of the charity funds all the sums which the Taxing Master certified they should pay their attorneys.

Held, that where the Taxing Master decided that certain items allowed against the defendants should not come out of the charity funds, his decision could not be disturbed.

It does not follow that because a charge is proper to be allowed between an attorney and a client, that the client, if a trustee, should be allowed that charge out of the trust funds.

[302] APPEAL from the Taxing Master.

This suit was brought by the Advocate General at the relation of certain persons to remove the defendants from the position of directors of a Mahomedan mosque in Bombay and for administration of the property belonging to the mosque, &c., &c. For a report of the trial, see I. L. R., 18 Bom., 401.

The decree ordered that the defendants (other than defendant No. 5) should have their costs out of the estate taxed as between attorney and client. Their attorneys sent in their bill of costs to the Taxing Master, who refused to allow out of the estate certain items which he allowed as between the defendants and their attorneys. The attorneys thereupon applied for and obtained his certificate, and the matter now came, by way of appeal, before the Judge in chambers.

Macpherson (Acting Advocate General) in suppcrt of the decision of the Taxing Master.

Inverarity, for the defendants, *contra*.

JUDGMENT.

STARLING, J.—This was a charity suit brought in regard to the funds of the Juma Masjid in Bombay. By the decree the first, second, third, fourth, sixth, seventh and eighth defendants were allowed their costs, taxed as between attorney and client, out of the mosque funds. Their

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* Suit No. 656 of 1891.

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attorneys sent in their bill to the Taxing Master for taxation, and he has disallowed certain items in the bill which amount in the whole to a large sum. Some of the items have been disallowed altogether as between the attorneys and their clients the trustees, and some have been allowed between the parties, but disallowed against the mosque funds. Objections have been taken to the disallowance, by the Assistant Taxing Master, of all these items. And I have now to determine whether his certificate should be varied in any way. [After dealing with the items which had been disallowed as between attorney and client, His Lordship continued :—]

All the other items which have been allowed in favour of the attorneys as against the defendants have been either reduced in amount or disallowed entirely as against the mosque funds, and it is contended that as the defendants were ordered to have their **[303]** costs, as between attorney and client, out of the mosque funds, they ought to be allowed all the sums which the Taxing Master certified they ought to pay their attorneys. The Acting Advocate General as representing the charity said he thought the defendants were entitled to what they asked ; as, although the expenditure was high, he did not think it excessive, and great good had been done by the defendants for the charity. He, however, only represents the charity officially, and it would be difficult to hold that his consent was sufficient to bind the charity and to release me from the duty of determining whether the Master was right in disallowing what he did. In deciding this question I am, therefore, under the disadvantage of not having heard any argument in support of the Taxing Master's decision.

That trustees cannot always obtain from their *cestui que trustent* all that they pay the attorney they employ, is evident from the cases of *Johnson* v. *Telford* (1), *Allen* v. *Jarvis* (2) and *Brown* v. *Burdett* (3) ; but the case which seems to me to govern the present case is *In re Brown* (4), referred to in *In re Robertson* (5). In the former case Lord Romilly, M.R., says : "If a person, being a trustee, chooses to employ a solicitor for the purpose of conducting the affairs of the trust, which, of course, the solicitor is well aware of, there is a distinction between his employing that same solicitor for exactly similar purposes with regard to which he is not a trustee. Suppose for instance that he is not a trustee, but simply a client, and that he says to the solicitor, 'I wish you would make for me, or procure for me, copies of such and such deeds, and I want to have them fully explained to me and I come to you for that purpose.' The solicitor tells him 'You can have them if you wish, but they are not at all wanted, they are of no species of use.' The client says 'Never mind, I require it to be done.' When the bill is taxed, and that fact is stated, the client cannot complain. But take the case where he is a trustee. * * There it is the duty of the solicitor to tell him very well, it shall be done, but you must understand that this is not required for the purposes of the administration of the trust ; you cannot charge these costs **[304]** against your *cestui que trust*, and I cannot put them into the bill of costs which will have to be paid out of the trust estate ; therefore, if you require it to be done, you must pay for it personally, and you will understand it is a personal matter between you and me.' * * I think, therefore, it is the duty of the solicitor to tell the trustee. 'This is not wanted for the administration of

(1) 3 Russ. 477. (2) L. R. 4 Ch. 616. (3) 40 Ch. D. 244 (254).
(4) L. R. 4 Eq. 464. (5) 42 Ch. D. 553 (558).

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the trust, and if you insist upon its being done, it is for your private convenience, and, therefore, cannot be charged against the trust estate.' So regarding it I have looked at this bill and I have no doubt that the client did order it all; but then the application of the rule I have mentioned appears to me to be necessary, and then comes this question, which is properly a question for the Taxing Master to determine, is it proper or necessary or fit for the administration of the trust that certain things should be done?" The Master of the Rolls then goes on to pay that the question of *quantum* and *quoties* is one in which the opinion of the Taxing Master as to how much of the trustees' bill ought to be charged against the *cestui que trustent* ought to be accepted.

I think I must follow this decision and refuse to disturb the decision of the Taxing Master that the items now under discussion ought not to come out of the mosque funds.

Attorneys for the Advocate General:—Messrs. *Ardesir, Hormasji and Dinsha.*

Attorneys for the defendants:—Messrs. *Nanu and Hormasji.*

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20 B. 304.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

SAMIBAI (*Plaintiff*) *v.* PREMJI PRAGJI (*Defendant*).*

[31st August, 1895.]

Civil Procedure Code (Act XIV of 1882), *s.* 375—*Agreement adjusting suit—Power of Court to determine fact of agreement having been made—Arbitration—Reference of suit to arbitration—Award—Submission and award filed as an agreement—Civil Procedure Code (Act XIV of* 1882), *s.* 525—*Practice—Procedure.*

The plaintiff sued the defendant to recover certain property of which she alleged he had taken possession. Subsequently the "matters in difference in the said suit" were by a signed submission paper referred to arbitration. An award was made [305] ordering the defendant to pay to the plaintiff Rs. 6,000, and cancelling a certain account. It also decided the claim of the plaintiff to two ornaments, which was a matter not included in the "submission paper," but had been verbally referred to the arbitrator in the course of the arbitration. The plaintiff now applied that the submission and award should be filed as an agreement adjusting the suit under s. 375 of the Civil Procedure Code (Act XIV of 1882), or, in the alternative, that the award should be filed under s. 525. The defendant disputed the agreement and denied the validity of the award.

Held, that under s. 375 of the Civil Procedure Code, the Court had jurisdiction to determine whether, as a fact, the alleged agreement adjusting the suit has been made, and if it was satisfied that it has been made, to record it. Whether that fact should be tried on affidavit or by oral evidence, is entirely for the discretion of the Court.

The Court accordingly, holding that this suit had been adjusted by the submission and award, ordered the same to be filed and the adjustment recorded.

Held, further, that the Court could make no order as to that portion of the award which dealt with matter not relating to the subject-matter of the suit. A separate application should be made with regard to the ornaments.

[F., 7 A.L.J. 778=6 Ind. Cas. 857; R., 21 B. 335; 24 C. 908 (F.B.)=1 C.W.N. 597; 26 B 76=3 Bom.L.R, 431; 33 B. 69=1 Ind. Cas. 622=10 Bom.L.R. 366; 12 C.P.L R. 55 (56); 9 Ind. Cas. 194=17 P.R. 1911=50 P.L.R. 1911=200 P.W.R 1911.]

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* Suit No. 40 of 1895.

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THE plaintiff and her sister Gomti were the only children of one Kanji Khimji who died in October, 1888, leaving them his only heirs and legal representatives. Kanji died possessed of a considerable amount of moveable and immoveable property.

On the 26th January, 1895, the plaintiff filed this suit against the defendant, who was her brother-in-law, the husband of her sister Gomti, alleging that he had taken possession of all Kanji's property on his death and that Gomti had died childless and intestate. The plaintiff claimed to recover from the defendant all the property left by her father Kanji, save such portion as was disposed of by Gomti during her life.

On the 30th March, 1895, the parties to the suit signed a document in the following terms, submitting the matters in difference to the arbitrators named therein :—

"To Thakur Versey Karumsey and Thakur Mowji Premji Tulsidas written by the undersigned Bai Samibai, wife of Thakur Walabhdas Hurry, and Thakur Premji Pragji, to wit: I, Bai Samibai, have filed a suit No. 40 of 1895, in the Bombay High Court against Thakur Premji Pragji. We, Bai Samibai and Thakur Premji Pragji, have appointed you sole arbitrators to decide the matters in difference in the said suit, and we and our heirs bind ourselves to abide by such orders as you both persons may make. Whatever decision shall be made by you shall be accepted by us two persons in Court. Your decision on the above matter should be made in two months.

"The 30th March, 1895.

[306] The time originally fixed for making the award was extended to the 1st July, and on the 30th June, 1895, the said arbitrators made their award as follows :—

To Bai Sami, wife of Thakur Walabhdas, dated the 7th of Asad Sud, 1951, the 30th June, 1895.

"We, the undersigned Thakur Versey Karumsey and Thakur Mowji Premji Tulsidas, (write as follows) :—Bai Sami, wife of Thakur Walabhdas Hurry, has filed a suit, No. 40 of 1895, against Thakur Premji Pragji in the Bombay High Court. We were appointed arbitrators to decide the questions relating to the subject. Having heard the arguments of both parties we give (our) decision as follows :—

"1. Thakur Premji Pragji shall pay to the plaintiff, Bai Sami, Rs. 6,000, namely six thousand, within 8 days from this date.

"2. Thakur Premji Pragji shall deliver to Bai Sami the *chakur* and *chakri* belonging to Bai Sami.

"3. The account of Rs. 2,000, which Thakur Premji Pragji has given to Bai Sami at Jamnagar in a book, shall be considered as cancelled. Dated the 7th of Asad Sud, 1951, the 30th June, 1895."

On the 17th July, 1895, the plaintiff applied by petition to have the award recorded as an agreement under s. 375 of the Civil Procedure Code (Act XIV of 1882) or filed as an award under s. 525.

The following was the concluding paragraph of the petition : —

"The plaintiff submits that the said submission and award are an agreement wholly adjusting the aforesaid suit, and prays that the same may be recorded under the provisions of s. 375 of the Civil Procedure Code, and a decree passed by this Honourable Court in accordance therewith, and in the alternative the plaintiff prays that the said award may be filed under the provisions of s. 525 of the said Code, and that all necessary directions may be given in that behalf."

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On the 22nd July, 1895, the plaintiff served notice on the defendant calling on him to show cause "why the submission and award should not be filed as an agreement wholly adjusting the above suit, or why, in the alternative, the said award should not be filed."

The defendant in his affidavit contended that the award was not made until after the time fixed by the submission paper; that it included matters not referred to arbitrators and did not decide all the matters referred; that it was made without making due inquiry and without taking accounts; that it was made under the influence of the plaintiff's husband; and that the defendant [307] was unable to carry out the award, as he had not recovered all the moneys belonging to the plaintiff's father Kanji Khimji.

Inverarity, for the defendant, showed cause.—The agreement is disputed, and the Court cannot try whether the suit has been adjusted by agreement. The decision in *The Goculdas Dulabdas Manufacturing Company* v. *James Scott* (1) does not apply where a dispute has been referred to arbitration. If the Court deals with the matter, it should take oral evidence on the points raised by the defendant. Section 525 of the Code does not apply to this case. That section only applies when no suit is in existence.

Lowndes, for the plaintiff, *contra*.—The submission and award constitute an agreement adjusting the suit which may be recorded under s. 375—*Dagdusa Tilakchand* v. *Bhukan Govind Shet* (2).

JUDGMENT.

STARLING, J.—The plaintiff in this suit seeks as the surviving heiress of her father, one Kanji Khimji, to recover from the defendant the estate of her father alleged to be in his hands, and for discovery and accounts, if necessary. The defendant in his written statement denies his own liability; denies the title of the plaintiff; alleges that she, if entitled to anything, is only entitled to what was specifically bequeathed to her by her father's will, and that there had been an adjustment between the defendant and the plaintiff, and that in accordance therewith an account had been opened in his book in her name and Rs. 2,000 credited to her therein.

On the 30th March, 1895, the plaintiff and the defendant by a submission paper referred all matters in difference in the suit to the decision of two arbitrators, and on the 30th June, 1895, these two arbitrators published their award, whereby they directed the defendant to pay to the plaintiff the sum of Rs. 6,000 and ordered that the account of the plaintiff in the defendant's books should be cancelled. They also decided the plaintiff's claim to two ornaments said to be in the possession of the defendant which was not referred to them by the submission paper, but which was said to have been verbally referred to them during the course of the arbitration.

[308] On the 18th July, 1895, the plaintiff presented a petition praying that the submission and award might be recorded under s. 375 of the Civil Procedure Code, as an adjustment of the suit, or else to be filed under the provisions of s. 525 of the Civil Procedure Code. The usual notices were issued, and the matter came on for argument on the 31st August, when the defendant contended that there was no jurisdiction to file the award, because he did not now admit that it was a valid one, and made

(1) 16 B. 202.

(2) 9 B. 82.

certain allegations in support of his contention that it was not valid and binding upon him.

The first question to be decided is whether when one of the parties to a suit sets up an agreement whereby, it is alleged, the suit has been adjusted, but that agreement is disputed by the other, the Court has jurisdiction under s. 375 to determine the fact whether such agreement has been come to, and, if it is satisfied that such is the case, to record it. The point has been decided several times in Madras and Bombay in the affirmative—*Karuppan* v. *Ramasami* (1); *Appasami* v. *Manikam* (2); *Ruttonsi Lalji* v. *Pooribai* (3); and *Goculdas Bulabdas Manufacturing Company* v. *James Scott* (4).

I agree with the decisions in these cases rather than with that in *Hara Sundari* v. *Kumar Dukhinessur* (5). Section 375 does not say "if the parties agree that a suit is adjusted," nor "if the parties certify to the Court that a suit has been adjusted," but "if a suit *be* adjusted," which is a fact which is capable of being proved although one party may deny it. It is a fact which is alleged in the course of the suit, and which, in my opinion, ought to be tried by the Court in the same way as any other relevant fact which is alleged and denied in the course of the suit. Whether it should be tried on affidavit, or by oral evidence, is a matter, it seems to me, entirely for the discretion of the Court. If on such trial the Court finds that the suit has been adjusted, then it is the duty of the Court to record the act or document by which such adjustment is arrived at, and to pass a decree in accordance therewith as far as it relates to the suit.

[309] As regards that portion of the award which does not relate to the subject-matter of the suit, if the application that it should be filed had been a separate one and had been wrongly endorsed as in this suit, or if it had not been numbered at all, I should have had no hesitation in ordering the endorsement to be amended, or the application to be numbered as a suit. The numbering is the act of the Court through its officer, and is a mere formal matter intended simply for the convenience of reference, and has nothing to do with the merits of the case; and if an application has been made to the Court otherwise in proper form, and due notice has been given to the opposite party, he can sustain no damage through the application not having being numbered or having been wrongly numbered. This case, however, is different. A double application has been made in this suit, and it would be exceedingly inconvenient to have among the records of this suit those of another, and I shall, therefore, make no order on the application under s. 525 of the Civil Procedure Code, but leave the plaintiff to make a proper separate application with regard to the ornaments, or else bring a suit as she may be advised.

Having held that I have power to enquire whether there has or has not been an adjustment of this suit, the next thing I have to do is to determine that fact. [His Lordship then discussed the affidavits and continued:—] Holding that this suit has been adjusted by the submission and award, I order the same to be filed and the adjustment to be recorded, and do also order that the defendant do pay the plaintiff's costs of this application and order, and I pass a decree for the plaintiff for the sum of Rs. 6,000, and I order that the account for Rs. 2,000 in

(1) 8 M. 482. (2) 9 M. 103. (3) 7 B. 304.
(4) 16 B. 202. (5) 11 C. 250.

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favour of the plaintiff in books given by the defendant to the plaintiff at Jamnagar be cancelled. As to the costs of the suit, I can make no order. The suit (which, of course, includes the costs) has been settled by the adjustment, and the award saying nothing about costs, I must assume that the Rs. 6,000 includes everything that can possibly be claimed in the suit, including costs.

Attorneys for the plaintiff :—Messrs. *Bicknell, Mervanji and Motilal.*
Attorneys for the defendant :—Messrs. *Matubhai and Jamietram.*

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20 B. 310.

[310] ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

HORMUSJI NOWROJI DAVUR (*Plaintiff*) *v.* DADABHOY NOWROJI DAVUR AND OTHERS (*Defendants*).* [30th September, 1895.]

Deed of settlement—Trust—Beneficiary—Proviso for forfeiture of interest in case of insolvency—Insolvency of beneficiary—Subsequent withdrawal of petition in insolvency—Effect of withdrawal of petition.

By a deed of settlement executed by the plaintiff's father, certain property was conveyed to trustees upon trust to recover the income thereof and to pay it to the settlor for life, and after his death to his seven sons, in equal shares, for the maintenance of them and their respective families. The deed provided that, in case any beneficiary became insolvent, "or do or suffer anything whereby his share or any part thereof would through his act or default or by operation of law" become vested in or payable to other persons, then the share and interest of such person should cease, and for the remainder of his life should be paid for the maintenance and support of the family of such persons. In July, 1894, the plaintiff, who was one of the sons of the settlor, filed his petition in insolvency, but on the 5th December, 1894, he withdrew it.

Held, that the forfeiture clause did not take effect, and that the plaintiff was entitled to be paid by the trustees his share of the income of the trust property.

ONE Nowroji Ardeshir Davur, a Parsi inhabitant of Bombay, the father of the plaintiff and the first defendant, by a deed dated 24th January, 1877, reciting that he was desirous of settling certain lands, &c., for the benefit of himself and his seven sons, conveyed the said lands, &c., to himself and three others, *viz.*, his eldest son Dadabhoy (the first defendant), Mancherji Sorabji Wadia and Dadabhoy Bomanji Mottabhoy as trustees upon trust to receive the income thereof and to pay the same to himself for life, and after his death to his seven sons in equal shares for the maintenance of them and their respective families. The said deed contained the following clause :—

"And it is hereby declared that in case any person entitled under the trusts herein contained to any share or interest in the residue of the income of the said trust premises shall become a bankrupt or insolvent debtor within the meaning of some Act of Parliament or of the Legislative Council of India or Bombay for the relief of insolvent debtors, or shall convey, assign, charge or incumber such his or her share of the residue of the said income of the said trust premises, or shall do or suffer anything whereby the same or any part thereof would through his or her act or default or by **[311]** operation or process of law or otherwise if then belonging absolutely to him or her become vested in or payable to any other person or persons, then the share and interest of any such person

* Suit No. 146 of 1895.

in the residue of the said income shall cease and determine and the trustees or trustee for the time being of these presents shall during the remainder of the life of the person whose share and interest in the said residue of the said income shall have so determined, pay such share and interest to and for the maintenance and support of the wife and the son of the said person."

On the 10th July, 1894, the plaintiff, who was one of the sons of the settlor, filed his petition in the Court for the Relief of Insolvent Debtors in Bombay, but on the 5th December, 1894, he withdrew it.

In March, 1895, the plaintiff brought this suit against the trustees of the deed (defendants Nos. 1 and 2) praying for a declaration that he was entitled to be paid 1/7th of the income of the trust premises, and that the trusts created in his favour by the said deed might be enforced, and for a declaration that he had not forfeited his right under the said deed by filing his petition in insolvency.

The first and second defendants were the trustees of the deed at the date of suit, and the third and fourth defendants were the wife and son of the plaintiff.

At the hearing the questions discussed were—(1) whether on his becoming insolvent the plaintiff's interest under the deed had ceased, (2) whether on the withdrawal of his petition his interest under the deed had revived, and (3) whether the trustees should pay the plaintiff's share to him or to the other beneficiaries under the deed.

Inverarity and *Lowndes*, for plaintiff.—The plaintiff is entitled. The deed gives him the share for life. Any conditions inconsistent with the gift are void—*Brandon* v. *Robinson*(1); *Bradley* v. *Peixoto*(2); *In re Machu* (3). Davidson's Conveyancing, Vol. III, Part 2, p. 797, shows the proper form to be adopted for the alleged purpose of the settlor—Tudor's Leading Cases on Real Property (3rd Ed.), 968. On the dismissal of the petition the vesting order became null and void—Section 7 of the Insolvent Act (Stat. 11 and 12 Vic., c. 21); *White* v. *Chitty* (4). There was no **[312]** forfeiture on insolvency—*Lloyd* v. *Lloyd* (5); *Ancona* v. *Waddell* (6); *Robertson* v. *Richardson* (7); *In re Parnham's Trusts* (8); *In re Otway* (9).

Macpherson (Acting Advocate-General) and *Scott*, for first and second defendants (trustees):—The plaintiff's interest ceased on his insolvency—*Dommett* v. *Bedford* (10); *Joel* v. *Mills* (11); *Hurst* v. *Hurst* (12); *Dugdale* v. *Dugdale* (13); *Metcalfe* v. *Metcalfe* (14).

JUDGMENT.

B. TYABJI, J.—This suit was filed by the plaintiff Hormusji Nowroji Davur on the 22nd March, 1895, for the purpose of having it declared that the plaintiff is entitled to be paid by the first and second defendants 1/7th of the net residue of the rents of the trust premises mentioned in the plaint and also for a declaration that the plaintiff has not forfeited his rights and interests under the indenture of trust in the plaint mentioned, and further that the first and second defendants may be ordered to account for the rents received by them since the last distribution of rents among the *cestuis que trust*, and that the sum due to the plaintiff may be ascertained and paid to him.

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(1) 18 Ves. 429 (433). (2) 3 Ves. 824. (3) 21 Ch. D. 838.
(4) L.R. 1 Eq. 372. (5) L.R. 2 Eq. 722. (6) 10 Ch. D. 157.
(7) 30 Ch. D. 623. (8) L.R. 13 Eq. 413. (9) 64 L.J. Ch. 529.
(10) 6 T.R. 684. (11) 3 Kay and J. 458. (12) 21 Ch. D. 278.
(13) 38 Ch. D. 176. (14) L.R. (1891), 3 Ch. 1.

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The undisputed facts of the case are that one Nowroji Ardeshir Davur, the father of the plaintiff, settled certain properties upon certain trusts by deed of settlement dated 24th January, 1877 (Ex. A). The said settlor died in the year 1884, and the first and the second defendants are the present trustees of the said indenture. The trust-deed directs that the trustees should stand possessed of the trust premises as follows:—

"Upon trust to receive the income thereof, and thereout in the first place to re-imburse themselves or pay and discharge all the costs and expenses incurred in or about the administration of the trusts, and subject thereto upon trust to pay the residue of the said income of the said trust premises unto the said Nowroji Ardeshir Davur for his life, and after the decease of the said Nowroji Ardeshir Davur upon trust after such reimbursements and such payment of such costs and expenses as aforesaid to pay the said residue of the said income unto Dadabhoy Nowroji Davur, Nanabhoy, Mancherji, Hormusji, Dorabji, Kharsedji and Ardeshir Nowroji Davur in equal shares as tenants-in-common for the maintenance of Dadabhoy Nowroji Davur, Nanabhoy, Mancherji, Hormusji, Dorabji, Kharsedji and Ardeshir Nowroji Davur and their [313] respective families * * * Provided always and it is hereby declared that in case any person entitled under the trusts herein contained to any share or interest in the residue of the income of the said trust premises shall become a bankrupt or insolvent debtor within the meaning of some Act of Parliament or of the Legislative Council of India or Bombay for the relief of insolvent debtors, or shall convey, assign, charge or incumber such his or her share of the residue of the said income of the said trust premises, or shall do or suffer anything whereby the same or any part thereof would through his or her act or default or by operation or process of law or otherwise if then belonging absolutely to him or her become vested in or payable to any other person or persons, then the share and interest of any such person in the residue of the said income shall cease and determine, and the trustees for the time being shall during the remainder of the life of the person whose share and interest in the residue of the said income shall have so determined, pay such share and interest to and for the maintenance and support of the wife and the son of the said person."

The plaintiff filed his petition in the Bombay Insolvent Court (Ex. B) on the 10th July, 1894, but he withdrew it under the order of the Court (Ex. C) on 5th December, 1894, and sent a notice of demand (Ex. D) on the 1st February, 1895, and having received an unsatisfactory reply on the 12th February, 1895, he filed this suit, as already stated, on the 22nd March, 1895.

Under the circumstances the first question for my consideration is whether the proviso for the cesser of the plaintiff's interest under the trust-deed is void as repugnant, and, secondly, whether such proviso, if valid, took effect and came into operation on the insolvency of the plaintiff notwithstanding the fact that his petition was soon afterwards withdrawn as above stated.

It was contended on behalf of the plaintiff that the trust-deed contains a clear gift of a life-estate to the plaintiff, and that, therefore, the attempted defeasance of that estate by the proviso must be held void as being repugnant to the previous gift. Mr. Lowndes relied upon the case of *Brandon* v. *Robinson*(1) in which Lord Eldon said: "There is no doubt that property may be given to a man, until he shall become bankrupt. It is

(1) 18 Ves. 429 (433-34).

equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest, short of a life-estate, neither [314] the man nor his assignees can have it beyond the period limited." The general doctrine as to repugnant conditions being void is illustrated by the leading case of *Bradley* v. *Peixoto* (1).

The distinction, however, between the gift of a life-estate " until bankruptcy " and a life-estate with a proviso for its cesser or forfeiture on bankruptcy has been considered as too fine and technical, and has accordingly been disregarded in later cases, which construe the original gift and the proviso together as a conditional limitation; and I think it is now clear, on the authorities, that the estate will be determined in the event of bankruptcy, no matter which of the two forms of gift is adopted. I think this proposition is borne out by the case of *Wilkinson* v. *Wilkinson*(2) where the Master of the Rolls (Sir Thomas Plumer) said: " With respect to the validity of the proviso," (of forfeiture or cesser) "it is clear that a testator may thus modify the estate he gives; for though, in a case which has been mentioned, it is stated as the opinion of a very great Judge, that if an estate is given for life, the incidents of a life-estate cannot be taken away, and though it is better, therefore, when such a limitation is intended, to give the estate until bankruptcy or alienation, and not first to give it for life, and then to prohibit the attempt to alien, yet this is answered by considering that, in a will any condition or modification may be annexed which does not offend against any rule of law; and it is immaterial by what form of words the intention is executed, whether by a devise until the devisee shall have charged or encumbered it, or by a proviso with a limitation over upon such an event. Each mode is equally valid, and of the same effect." It is true that this was the case of a will and not of a deed *inter vivos*; but I don't think that any distinction can be usefully drawn on that ground, and I find that in Tudor's Leading Cases on Real Property (3rd Ed.), p. 978, the doctrine is laid down broadly in these words: " The principle " that of a grant conditions are void "would not be violated by a provision limiting over or making to cease a life-interest * * on the bankruptcy or insolvency of the owner, and it has accordingly been clearly held that a limitation over or a proviso determining a life-interest on bankruptcy is valid."

[315] I am of opinion, therefore, that the proviso for cesser is not invalid on the ground of repugnancy.

The question, however, arises whether the clause in question took effect in consequence of the plaintiff's insolvency on 10th July, 1894. It was contended on behalf of the plaintiff that inasmuch as the insolvency was annulled on 5th December, 1894, and that no distribution of the income took place during the insolvency, therefore, the forfeiture clause never took effect. The facts bearing on this point are that the last distribution of the trust fund prior to the insolvency was made on 31st March, 1894, and that the next distribution was not made till the 1st February, 1895, that is to say, till after the withdrawal of the plaintiff's petition. No distribution took place in the interval owing to the fact that there

(1) 3 Ves. 324.

(2) 3 Swanston, 515 (522).

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was no fund to distribute, as repairs to the trust premises were being made, and the income not being sufficient, money to the extent of about Rs. 1,200 had to be borrowed. Now, I think the cases of *White* v. *Chitty* (1), *Lloyd* v. *Lloyd* (2) and *Ancona* v. *Waddell* (3) clearly decide that if a bankruptcy is annulled in the interval between the time when the title to a fund accrues and the time when it becomes payable, the bankrupt is in the same position as if he had never been bankrupt, and is entitled to receive the fund if it has not been interrupted in the meantime. On the other hand, the cases of *In re Parnham's Trust* (4), *Robertson* v. *Richardson* (5) and *Otway* v. *Otway* (6) establish that forfeiture will not be prevented unless the annulment takes place before the fund becomes "an interest in possession" or at least before any payment in respect of it actually becomes due. I have had some difficulty in coming to a conclusion as to which of the two classes of cases the present case falls under. Considering, however, that the object of the settlor was to benefit his own sons directly and as long and as far as practicable; that all the authorities concur in laying down that the Court should strive to carry out the intention of the settlor as far as the law will permit; that no distribution was made during the pendency of the plaintiff's insolvency proceedings; that no money is proved to have been actually due or [316] become payable during the insolvency; that no claim or attempt to intercept it was ever made on behalf of the Official Assignee or by the donees under the limitation over; that the plaintiff was a free man and perfectly able to receive the money at the time when the next distribution did, or according to the deed could, take place, and considering that I should be better carrying out the intentions of the settlor by continuing the property direct to the plaintiff rather than to his wife and children —I have on the whole come to the conclusion that the mere filing of the petition and withdrawal of it within less than five months without the fund being in any way claimed or interrupted by the Official Assignee, or by the other donees is not such an insolvency as was contemplated by the settlor, and that the plaintiff's interest has not, therefore, ceased under the proviso, and that he is still entitled to his rights under the deed as if he had never become insolvent.

Attorneys for the plaintiff and third and fourth defendants.—Messrs. *Janardan and Ardeshir.*

Attorneys for defendants Nos. 1 and 2.—Messrs. *Payne, Gilbert and Sayani.*

(1) L.R. 1 Eq. 372.
(2) L.R. 2 Eq. 722.
(3) 10 Ch. D. 157.
(4) L.R. 13 Eq. 413.
(5) 30 Ch. D. 623.
(6) 64 L.J. Ch. 529.

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Before Mr. Justice B. Tyabji.

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TRIBHOVANDAS MANGALDAS AND PURSHOTAMDAS MANGALDAS (*Plaintiffs*) *v.* YORKE SMITH AND OTHERS (*Defendants*).*

[3rd, 7th, 8th and 10th October, 1895.]

Hindu law *— Undivided family — Ancestral property — Self-acquired property made ancestral by agreement—Operation of such agreement Effect of such agreement on accumulations and accretions of the property— Election — Estoppel—Minor members of undivided family—Interest of minors in property made ancestral by agreement—Minor bound by acts of his father as to such property.*

Sir Mangaldas Nathubhoy and his three sons Tribhovandas, Purshotamdas and Jugmohandas lived together as an undivided Hindu family. In 1881 the youngest son, Jugmohandas, filed a suit for partition (No. 444 of 1881) against his father and his two brothers. Being apprehensive that his other sons (the plaintiffs) might make a similar claim, Sir Mangaldas on the 28th June, 1881, entered into an agreement with **[317]** them (the plaintiffs) which recited (*inter alia*) that he (Sir Mangaldas) alleged that the only ancestral immoveable property belonging to him was the property specified in Part I of the sch. I annexed to the agreement, but that the plaintiffs (his sons) alleged that the immoveable property specified in Part II of that schedule was also ancestral property, and provided (*inter alia*) that, in consideration of the terms and conditions therein set forth, his sons (the plaintiffs) would not "claim a partition of the said property" during the lifetime of the said Sir Mangaldas.

The terms of this agreement were duly observed by the plaintiffs during their father's lifetime, and they continued to reside with him until his death.

In the interval, however, *viz.* in 1886, the partition suit (No. 444 of 1881), brought by Jugmohandas was decided, and by the decree it was declared that the immoveable property specified in sch. I of the aforesaid agreement was not ancestral property, but was the self-acquired property of Sir Mangaldas.

On the 9th March, 1890, Sir Mangaldas died, leaving a will dated 27th January, 1888. By this will he directed that his executors and trustees should take possession of all his property both ancestral and self-acquired, and, after referring to the agreement of the 28th June, 1881, and to the property in Part I of the schedule thereto, continued: "Whereas it has been decided by the Court of first instance, and such decision has been confirmed by the appellate Court, that such property (*i.e.*, the property in Part I) is not ancestral property, yet I am unwilling to disturb the said deed as between my said two sons, and I, therefore, hereby confirm the same." Then after making some other provisions he devised and bequeathed to his trustees "all the residue of my self-acquired property," and he direcred that such residue when ascertained and realized should be handed over to the Chancellor and Senate of the Bombay University to be devoted to the founding of scholarships.

As directed by the will, the executors took possession of all the testator's property, including the property in Part I of the said schedule. This last named property was subsequently, *viz.*, in December, 1890, conveyed by the executors to the plaintiffs.

The plaintiffs now sued the executors, contending that the properties in Part I of the schedule to the agreement being ancestral under the agreement and will, they (the plaintiffs) were entitled not only to them, but to all the accumulations and accretions thereof, which amounted in value to about ten lakhs of rupees. The University, on the other hand, contended that the accumulations and accretions formed part of the self-acquired property of the testator, and went to the University under the residuary clause of the will.

Held (1) that the effect of the agreement was to make the property specified in Part I of the schedule thereto, ancestral property as between the parties to the agreement.

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* Suit No. 114 of 1895.

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(2) That the agreement was confirmed by the will, and was binding on the executors.

(3) That, although the *corpus* of the said property became ancestral under the agreement, the accumulations and accretions thereof did not. They were the self-acquired property of the testator, and passed to the trustees under the residuary clause of the will.

[318] The plaintiffs had subsequently to the death of Sir Mangaldas taken possession of the properties in question, and had paid probate duty on them. The plaintiffs had taken conveyances from the executors and had given releases to the executors, and in a previous suit (No. 670 of 1892) the first plaintiff had in his evidence stated that he did not wish to dispute the will, and that he had elected to take under it.

Held, that by their conduct the plaintiffs had elected to take the properties in question under the will, and could not maintain a suit for an account of the rents and profits either under or in opposition to the will.

Held, also, that the sons of the plaintiffs (the minor defendants) were bound by the acts of the plaintiffs. The property in question was not really ancestral. It was only such for the purpose and by virtue of the agreement of 28th July, 1881, and the plaintiffs were entitled to waive it or rescind it if they pleased, and their sons could not prevent them from doing so.

[Reversed, 21 B. 349 ; D., 4 Bom. L.R. 257 (261).]

SUIT to recover accumulations and accretions of ancestral property.

The plaintiffs were the sons of Sir Mangaldas Nathubhoy, deceased. Defendants Nos. 1, 2 and 3 were the executors of the will of the said Sir Mangaldas Nathubhoy.

Defendants Nos. 4, 5, 6 and 7 were sons of the first plaintiff. Defendant No. 8 was the son of the second plaintiff. Three of these defendants, *viz.*, defendants Nos. 6, 7 and 8, were born after the death of Sir Mangaldas Nathubhoy (1). Defendant No. 9 was the third son of Sir Mangaldas Nathubhoy. Defendant No. 10 was the University of Bombay.

Sir Mangaldas Nathubhoy was a wealthy Hindu inhabitant of Bombay. Up to the year 1880 he and his three sons, *viz.*, the two plaintiffs and defendant No. 9, lived together as members of a joint and undivided Hindu family. In that year, however, disputes arose between the youngest son Jugmohandas (defendant No. 9) and his father, in consequence of which Jugmohandas ceased to live with the family and went to live apart.

In 1881 Jugmohandas brought a suit (No. 444 of 1881) against his father and two brothers for partition, alleging that the whole of his father's property was ancestral and that he was entitled to a share.

[319] Being apparently apprehensive that his other sons (the plaintiffs) might also separate from him and make a similar claim upon the property, Sir Mangaldas on the 28th June, 1881, entered into the following agreement with them :—

"Articles of agreement made and entered into this 28th day of June, 1881, between Sir Mangaldas Nathubhoy, Knight, C.S.I., of Bombay Hindu inhabitant, of the first part ; Tribhovandas Mangaldas, of Bombay Hindu inhabitant, son of the said Sir Mangaldas Nathubhoy, of the second part ; and Purshotamdas Mangaldas, also of Bombay Hindu inhabitant, son of the said Sir Mangaldas Nathubhoy, of the third part. Whereas the said Sir Mangaldas Nathubhoy has three sons only, *viz.*, the said Tribhovandas Mangaldas and Purshotamdas Mangaldas, parties

(1) Defendant No. 4 was born on the 19th October, 1886 ; defendant No. 5 on 25th June, 1888; defendant No. 6 on the 27th February, 1892 ; defendant No. 7 on the 1st September, 1893 ; and defendant No. 8 on the 9th October, 1894.

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hereto, and a third son named Jugmohandas Mangaldas. And whereas the said Jugmohandas Mangaldas has left the protection of the said Sir Mangaldas Nathubhoy and has gone to reside apart from the said Sir Mangaldas Nathubhoy and his said other two sons Tribhovandas Mangaldas and Purshotamdas Mangaldas and has preferred a claim against the said Sir Mangaldas Nathubhoy for large sums of money by way of allowance and otherwise, the validity of which claim the said Sir Mangaldas Nathubhoy disputes. And whereas the said Tribhovandas Mangaldas and Purshotamdas Mangaldas are living with the said Sir Mangaldas Nathubhoy as members of an undivided Hindu family. And whereas having regard to the fact that differences have arisen as aforesaid between the said Sir Mangaldas Nathubhoy and the said Jugmohandas Mangaldas and that in consequence thereof feelings of mutual distrust have arisen between the said Sir Mangaldas Nathubhoy and the said Tribhovandas Mangaldas and Purshotamdas Mangaldas, *and it is possible that the said Tribhovandas Mangaldas and Purshotamdas Mangaldas or one of them may desire to separate and live apart from the said Sir Mangaldas Nathubhoy and prefer a claim against the said Sir Mangaldas Nathubhoy* either for payment to them or him of sums of money by way of allowance or for partition of the ancestral property of the said Sir Mangaldas Nathubhoy. And whereas the said Sir Mangaldas Nathubhoy denies that such a claim on the part of his said two last mentioned sons or one of them could in such an event as aforesaid be enforced, and whereas the validity of any such claim could not be tried and decided in a Court of law without incurring great expense. And whereas in order to remove the aforesaid feelings of distrust and to promote feelings of mutual love and affection between the parties hereto and to *avoid litigation, expense and disputes and the possibility of a partition* of the ancestral property of the said Sir Mangaldas Nathubhoy being enforced in his lifetime and of such property consequently being to its great detriment divided into four parts it has been mutually arranged between the parties hereto that, in the event of the said Tribhovandas Mangaldas and Purshotamdas Mangaldas or either of them going to live apart from the said Sir Mangaldas Nathubhoy whether of their or his own accord or owing to the directions or request of the said Sir Mangaldas Nathubhoy in that behalf, they the said Tribhovandas Mangaldas and Purshotamdas Mangaldas or such one of them as shall so separate shall accept from the said Sir Mangaldas Nathubhoy and the said Sir Mangaldas Nathubhoy shall pay the sums hereinafter mentioned in full discharge of all claims which they or such one of them as aforesaid may have against the said Sir **[320]** Mangaldas Nathubhoy or his property during his life. *And whereas it is alleged by the said Sir Mangaldas Nathubhoy that the immoveable property mentioned and described in Part I of the schedule hereinunder written and marked with the letter A is the only ancestral immoveable property of or belonging to him the said Sir Mangaldas Nathubhoy.* And whereas it is alleged by the said Tribhovandas Mangaldas and Purshotamdas Mangaldas that the immoveable property mentioned and described in Part II of the said schedule A is also the ancestral immoveable property of the said Sir Mangaldas, but the said Sir Mangaldas Nathubhoy denies that the immoveable property mentioned and described in Part II of the said schedule forms part of his ancestral immoveable property, and it has been agreed *that the question as to whether such last mentioned immoveable property is or is not the ancestral property of the said Sir Mangaldas Nathubhoy should remain an open question between the parties to these*

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presents. Now these presents witness that, in order to effectuate the aforesaid objects and to carry out the said arrangement, and in consideration of the premises and of the covenants on the part of the said Tribhovandas Mangaldas and Purshotamdas Mangaldas hereinafter contained, he the said Sir Mangaldas Nathubhoy covenants and agrees with the said Tribhovandas Mangaldas and Purshotamdas Mangaldas and with each of them as follows :—

"1. That if they the said Tribhovandas Mangaldas and Purshotamdas Mangaldas or either of them separate and go to live apart from the said Sir Mangaldas Nathubhoy either of their own accord or in compliance with the wishes of him the said Sir Mangaldas Nathubhoy, then he the said Sir Mangaldas Nathubhoy will give to each of his said two sons who may separate from him a monthly allowance of Rs. 600, a portion of the family jewels including the jewels which he (such separating son) may have at present in his possession for the use of himself and his wife and children amounting in value to the sum of Rs. 10,000 and a portion of the family furniture including posts, pans, plate and other articles together with a horse and carriage, all which last mentioned effects shall together be of the aggregate value of Rs. 5,000.

"And these presents further witness that, in consideration of the premises and of the covenant agreement hereinbefore contained on the part of the said Sir Mangaldas Nathubhoy, they the said Tribhovandas Mangaldas and Purshotamdas Mangaldas do and each of them doth for himself, his heirs, executors and administrators, covenant and agree with the said Sir Mangaldas Nathubhoy and with each other :—

"1. That they will not respectively, until they respectively separate and live apart from the said Sir Mangaldas Nathubhoy, claim from him the said monthly allowance of Rs. 600, nor the jewels, furniture and other articles respectively abovementioned.

"2. That if the said Sir Mangaldas Nathubhoy shall express to them the said Tribhovandas Mangaldas and Purshotamdas Mangaldas, or either of them, his desire that they or he shall separate and live apart from him the said Sir Mangaldas Nathubhoy, they the said Tribhovandas Mangaldas and Purshotamdas Mangaldas or such one of them as shall be requested so to do by the said Sir Mangaldas Nathubhoy shall separate and live apart with their respective families from and independently of him.

"3. That they the said Tribhovandas Mangaldas and Purshotamdas Mangaldas will not at any time during the life of the said Sir Mangaldas Nathubhoy claim a partition of any of his property, ancestral or otherwise, moveable or immoveable, nor [321] during his lifetime claim or seek to exercise any rights over any of his property other than what is abovementioned, whether the said Jugmohandas Mangaldas shall or shall not claim a partition of the said property or seek to obtain his share therein and whether or not he shall succeed in such claim or in obtaining possession of his said share or any part thereof or in obtaining from the said Sir Mangaldas Nathubhoy any allowance, gift of money or property.

"4. That they will not respectively alienate their respective shares and interests in the ancestral property of Sir Mangaldas Nathubhoy or do suffer or omit any act or thing whereby the same shall or may be incumbered or transferred to third persons.

"5. That they will not respectively interfere, or attempt to interfere, in any way, with the mode in which Sir Mangaldas Nathubhoy may think proper to manage, invest or deal with his ancestral property unless he shall

take any steps with the object of or which may have the effect of depriving his sons the said Tribhovandas Mangaldas and Purshotamdas Mangaldas of their respective shares therein, but such exception shall not have the effect of depriving the said Sir Mangaldas Nathubhoy of making donations reasonable in amount and such as he has hitherto been in the habit of making out of such property.

"6. That, if in the event of the said Jugmohandas Mangaldas claiming and succeeding in obtaining a share of the ancestral property in the hands of the said Sir Mangaldas Nathubhoy, the whole of the ancestral property of the said Sir Mangaldas Nathubhoy shall be required to be divided actually or constructively into four parts, to be allotted one part to each of them the said Sir Mangaldas Nathubhoy, Tribhovandas Mangaldas, Purshotamdas Mangaldas and Jugmohandas Mangaldas, the said Tribhovandas Mangaldas and Purshotamdas Mangaldas shall re-unite their parts with that of the said Sir Mangaldas Nathubhoy in order that they the said Tribhovandas Mangaldas and Purshotamdas Mangaldas may in accordance with the terms of this agreement legally be entitled to share according to Hindu law if they survive the said Sir Mangaldas Nathubhoy the entire share which shall have actually or constructively as aforesaid fallen to the lot of the said Sir Mangaldas Nathubhoy to the exclusion of the said Jugmohandas Mangaldas.

"Provided always and it is hereby agreed by and between the said parties to these presents that the said monthly payments of Rs. 600 in the event of the same being made shall not be debited to the respective shares of the said Tribhovandas Mangaldas and Purshotamdas Mangaldas in the ancestral property of Sir Mangaldas Nathubhoy, but the value of the family jewels and the value of or the money paid for the furniture, horse and carriage which may be given to each of them the said Tribhovandas Mangaldas and Purshotamdas shall be debited to their respective shares in the aforesaid ancestral property: Provided also and it is hereby agreed that if the said Tribhovandas Mangaldas and Purshotamdas Mangaldas or either of them go to live separate as aforesaid and their or his aforesaid monthly allowance of Rs. 600 shall be withheld by the said Sir Mangaldas Nathubhoy, then the said Tribhovandas Mangaldas and Purshotamdas Mangaldas or either of them upon their or his allowance being stopped shall be at liberty to apply for a partition of the said property, but shall not otherwise be at liberty to compel the said Sir Mangaldas Nathubhoy to pay the said monthly sum of Rs. 600."

[322] Annexed to this agreement was a schedule which set forth all the immoveable properties (seventy-nine in number) referred to in the agreement. Part I of the schedule comprised fourteen properties situate in the Fort of Bombay, Warli and Girgaon. Part II of the schedule comprised sixty-five properties situate in Bombay, Thana, Poona, &c.

Subsequently to this agreement and until his death the plaintiffs continued to reside with Sir Mangaldas.

In 1886 the above-mentioned suit for partition (No. 444 of 1881) brought by Jugmohandas (defendant No. 9) was decided. By the decree therein made it was declared that a certain portion of the property claimed by Jugmohandas was ancestral property. But a large portion of the property claimed, including the fourteen properties in Part I of the schedule to the agreement, was held to be not ancestral but self-acquired by Sir Mangaldas, to which, therefore, Jugmohandas had no claim. The suit was referred to the Commissioner to take accounts of the partible property. For the report of the case see I. L. R., 10 Bom, 528.

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Sir Mangaldas died on the 9th March, 1890, leaving a will dated 27th January, 1888.

By his will he directed as follows :—

"I direct my executors and trustees immediately on my death to take charge of all my moveable and immoveable property of every description, *both ancestral and self-acquired*, and for such purpose I have given them a power of attorney to take possession of the same during my lifetime, and I direct them, except as is hereinafter specially provided, to retain the same after my death until it has been finally decided in the suit No. 444 of 1881 brought by my son Jugmohandas against me and my other two sons as to how much of my property is ancestral and what self-acquired, and after which they are to deal with the same in manner hereinafter directed."

Then after referring to the decree in suit No. 444 of 1881, which directed accounts to be taken, the will continued as follows :—

"And whereas the accounts are now being taken in the office of the said Commissioner for the purpose of carrying out the directions and orders contained in the said decree of the 30th July, 1885, and according to the above direction I have filed an account of the ancestral property on the 19th day of January, 1888. Now, I hereby direct that if the said suit or any appeal in connection therewith or the said proceedings in the Commissioner's office shall be pending and undetermined at the date of my decease, my said executors and trustees do and shall continue my defence to the said suit or to any appeal in which I am respondent, and also all proceedings in the said **[323]** Commissioner's office, and do and shall continue the prosecution of any appeal from any order or decree or from any report of the Commissioner, which may have been commenced by me, and do and shall also be at liberty in their discretion to institute and prosecute any appeal in the said suit from any report or order by the said Commissioner or hereafter to be made in the said suit by any Court as to them shall seem expedient in the interest of my separate estate, and to carry up such appeal to the appellate Court of Bombay, and shall be at liberty to defend all appeals whatever which may be instituted hereafter by the plaintiff or second and third defendants in the said suit from any such report or from any order by the said Commissioner or from any order or decree of any Court in India whether of original or appellate jurisdiction, and I do further direct that upon the final order for partition (if any) being made in the said suit my executors and trustees shall make over to my son Jugmchandas his fourth share in such of my property as shall be finally determined to be ancestral and to which he may be decreed to be entitled.

"I direct that as soon as such share has been made over to my son Jugmohandas Mangaldas in pursuance of such final decree, my said executors shall distribute the rest and residue of may ancestral estate including my one-fourth share therein amongst and for the benefit of my sons, *viz.*, Tribhovandas Mangaldas and Purshotamdas Mangaldas and their issue according to the rules of Hindu law, or shall make over the same undivided to them as co-parceners according as my said sons Tribhovandas Mangaldas and Purshotamdas Mangaldas shall then elect and determine.

"And whereas although I consider that I was in law justified in contending that none of the property of which I am in possession is ancestral property, I have yet in a certain indenture bearing date the 28th day of June, 1881, made between me of the first part, my son Tribhovandas of the second part and my son Purshotamdas of the third part, in order to promote feelings of mutual love and affection between me and my said

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sons and to avoid at the time litigation, expense and disputes admitted that the immoveable property mentioned and described in part I of the schedule, under the said indenture written (which is the immoveable property mentioned and described in the said schedule hereunder written) is ancestral property; and whereas it has been decided by the Court of first instance and such decision has been confirmed by the appellate Court that such property is not ancestral property, *yet I am unwilling to disturb the said deed as between my said two sons, and I, therefore, hereby confirm the same.* I direct that my said executors and trustees shall divide and distribute such part of my estate as is mentioned in the schedule hereto (except the property No. 14 in the said schedule) amongst and for the benefit of my two sons named, respectively, Tribhovandas Mangaldas and Purshotamdas Mangaldas, and their issue according to the rules of Hindu law. I devise and bequeath all my property at Girgaon Back Road and Khetvadi Road, as well as all the furniture, pictures, glass and crockery-ware and cooking utensils, that it may contain at the time of my death to my said executors and trustees upon trust for my son Tribhovandas and his heirs from the time of my death to allow him to occupy and use the same, and to enjoy the income thereof, and after the death of my said son Tribhovandas in trust to allow his widow to occupy and use the same and enjoy the income thereof, and after the death of my said son Tribhovandas in trust to allow his widow to occupy and use the same and enjoy the income thereof during her life; but if the said Tribhovandas Mangaldas **[324]** shall die without leaving male issue him surviving, then in trust (after the death of the survivor of them without leaving such male issue) to my son Purshotamdas and his heirs according to the rules of Hindu law.

"I devise my bungalow at Malabar Hill with its two separate compounds, out-houses and the furniture, pictures and cooking utensils, which shall be therein at the time of my death, unto my son Purshotamdas to be transferred to him twelve months after my decease.

"I devise all my property at Poona, moveable and immoveable, to my son Purshotamdas as an absolute devise, but the above devise to my said son Purshotamdas of my house and property at Malabar Hill and my property at Poona are only made on condition that he gives up to his brother Tribhovandas all his right and interest to the property or share in the property mentioned in the said schedule hereto, as piece of garden ground at Girgaon outside the Fort, and containing 12,000 square yards, and numbered 14 in such schedule hereto attached, being a portion of the ground under the bungalow and in the compound of my Girgaon residence, which is part of the subject-matter of the said deed of 28th June, 1881, and in the event of the said Purshotamdas not being willing to give up his claim to the said property, then I devise my said house and furniture at Malabar Hill and my said Poona property to my said son Tribhovandas."

Then after making various bequests the will gave the residue of the testator's self-acquired property to the University of Bombay as follows:—

"I devise and bequeath to my said trustees all the residue of my self-acquired property, both moveable and immoveable. I empower and direct my said trustees to sell and convert the same into money immediately after my decease and to recover all outstandings and to invest the proceeds in Government securities, and I direct that such conversion and investment shall, if possible, take place within six months after my decease and notwithstanding that the said suit No. 444 of 1881 shall be still pending, and that the said residue shall be unascertained, it being my

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wish that all the residue of my property shall be invested in Government paper so soon as possible after my decease. I direct my said trustees as soon as such residue has been finally ascertained and realized in manner aforesaid to devote the whole of the said residue to the founding of as many scholarships as possible at the Bombay University of the following description, and on the following conditions and to hand over all such residue to the Chancellor and Senate of the Bombay University on their agreeing to such conditions."

(Then followed the conditions).

In December, 1890, the executors agreed to deliver over to the plaintiffs such portions of the estate of Sir Mangaldas as were specifically or otherwise devised or bequeathed to them by his will, and (*inter alia*) they handed over the fourteen properties comprised in part I of the schedule, annexed to the agreement of the 28th June, 1881, and referred to in the above clause of the will.

[325] The plaintiffs now sued the executors, contending that the said fourteen properties being ancestral under the agreement and the will, they (the plaintiffs) were entitled not only to them but to all the accumulations and accretions thereof, which amounted in value to ten lakhs of rupees or thereabouts.

The University of Bombay (defendant No. 10) on the other hand claimed that the accumulations and accretions of the said properties formed part of the self-acquired property of Sir Mangaldas, and went to the University as part of the residue under the concluding clause of the will.

The following clauses of the plaint set forth the plaintiffs' claim :—

"9. The plaintiffs say that the executors of the said Sir Mangaldas have given possession to the plaintiffs of the said immoveable property mentioned in the said schedule hereto annexed and marked B as the ancestral property of the said Sir Mangaldas, but they have not delivered over to the plaintiffs the accumulations and accretions of and to the said ancestral property and which accumulations and accretions amount as the plaintiffs believe to the sum of rupees ten lakhs or more, on the ground that the same do not form a part of the said ancestral estate and that the same are or may be required for the purpose of paying the legacies directed to be paid by the said will, and that the same forms a part of the residue under the said will.

"10. The plaintiffs, however, charge and submit that the said Sir Mangaldas Nathubhoy had no power or authority to dispose of the said ancestral property or its accumulations or accretions as aforesaid, and that such ancestral property and its accumulations and accretions are and must be deemed to be entirely unaffected by the said will of the said Sir Mangaldas Nathubhoy and belong to the plaintiffs and their heirs.

"11. The plaintiffs' further charge and submit that on a true construction of the said will of the said Sir Mangaldas Nathubhoy neither the said ancestral property nor its accumulations or accretions have been disposed of to the prejudice of the plaintiffs and their heirs, and that the intention of the said Sir Mangaldas Nathubhoy was that the legacies and payments directed by his will should be paid out of his self-acquired property only, and not otherwise.

"12. The defendants, the University of Bombay, however, contend that the aforesaid accumulations and accretions form a part of the self-acquired property of the said Sir Mangaldas Nathubhoy, and they accordingly claim the said accumulations and accretions as a part of the residue under the residuary clause of the said will.

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"13. The plaintiffs, however, submit that the said contention is groundless and invalid in law, and that the plaintiffs and their heirs are entitled to the said accumulations and accretions as a part of the said ancestral property."

[326] The plaintiffs prayed (*inter alia*) as follows:—

"(1) That it may be declared that the will of the said Sir Mangaldas Nathubhoy is wholly inoperative and void so far as it purports to dispose of or to deal with the ancestral property, or any part thereof.

"(2) That it may be declared that as between the plaintiffs and the defendants (Nos. 4 to 8, the plaintiffs' children) Kissondas, Jamnadas, Goverdhandas, Ambadas, and Baba Purshotamdas on the one hand, and the executors of the said Sir Mangaldas Nathubhoy on the other hand, the said immoveable properties mentioned in the said schedule B and all their accumulations and accretions are ancestral property, and as such devolved upon the plaintiffs and their heirs according to Hindu law irrespectively of the said will.

"(3) That an account may be taken of the accumulations and accretions of the said ancestral property left by the said Sir Mangaldas Nathubhoy and come to the hands of his executors, and that such accumulations and accretions may be ordered to be handed over to the plaintiffs for the benefit of themselves and their issue as members of an undivided Hindu family.

"(4) That it may be declared that as against the plaintiffs and their heirs the said accumulations and accretions do not form a part of the self-acquired property of the said Sir Mangaldas Nathubhoy, and that no part thereof was or could be validly disposed of by the will of the said Sir Mangaldas Nathubhoy, and that no part thereof is or could be made available for paying any of the legacies directed to be paid by the said will.

"(5) That it may further be declared that the defendants, the University of Bombay, are not entitled to any part of the said accumulations and accretions, and that the same wholly belong to the plaintiffs and their heirs as aforesaid.

The executors put in a written statement in which they denied the plaintiffs' claim, and raised the various contentions which were subsequently discussed at the hearing.

The University of Bombay filed a merely formal written statement submitting its rights and the construction of the will to the Court, and at the hearing the counsel who appeared on its behalf withdrew after the issues were raised, and did not appear to argue the case.

The main points raised at the hearing were as follows:—

1. The properties comprised in part I of the schedule to the agreement of 28th June, 1881, having been declared by the decree in suit No. 444 of 1881 to be the self-acquired property of Sir Mangaldas Nathubhoy, what was the effect of the agreement of the 28th June, 1881, between him and his two sons (the plaintiffs) based upon his admission therein that these properties were **[327]** ancestral, and of the confirmation of that agreement by his will and the direction therein that the said properties should be divided and distributed between his two sons and their issue according to the rules of Hindu law?

2. Whether, if the *corpus* of the said properties became ancestral by virtue of the agreement confirmed by the will, the accumulations and accretions thereof were also ancestral?

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3. Whether the will was not inconsistent with the agreement and did not override its provisions, and whether the will did not purport to dispose of the said properties ?

4. Whether Sir Mangaldas could dispose of the said properties, or the accumulations thereof, by his will ?

5. Whether the plaintiffs had not, in fact, elected to take the said properties under the will, and not as ancestral property independently of the will, and were not now estopped from claiming the properties as ancestral ?

6. Whether the claim of the minor defendants to the properties as ancestral property could be barred by any election or estoppel of the plaintiffs ?

7. Whether the accumulations and accretions of the said properties were not the self-acquired property of Sir Mangaldas and were not devised by the residuary clause of his will to the University of Bombay ?

On the questions of election and estoppel, the defendants (executors) contended that the plaintiffs by their conduct had clearly elected not to assert their alleged rights to the properties in question, but to take them under the will which had been duly proved and the provisions of which they had observed and obeyed since the death of Sir Mangaldas. The executors relied (*inter alia*) on a deed of indemnity dated the 1st December, 1890, passed to them by the plaintiffs from all liability in respect of any of the testator's properties specifically devised or bequeathed to them by the said will which the executors had made over, or might thereafter make over, to the plaintiffs, pending the suit No. 444 of 1881, by which the ancestral estate was to be ascertained ; also upon another release, dated 23rd July, 1891, passed by the plaintiffs to the executors which released the latter from " all actions, suits, **[328]** accounts, claims and demands for or in respect of the said properties or the rents and profits thereof;" also upon certain evidence given by the first plaintiff (Tribhovandas) in a previous suit (No. 670 of 1892) in which he said : "I don't wish to dispute any of the provisions of the will. I have considered my position and elected to take under the will ;" and upon correspondence which had passed between the executors and the plaintiffs.

Vicaji (*Lowndes* with him), for the plaintiffs.—We take the properties in question as ancestral and also their accretions. The properties in dispute were no doubt declared by this Court in 1886 (suit No. 444 of 1881) to be the self-acquired property of Sir Mangaldas. But self-acquired property may be treated as ancestral property and may by agreement acquire that character—Mayne's Hindu Law (5th Ed.). para. 254; *Gopalasami* v. *Chinnasami* (1) ; *Krishnaji Mahadev* v. *Moro Mahadev* (2) ; *Shankar Baksh* v. *Hurdeo Baksh* (3). By the agreement of 28th June, 1881, it was agreed that these properties should be ancestral. That agreement was a family arrangement, and is binding. It was acted upon, and the plaintiffs observed its provisions until the death of Sir Mangaldas—Leake on Contracts (3rd Ed.), p. 289; *Stapilton* v. *Stapilton* (4). The property having thus been made ancestral by agreement, Sir Mangaldas could not dispose of it by will even if he desired to do so. But he clearly did not intend to dispose of it. He recognises in his will that the property had become ancestral, and expressly confirms the agreement which made it

(1) 7 M. 458.
(2) 15 B. 32 (41).
(3) 16 I. A. 71.
(4) 2 W. & T. 920 (6th Ed.).

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ancestral, and directs that the property should be distributed according to the rules of Hindu law. But by Hindu law, if the *corpus* of property is ancestral, its accumulations are also ancestral: see Mayne's Hindu Law (5th Ed.), para. 251. Neither the *corpus* of these properties nor their accumulations, therefore, vested in the executors, but devolved at once, on Sir Mangaldas' death, on the plaintiffs and their children who were joint with him (Act V of 1881, s. 4)—Henderson on Wills, p. 314. No doubt the will directs that the executors should take possession of the ancestral property, and they did so; but that was permitted by the plaintiffs merely out of respect for their father's wishes **[329]** and did not affect their legal rights. As to estoppel, the releases only relate to the rents or profits subsequent to the death of Sir Mangaldas —Leake on Contracts (3rd Ed.), pp. 796, 797; *Turner* v. *Turner* (1). There is no case here of election—Succession Act (X of 1865), s. 167; Serrell on Election), 94. They also referred to *Hurpurshad* v. *Sheo Dyal* (2); *Rampershad* v. *Sheochurn* (3).

Kirkpatrick (*Russell* with him), for the minor defendants Nos. 4 to 8 in the same interest.—The agreement of June, 1881, was not that the properties in question should then for the first time become ancestral. It was a formal declaration and admission that they were then and had previously been ancestral in Sir Mangaldas' hands, *i.e.*, ancestral according to Hindu law. That was the basis of the agreement. The agreement does not limit the sense of the word, and Hindu law recognises no limitations or variety in its use and meaning. There are not different classes of ancestral property with different incidents. If once property is ancestral, the legal result is that its accumulations are also ancestral. Therefore, in the absence of any limitation, the effect of the admission in the agreement was that the *corpus* and the then existing accumulations were ancestral. *A fortiori* all the accumulations since the agreement have been ancestral. The plaintiffs' children (the minor defendants) at birth took an interest in all his ancestral property. Sir Mangaldas could not dispose of any part of such property by will, and he recognises that he had no power to do so by the provisions with respect to the Girgaon property.

There is no case of election here. In order to put the plaintiffs to election, there must be, in the will, a clear intention on the part of the testator to give property not his own (White and Tudor, 6th Ed., Vol. I, p. 409). There is no such intention apparent. The will does not give the plaintiffs anything not the testator's own. Even if it be held that it gives them the properties in dispute (which we deny), it only gives them what was their's already by law. And it does not give them anything which should of right go to other persons. How, then, are the plaintiffs put to election? They, no doubt, have **[330]** allowed the executors to convey these properties to them and to pay probate duty on them and have executed releases, &c., but these acts were wholly unnecessary. Mere careless expenditure of the estate in this way could not affect their legal rights in that estate. In his evidence in suit No. 670 of 1892 the plaintiff did not use the word 'elect' in its legal sense. Further, the plaintiffs have never been in a position to elect, as the accounts have not been taken (White and Tudor, 6th Ed., Vol. I, pp. 429, 430).

But, in any case, the minor defendants are not bound by the plaintiffs election or estoppel. They have an interest independent of the plaintiffs

(1) 14 Ch. D. 829. (2) 3 I. A. 259. (3) 10 M. I. A. 490 (506).

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in all ancestral property, and the plaintiffs' conduct could not destroy their right. They claim only their own. Defendants Nos. 4 and 5 were living at the death of Sir Mangaldas.

Nor is there an estoppel. The plaintiffs make no claim against the executors personally. The contest is with the case made by them on behalf of the University. The plaintiffs' conduct towards the executors cannot estop them as against the University. A plaintiff claiming against one party is not estopped by his conduct towards another. The executors are mere trustees and ought to be passive in this matter. The University does not plead the election or estoppel of the plaintiffs. It only submits its rights to the Court. The executors ought to be indifferent. They have no right to fight for one claimant at the cost of the estate. A claimant should fight his own case and at his own risk. But in no case could dealings with the executors estop the plaintiffs as against the University. They cited *Gopalasami* v. *Chinnasami* (1).

Scott (with *Inverarity*), for the executors.—The properties in question were self-acquired, and were declared to be so by the decree in suit No. 444 of 1881. The accumulations are, therefore, also self-acquired. The agreement only dealt with the *corpus* of the properties. But the agreement did not make the properties ancestral. It only estopped Sir Mangaldas from dealing with them as self-acquired. He could not deal by will with the plaintiffs' share, but he could deal with his own share, and he **[331]** could deal with the accumulations. The latter he has bequeathed as residue to the University.

Next, we say the plaintiffs clearly elected to take these properties under the will and not as ancestral property. The will vested the whole estate in the executors and directed them to divide his estate. The will was proved, and the executors took possession without objection. Probate duty was paid on all the estate, including the properties in question. The plaintiffs have taken conveyance of them from the executors, who paid all the costs of the conveyance. The executors have dealt with the properties since Sir Mangaldas' death, and the plaintiffs have recognised their right to do so under the will. They cannot now claim to ignore the will.

No claim for these accretions was made by the plaintiffs until the 14th July, 1893, and then the claim was only for the accumulations between the date of agreement and Sir Mangaldas' death. We rely on the correspondence between the executors and the plaintiffs, which shows that the plaintiffs elected to take under the will. We also rely on the releases given by the plaintiffs to the executors dated 1st December, 1890, and 23rd July, 1891, by which the executors were released from all liability in respect of these properties, and on the evidence given by plaintiff No. 1 in suit No. 670 of 1892, where he explicitly stated that he elected to take under the will. They referred to *Howkins* v. *Jackson* (2), *Antaji* v. *Dattaji* (3).

Rivett-Carnac and *Lowndes*, for Jugmohandas Mangaldas (defendant No. 9).

JUDGMENT.

B. TYABJI, J.—This suit was filed on 28th February, 1895, for the purpose of having it declared that the will of Sir Mangaldas Nathubhoy is inoperative and void so far as it purports to dispose of or to deal with the

(1) 7 M. 458. (2) 2 Mac. and Gor. 372. (3) 19 B. 36 (40).

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ancestral property or its accumulations and accretions, and for a declaration that the properties mentioned in sch. B to the plaint and all the accumulations and accretions are ancestral property, and as such devolved upon the plaintiffs and their heirs according to Hindu law irrespective of the said will, and for an account of such accumulations and accretions, and that the same may be handed over to the plaintiffs for the benefit of themselves and their issue as members of an undivided Hindu family.

[332] The undisputed facts of the case are as follows. Sir Mangaldas Nathubhoy, a well-known and wealthy inhabitant of Bombay, died on 9th March, 1890, having previously made his will, dated 27th January, 1888, probate of which was obtained by the first, second and third defendants on 8th May, 1890. At the time of his death, Sir Mangaldas had three sons, namely, the plaintiffs Tribhovandas and Purshotamdas, and the defendant Jugmohandas. The defendants Kissondas and Jamnadas, who are both sons of the plaintiff Tribhovandas, were also born before and living at the time of Sir Mangaldas' death. The defendants Gordhandas and Ambadas, who are sons of the plaintiff Tribhovandas, and also the defendant Baba, who is son of the plaintiff Purshotamdas, were all born after Sir Mangaldas' death. The defendant Jugmohandas had separated from Sir Mangaldas some time before his death, but the plaintiffs and their sons, who were living at Sir Mangaldas' death, were joint with Sir Mangaldas during the whole of his life, and are now still members of an undivided Hindu family.

It appaers that some time before 1881 there were disputes between Sir Mangaldas and his son Jugmohandas and that there was apprehension of similar disputes arising between Sir Mangaldas and his other sons; and for the purpose of quieting and settling such disputes an agreement was made between Sir Mangaldas of the first part, the plaintiff Tribhovandas of the second part, and the plaintiff Purshotamdas of the third part. This agreement, which is dated 28th June, 1881 (Ex. A), recites (*inter alia*) as follows:—[His Lordship read the agreement as above set forth, and continued:—]

It is admitted by the parties to the suit that, as a matter of fact, the properties mentioned in part I of the said schedule to the said agreement was not ancestral property, but was in reality the separate and self-acquired property of Sir Mangaldas, and that they were so declared in suit No. 444 of 1881, a decree in which was passed on 30th July, 1885, and was confirmed on appeal on 30th April, 1886 (Exs. D and E). This suit (No. 444 of 1881) was a partition suit brought by Jugmohandas alone against his father Sir Mangaldas and his brothers the plaintiffs Tribhovandas and Purshotamdas.

[333] By the will dated 27th January, 1888, Sir Mangaldas appointed the first, second and third defendants to be his executors, and directed (*inter alia*) as follows:—[His Lordship read the passages of the will above set forth and continued:—]

Under these circumstances it was argued before me on behalf of the plaintiffs,

1st. That the effect of the agreement was to make the property mentioned in part I of the schedule to that agreement absolutely ancestral.

2ndly. That the proceedings and decree in suit No. 444 of 1881, by which the said property was declared to be self-acquired, did not affect the agreement.

3rdly. That the agreement was confirmed by the will, and was, therefore, binding upon the executors.

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4thly. That the *corpus* of the property being ancestral, all the accretions and accumulations, both prior and subsequent to the agreement, are also ancestral and have become a part of the ancestral property.

5thly. That the property and the accretions and accumulations being ancestral, the will is invalid and inoperative so far as it purports to dispose of the same.

I will deal with these contentions in their order :—

1st. It seems to me that the whole object of the agreement was to settle the disputes between Sir Mangaldas and his two sons amicably as far as possible. It is clear that one main dispute was as to the nature of the property in the hands of Sir Mangaldas, and, if no arrangement had been come to on that point, litigation would have certainly arisen between the parties. They came to an absolute agreement as to the nature of the property in part I of the schedule. As between the father and the sons it was, I think, declared to be ancestral. The rights of the parties were regulated and safeguarded on that footing, and I think, therefore, that whatever be the real nature of the property, it must as between the parties to the agreement be treated as ancestral.

2nd. As to the second point, I do not think it is necessary for me to decide it, as I am clearly of opinion that the third point **[334]** must be decided in favour of the plaintiffs. Sir Mangaldas in his will specially recites the decision of the Court in suit No. 444 of 1881, and says in express terms that he is unwilling to disturb the agreement, and indeed expressly confirms it.

As to the fourth point, it is no doubt true that under the general Hindu law the accretions and accumulations of the ancestral property would become a part of such property—*Jugmohandas* v. *Sir Mangaldas* (1). In this case, however, the property itself is not only decided by the Court to be self-acquired, but has been expressly admitted before me to have been of that nature. If it is to be treated as ancestral, it is not because it was so in reality, but because it is so admitted in the agreement, and because Sir Mangaldas himself was estopped, and, therefore, his executors are now estopped from disputing its character as ancestral property. But I find no provision in the agreement that the accretions and accumulations of the property were to be treated as ancestral. Indeed, the agreement in express terms leaves the nature of his other properties described in part II of the schedule, a part of which must according to the plaintiffs' contention have been acquired out of the accretions and accumulations of the property which was admitted to be ancestral, as an open question. In other words, Sir Mangaldas was in his lifetime and, therefore, his executors are now entitled to contend that all Sir Mangaldas' property (including the accretions and accumulations in question except that mentioned in part I of the schedule) was and is Sir Mangaldas' self-acquired property. If the other property was, in fact, acquired out of the rents and profits of the property in part I of the schedule, it would, in my opinion, be self-acquired property, because the property from which it was derived was in reality self-acquired, though admitted to be ancestral for the purposes of the agreement. In fact, I hold that there is no estoppel against Sir Mangaldas or his executors in regard to the nature of the accretions of the property, though there is an estoppel as regards the *corpus* of the property itself.

(1) 10 B. 528.

The fifth point assumes that both the *corpus* and the accretions [335] and accumulations of property must be treated as ancestral ; but, as I have already pointed out above, that is not necessarily the case here, and I am, therefore, of opinion that the will is inoperative only as regards the *corpus* of the property (which is ancestral by estoppel) and not necessarily as regards the accretions and accumulations, as to which there is no estoppel. In connection with the above points it must be remembered, that under the express terms of the agreement, Sir Mangaldas had wide powers of dealing with the ancestral property and of making donations out of it, unless they were made with the object of depriving his sons of their shares in such property.

The next question I have to determine is whether, as a matter of fact, Sir Mangaldas has disposed of the accretions and accumulations of the so-called ancestral property or not under the residuary clause of his will. It is to be observed that throughout the will he uses the expression "ancestral property" as equivalent to the immoveable property mentioned in the schedule to his will which corresponds with part I of the schedule to the agreement A. It is this property which he wishes to be divided between his two sons, Tribhovandas and Purshotamdas. All the rest of the property, whether immoveable or moveable, he evidently treats as self-acquired, and I am, therefore, of opinion that the expression "my self-acquired property, both moveable and immoveable," as used in the residuary clause of the will, must be construed to mean all property which was really self-acquired, except only so much of it as was included in part I of the schedule to the agreement A which Sir Mangaldas was desirous should be treated as ancestral property. I have, therefore, come to the conclusion that the accretions and accumulations of any of the property mentioned in part I of the said schedule, being in reality self-acquired property, passed to the trustees under the residuary clause, although the *corpus* of the property was treated both under the agreement and the will as ancestral property.

I am, however, further of opinion that, having regard to the conduct of the plaintiffs and to the deeds passed by them subsequently to the death of Sir Mangaldas, they must be held to have accepted the will in its entirety, and to have acquiesced in all its provisions, and to have elected to take under it, and that it is now [336] too late for them to contend that they are entitled to an account of the accretions and accumulations of the so-called ancestral property. On 1st December, 1890, both the plaintiffs passed a deed of indemnity to the executors. On the same day the plaintiff Purshotamdas executed a release to the plaintiff Tribhovandas in respect of the 12,000 square yards forming a part of the Girgaon property. On the 11th July, 1891, both the plaintiffs obtained conveyances from the executors of the property devised to them under the will (Exs. I, J. K). Similarly, the executors conveyed to Purshotamdas the Poona property on 1st December, 1890 (Ex. No. 10), and obtained from Purshotamdas a release in respect of such property (Ex. No. 11). They also conveyed the Malabar Hill property to Purshotamdas on 15th March, 1893 (Ex. No. 12), and obtained from Purshotamdas a release in respect of such property, &c., on 25th March, 1893 (Ex. 13). Moreover, the petition for probate was filed on 17th April, 1890, and citation was served upon both the plaintiffs, but no objection was made by them. Further, both the plaintiffs were not only parties to, or cognizant of, the correspondence, accounts, receipts, &c., collectively put in as Ex. No. 1, but actually

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executed a release to the executors on 23rd July, 1891 (Ex. L). which, after reciting that the executors had rendered account of the rents and profits to Tribhovandas and Purshotamdas with which they were satisfied, and that they had requested the executors to hand over to them the properties in pursuance of the directions contained in Sir Mangaldas' will, provides that,

"In consideration of the premises, each of them the said Tribhovandas and Purshotamdas doth hereby release the executors and every of them and their and every of their heirs, executors and administrators estates and effects of and from all actions suits accounts claims and demands for or in respect of the said properties or the rents or profits thereof or any part thereof or for or in respect of the said direction contained in the herein-before recited will regarding the distribution of the said properties between the said Tribhovandas and Purshotamdas or for or in respect of any act or thing made, done or omitted by them the said executors or any of them in or about the execution of the trusts of the said will of the said testator Sir Mangaldas so far as relates to the said properties specified in the schedule hereto or in anywise relating thereto."

It must be observed that this schedule to the release (Ex. L.) corresponds with part I of the schedule to the agreement **[337]** A. The release (Ex. L) is, therefore, a complete release, not only in respect of the *corpus* of the so-called ancestral property, but also in respect of the "rents and profits thereof and all actions, suits, accounts, claims and demands for or in respect of the same."

It seems to me, therefore, impossible for the plaintiffs to contend that they can now maintain a suit for an account of the rents and profits of the so-called ancestral property either under or in opposition to the will. How completely the plaintiffs have, or at least the plaintiff Tribhovandas has acquiesced in the will, is further shown by Tribhovandas' own evidence in suit No. 670 of 1892 (Ex. 5) in which he says: "I don't wish to dispute any of the provisions of the will. I have considered my position and elected to take under the will."

On the whole, therefore, I am of opinion that the plaintiffs are not now in a position to maintain this suit for an account of the accretions and accumulations of the so-called ancestral property even if they could have done so immediately after Sir Mangaldas' death and before they so completely acquiesced in the provisions of the will, or at least before they had executed a complete release to the executors.

It was contended before me that the release must be so construed as to confine its operation to the plaintiffs' claims which accrued subsequently to the death of Sir Mangaldas. I am, however, of opinion that, having regard to the circumstances under which the release was executed, its construction ought not to be so limited, and that it was intended to extend to all claims in respect of the properties in question up to the date of the execution of the release.

It was also contended by Mr. Kirkpatrick that any acts of the plaintiffs prejudicial to the interests of their sons in regard to the property in question could not bind the sons after the property was once admitted to be ancestral. I do not think that this contention is well founded. The property was not in reality ancestral. It was only such for the purposes and by virtue of the agreement and I am of opinion that the plaintiffs, who made the agreement, were entitled to waive it or to rescind it if they **[338]** pleased, and that their sons could not prevent

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them from doing so. Under any circumstances this is a suit by Tribhovandas and Pursbotamdas (and not by their sons), and in my opinion they could not maintain it. I record my findings upon the issues as follows :—[His Lordship stated his findings.]

I, therefore, dismiss this suit; but, having regard to the complicated and difficult nature of the case, I think the most equitable course is to direct that the costs of all parties (those of the executors to be taxed as between attorney and client) should come out of the estate, that is, out of the estate which is not ancestral.

Suit dismissed.

Attorneys for the plaintiffs and minor defendants :—Messrs. *Nanu and Hormasji* and Messrs. *Roughton and Byrne.*

Attorneys for the executors :—Messrs. *Little and Co.*

Attorneys for defendant No. 9.—Messrs. *Edgelow and Gulabchand.*

Attorneys for the University of Bombay :—Messrs. *Craigie, Lynch and Owen.*

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APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

DAVALAVA AND OTHERS (*Original Plaintiffs*), *Appellants v.* BHIMAJI DHONDO AND ANOTHER (*Original Defendants*), *Respondents.**

[14th February, 1895.]

Mortgage—Mahomedan family—Mortgage by Mohomedan father—Suit by mortgagee against minor son after mortgagor's death—Decree—Possession—Minor son represented by his mother—Widow represents heirs—Decree—Daughters not parties, but bound by decree—Subsequent suit by daughters as heirs of mortgagor for redemption.

When in a mortgage suit the debt is due from the father, and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the mortgagor, and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they are not bound by the sale simply because they are not parties to the record. This principle of law applies as much to a Hindu family governed by the Mitakshara law as to a Mahomedan family.

[339] *Hari* v. *Jairam* (1) and *Khurshetbibi* v. *Keso* (2), referred to and followed.

One Nur Saheb mortgaged his property in 1862 to Bhimaji and died in 1864, leaving a widow, a son and two daughters. In 1864 Bhimaji (the mortgagee) sued the minor son represented by his mother for possession as owner under the *gahan lahan* clause and got a decree on 30th September, 1864, and obtained possession in 1865. To this suit the daughters of Nur Saheb were not parties. Bhimaji held the land till 1887 and then sold it to Somana (defendant No. 2). In 1890 Nur Saheb's daughters brought this suit against Bhimaji and Somana to redeem the mortgage of 1862, contending they were not bound by Bhimaji's suit in 1864, not having been parties to it.

Held, that the plaintiffs could not redeem. They were bound by the decree obtained by the mortgagee in 1864.

[R., 26 M. 734; 16 C.P.L.R. 19 (25); 2 Ind. Cas. 922=12 O.C. 146; 2 S.L.R. 76; D., 22 B. 825 (830).]

SUIT for redemption. The land in question was mortgaged in 1862 by Nur Saheb, a Mahomedan, to one Bhimaji Dhondo. The mortgage

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* Second Appeal No. 671 of 1893.

(1) 14 B. 597.

(2) 12 B. 101.

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contained a *gahan lahan* clause (*i.e.*, a provision that, in default of payment within a certain period, the land should become the property of the mortgagee).

Nur Mahomed (the mortgagor) died leaving a widow Badana, a son Husein, and two daughters Davalava and Biyama.

In 1864 the mortgagee Bhimaji sued the minor son Husein, represented by his mother Badana, for possession of the land as owner under the *gahan lahan* clause in the mortgage-deed. He obtained a decree and got possession in 1865; and the land was then transferred to his name in the revenue books.

To this suit the daughters of Nur Saheb (Davalava and Biyama) were not parties.

Bhimaji held the land until 1887, in which year he sold it to Somana Fakira, whose name was then entered in the revenue books, and Somana (defendant No. 2) was in possession at the date of suit.

In 1890 the two daughters (Davalava and Biyama) of Nur Mahomed, his son Husein and his widow Badana brought this suit against Bhimaji and Somana to redeem the mortgage of 1862.

The Subordinate Judge held that the decree of 1864 was conclusive against Husein and Badana, but was not binding against the daughters Davalava and Biyama, as they had not been parties to that suit, and he decreed that they might redeem their shares in the land.

[340] On appeal the District Judge of Dharwar dismissed the suit, holding that all the plaintiffs were bound by the former decree. He observed :—

"That decree was passed against plaintiff No. 4 as representing her then minor son, plaintiff No. 3. It appears to me that this decree cannot now be questioned by plaintiff No. 3 or plaintiff No. 4 who were parties to the suit, and that plaintiffs Nos. 1 and 2 are also estopped from questioning defendant No. 1's ownership and defendant No. 2's ownership derived from defendant No. 1 by *bona-fide* purchase for valuable consideration.

"The plaintiffs Nos. 1 and 2 were represented by their mother, plaintiff No. 4, in that litigation. They have all along stood by and acquiesced in defendant No. 1 holding as owner for twenty-two years and defendant No. 2 for three years. As against defendant No. 2, they are estopped, as they stood by and gave him no warning of their claim. Plaintiff No. 1 became major in 1874-75, and plaintiff No. 2 became major in 1880, at the latest sixteen years after her father's death. The plaintiffs Nos. 1 and 2 have not sued to set aside the decree of 1865 within three years of their having attained majority. Their claim is also time-barred."

Against this decision the plaintiffs appealed to the High Court.

Balaji Abaji Bhagvat, for the plaintiffs (appellants).—Plaintiffs Nos. 1 and 2 are the daughters of the mortgagor and are sharers by Mahomedan law. Their mother Badana did not represent them in the former suit—*Akoba* v. *Sakharam* (1). They were not parties to it, and their rights are, therefore, not affected by the decree, and they have a right to redeem. Their rights are several, not joint rights. A Mahomedan mother, though *de facto* manager, does not represent her minor daughters. See *Sita Ram* v. *Amir Begam* (2) and *Baba* v. *Shivappa* (3). The case of *Daulat Ram*

(1) 9 B. 429. (2) 8 A. 324. (3) P. J. (1895), 25 = 20 B. 199.

v. *Meher Chand* (1) was with reference to a Hindu joint family. The rule laid down by it and other cases does not apply to Mahomedans. This suit is not barred by limitation, as sixty years is the time within which a redemption suit can be brought.

Manekshah Jehangirshah, for the defendant, respondent No. 2 (Somana).—The law on this point has been considerably modified by the decision of the Privy Council in *Girdharee Lal* v. *Kantoo Lall* (2). In the former suit and the proceedings therein the daughters and the son of Nur Mahomed (plaintiffs Nos. 1, 2 and 3) [341] were represented without fraud or collusion by their mother (plaintiff No. 4). Their interests, therefore, passed to the defendants. See *Hari* v. *Jairam* (3) and *Khurshetbibi* v. *Keso* (4).

Bhimaji got the property as owner by the decree of 1864, and the land was transferred to his name in the revenue register. His possession thus became adverse from 1865. Defendant No. 2 is a *bona fide* purchaser for value from him who was in possession without notice. He cannot, therefore, be ousted—*Vasudeva* v. *Krishna* (5); *Venkatesh Appa* v. *Pira Saiba* (6).

JUDGMENT.

RANADE, J.—The first two appellants in this case are the daughters, the third appellant is the son, and the fourth appellant is the widow, of one Nur Saheb who mortgaged the land in dispute with respondent No. 1 in 1862. Respondent No. 1 brought suit No. 333 of 1864 on his mortgage-bond against the appellant No. 3, a minor represented by his guardian and mother, appellant No. 4. Appellants Nos. 1 and 2 were not parties to this suit.

The mortgage-bond contained a *gahan lahan* clause, and on the strength of this provision respondent No. 1 claimed to recover possession of the land as owner. An *ex-parte* decree was passed on 30th September, 1864, directing appellant No. 4, as representing appellant No. 3, heir of the deceased mortgagor, to make over possession of the land to respondent No. 1, and he accordingly obtained possession of it on 12th September, 1865. The khata of the land was soon after transferred from appellant No. 3's name to that of respondent No. 1. Respondent No. 1 remained in possession of the land till 1887, in which year he sold it to respondent No. 2.

The present suit was brought in 1890 by the four appellants as heirs of the deceased Nur Saheb to redeem the mortgage of 1862. Both the lower Courts held that the decree in suit No. 333 of 1864 was conclusive against the claims of appellants Nos. 3 and 4, who were parties to that decree. The Court of first instance, however, held that as appellants Nos. 1 and 2 were not parties to the former suit, it was still open to them to sue for [342] redemption to the extent of their 7/16ths share, and partial redemption was accordingly decreed. The District Judge in appeal held that all the appellants were estopped from redeeming the land by the decision in the former suit, in which appellant No. 4 represented her minor daughters as much as her minor son, and that the claim was also time-barred, as it was not brought within three years from the time when appellants Nos. 1 and 2 attained majority.

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(1) 14 I. A. 187. (2) 14 B.L.R. 187. (3) 14 B. 597.
(4) 12 B. 101. (5) P. J. (1891), p. 18. (6) P.J. (1891), p. 103.

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In second appeal, it was contended before us that appellants Nos. 1 and 2, not being parties to the former suit, could not be estopped by the decision in that suit, as appellant No. 4 did not, and as mother could not, under Mahomedan law, represent appellants Nos. 1 and 2, and further the suit was not barred, as sixty years' limitation applied to the redemption suit.

As regards the first point, the Courts were no doubt at one time inclined to hold, especially in the case of a joint Hindu family governed by the Mitakshara law, that only the right, title and interest of a father or other manager passed to the purchaser at a sale in execution of a decree against him, and that the interest of his sons or co-sharers, not parties to the record, remained unaffected. In the leading case on the subject—*Deendyal* v. *Jugdeep Narain* (1)—their Lordships of ther Privy Council, following two earlier rulings—*Nugendar Chunder* v. *Kaminee* (2) and *Baijun* v. *Brij Bhookun* (3)—appear to have ruled not only that the interest of a son, who was not a party to the suit against his father, did not pass to the auction-purchaser at the execution sale, but that the question of legal necessity could not be inquired into in the son's suit, and that the son was entitled to recover possession of the property, subject to the auction-purchaser's right to demand partition in a separate proceeding. This ruling in *Deendyal's* case governed the decisions in *Jatha Naik* v. *Venktapa* (4); *Maruti* v. *Lilachand*(5); *Akoba* v. *Sakharam*(6); *Lakshman* v. *Kashinath* (7); and was extended by these decisions to mortgage suits, which do not appear to have **[343]** been contemplated in *Deendyal's* case. In *Assamathem* v. *Roy Lutchmeeput* (8) the same principle was applied to Mahomedan claimants. A sister, who was not made a party to the record, was held not bound by a mortgage decree and an execution sale to which other heirs of her deceased father were parties. The facts of that case closely resemble those in the present dispute, and if the view therein upheld was accepted as still authoritative, the appellants Nos. 1 and 2 in the present case would be certainly entitled to succeed.

The authority of the cases noted above, however, has been considerably shaken by subsequent decisions. Their Lordships of the Privy Council had indeed in *Girdharee Lall* v. *Kantoo Lall* (9) following an earlier ruling (*Hunoomanpersaud* v. *Mussamut Babooee*(10) held that the interest of the son, who was alive, and not a party to the suit, would pass to a purchaser in an execution sale of the right, title and interest of the father under certain circumstances where the whole property was put up to sale by order of the Court. This view was more explicitly laid down by Sir Barnes Peacock in what has been since regarded as the leading case on the subject—*Ishun Chunder* v. *Buksh Ali* (11). Sir Barnes Peacock decided that if the debt for which the property is sold is not the widow's but her husband's debt, and the property sold also belongs to the husband, the widow, though a party to the record, must be held to have been sued in her representative character (as representing her husband's estate), and the proceedings against her as such representative would be effectual against the estate, notwithstanding that the son, who in that case brought his suit to set aside the sale, was not a party to the suit. This decision was re-affirmed in many subsequent decisions by the Calcutta High Court —*Hakeem Bebee* v. *Khajah Gowhur Ali* (12); *Pursid Narain* v. *Honooman*

(1) 4 I.A. 247. (2) 11 M. I. A. 241. (3) 2 I. A. 275.
(4) 5 B. 14. (5) 6 B. 564. (6) 9 B. 429.
(7) 11 B. 700. (8) 4 C. 142 (F.B.) (9) 14 B.L.R. 187.
(10) 6 M, I. A. 393. (11) 1 Marsh. 614. (12) 5 Wym. 27.

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Sahay (1); *Baboojan Jha* v. *Byjnath Dutt Jha* (2); *Sham Coomar* v. *Juttun Bibee* (3); *Lalla Seeta Ram* v. **[344]** *Ram Buksh* (4); *Sotish Chunder* v. *Nil Comul* (5); *Jotendro Mohun* v. *Jogul Kishore* (6). In *The General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh* (7) their Lordships of the Privy Council affirmed the correctness of the principle laid down in *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* (8). The same point was similarly decided by their Lordships in *Bissessur Lall* v. *Maharajah Luchmessur* (9).

In *Mussamut Nanomi* v. *Modun Mohun* (10) their Lordships of the Privy Council held that the decision in *Deendyal's* case did not bind them to hold that only the interest of the judgment-debtor, party to the record, passed by the auction sale to the purchaser. The last case on the subject is the decision of the Privy Council in *Daulat Ram* v. *Meher Chand* (11); see also *Bhagbut* v. *Girja Koer* (12). The decision in *Daulat Ram's* case was expressly relied upon by Sir C. Sargent, C. J., and Candy, J., in *Vishnu* v. *Venkatrao* (13) where it was held that if the entire equity of redemption was found to have been sold to the auction-purchaser the interest of the plaintiff in that suit (one of five brothers who was not a party to the record in the execution proceeding), would pass. This same doctrine was again affirmed in *Jairam* v. *Joma* (14) and *Hari* v. *Jairam* (15); and in this last case, their Lordships (Birdwood and Jardine, JJ.) expressly overruled the decisions in *Maruti* v. *Lilachand* (16) and *Lakshman* v. *Kashinath* (17) noticed before. It may, therefore, be now regarded as settled law that when, in a mortgage suit, the debt is due from the father, and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the mortgagor, and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they were not bound by the sale simply because they were not parties to the record.

[345] It is, however, contended that this ruling is based on the peculiar constitution of a Hindu joint family, and that the analogy does not hold good in the case of Mahomedans. There is, however, no foundation for such a contention. One of the cases noted above related to Mahomedans, and the same principle was made applicable to them—*Assamathem* v. *Roy Lutchmeeput* (18) also *Hukeem Bebee* v. *Khajah Gowhur Ali* (19). In *Assamathem* v. *Roy Lutchmeeput* (18), this point was expressly considered by the Full Bench, and both the Chief Justice and Markby, J., held that the Mahomedan law is, if possible, more strict in its recognition of the obligation to pay debts. The succession is of the kind known as universal, and any one of the heirs of a deceased person stands as litigant on behalf of all the others with respect to anything due by the estate of the deceased. The creditor can seek his relief against one of several heirs in a case when all the effects are in the hands of that heir. If, as in the present case, the property was in the hands of the widow, appellant No. 4, that heir could be sued by the creditor as representing the entire estate, and a decree obtained against her would be binding against the other heirs. This view was given effect to by this Court in *Khurshetbibi* v. *Keso* (20), where it was held that the daughter of the

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(1) 5 C. 845. (2) 6 C. 474. (3) 14 W. R. 448. (4) 24 W. R. 383.
(5) 11 C. 45. (6) 7 C. 357. (7) 14 M.I.A. 605 (8) 1 Marsh. 614.
(9) 6 I.A. 233. (10) 13 I.A. 1. (11) 14 I.A. 187. (12) 15 C. 717.
(13) P.J. (1889), p. 248. (14) 11 B. 361. (15) 14 B. 597. (16) 6 B. 564.
(17) 11 B. 700. (18) 4 C. 142. (19) 5 Wym. 27. (20) 12 B. 101.

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deceased Mohomedan was bound by the sale in execution of a decree obtained against the son whose name appeared on the record. The present case is on all fours with this case. If possible, the present respondent's claim is stronger, as the property sold was mortgaged with respondent No. 1.

On a careful consideration of all these authorities, we have come to the conclusion that the decree passed in 1864, giving effect to the *gahan lahan* clause, bound the appellants Nos. 1 and 2 equally with appellants Nos. 3 and 4. The rights of a decree-holder who obtains possession as owner are, if possible, stronger than the case of execution purchasers, for there can be no room for doubt here that the whole property passed into respondent No. 1's possession under the forfeiture clause of the bond.

[346] It was, indeed, urged by appellant's pleader that appellant No. 4 could not act as guardian of appellants Nos. 1 and 2, as she was their mother, and our attention was drawn to *Sita Ram* v. *Amir Begam* (1) and *Baba* v. *Shivappa* (2). The point thus urged does not appear to arise in the present case. The widow and the son represented the estate, and it was immaterial whether the widow could or could not act as guardian. It may also be noted that, under Mahomedan law, the sons make the daughters residuary heirs only, and it is easy to understand the reason why the minor daughters were passed over by the creditor who brought the son's name on the record. We accordingly confirm the decree of the lower Court, and reject the appeal with costs on appellants.

JARDINE, J.—I concur. It has been admitted by the pleader for the appellants that the whole property had been mortgaged and was liable for the debt, and passed under the decree. If, then, the appellants were members of a Hindu family governed by the Mitakshara law, there would be no difficulty in upholding the decision of the District Judge on the strength of *Hari* v. *Jairam* (3) and the judgments of the Privy Council there expounded. The present case is one of a Mahomedan family, to which in *Khurshetbibi* v. *Keso* (4) similar principles were applied. I follow that authority.

Decree confirmed.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

KRISHNAJI AND OTHERS (*Original Plaintiffs*), *Appellants v.* MAHESHVAR LAKSHMAN GONDHALEKAR (*Original Defendant No.* 1), *Respondent.** [14th February, 1895.]

Mortgage—Agreement in a subsequent deed to postpone redemption until payment of another debt—Agreement valid.

[347] An agreement contained in a deed executed for a fresh consideration subsequent to a mortgage-deed to postpone redemption of the mortgage until the payment of another debt which has not been made a charge on the land, is valid.

[R., 11 Bom.L.R. 318 (327); 9 C.W.N. 789; 8 O.C. 132 (135, 138); D., 28 B. 349=6 Bom.L.R. 313.]

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* Second Appeal No. 277 of 1893.

(1) 8 A. 324.
(2) P. J. (1895), 25; *ante* 20 B. 199.
(3) 14 B. 597.
(4) 12 B. 101.

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THIS was a second appeal from the decision of T. Walker, Assistant Judge of Ratnagiri, amending the decree of Rao Saheb R. B. Chitale, Subordinate Judge of Dapoli.

Suit for redemption. The plaintiff sued to redeem a mortgage. The defendants contended that the plaintiffs were not entitled to redeem without also paying off certain money debts secured by bonds which (they alleged) were by the terms of the bonds to be paid off before the mortgage was redeemed.

The lower Court passed a decree for redemption on payment of the bonds as well as of the sum due upon the mortgage.

The plaintiffs appealed to the High Court.

Vasudeo R. Joglekar, for the appellants (plaintiffs).—The Judge was wrong in holding that we could not redeem the mortgage before the amount of the money bonds was paid. The decree passed by the Judge has clogged the equity of redemption. Supposing that the amount of the money bonds was a charge on the land, still as the suit was filed after the expiration of twelve years from the dates of the bonds, the claim for the amount is time-barred—*Narayan* v. *Raoji* (1).

[SARGENT, C. J., referred to *Yashvant* v. *Vithoba* (2).]

Ganesh K. Deshamukh, for the respondent (defendant.)—We rely on *Hari Mahadaji* v. *Balambhat* (3); *Sundar Malhar* v. *Bapuji Shridhar* (4).

JUDGMENT.

SARGENT, C.J.—Having regard to the decision in *Yashvant Shenvi* v. *Vithoba Sheti* (2) affirming the validity of an agreement embodied in a mortgage-deed to postpone redemption of the mortgage until payment of another debt which had not been made a charge on the land, we are unable to hold that a similar agreement contained in a subsequent deed executed for a fresh consideration is invalid.

We, therefore, confirm the decree with costs.

Decree confirmed.

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[348] CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS v. DHANJIBHAI EDULJI.*

[21st February, 1895.]

Police Act (XIII of 1856), s. 35, cl. 1—Fraudulent possession of property—Property reasonably suspected of being stolen—Duty of the prosecution to prove to the satisfaction of the Court that there exist reasonable grounds of suspicion– Onus probandi.

A person cannot be called on to account for his possession of property under s. 35, cl. (1) of the Police Act, XIII of 1856, unless there is evidence which satisfies, not the police officer, but the Court, after judicial consideration, that such property "may be reasonably suspected of being stolen or fraudulently obtained."

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882) for the exercise of the High Court's criminal revisional jurisdiction.

The accused was a carpenter employed by merchants in the Prince's Dock to open cases of liquor.

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* Criminal Revision, No. 25 of 1895.

(1) P.J. (1884), p. 254. (2) 12 B. 231. (3) 9 B. 233. (4) 18 B. 755.

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He was charged under s. 35 of Act XIII of 1856 (1) with having in his possession certain articles, (*viz.*, two bottles of beer, some rectified spirit, three glass tumblers, and a quantity of figs and walnuts) reasonably suspected of being stolen or fraudulently obtained, and failing to account satisfactorily how he came by the same.

The accused was tried summarily on the above charge: the only evidence tendered for the prosecution was that of the shed supervisor in the Prince's and Victoria Docks, who said that, in consequence of certain information he had received, he called the police, who examined the accused's box, and found the above articles of which the accused could not give any satisfactory account.

The Chief Presidency Magistrate convicted the accused and sentenced him to one month's rigorous imprisonment

[349] Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction.

Macpherson (with him *J. D. Neemuchwalla*), for the accused.—Section 35, cl. 1 of Act XIII of 1856 is based on 2 and 3 Vic., c. 71, s. 24. It is copied word for word from the English Act. as appears from the Proceedings of the Legislative Council of India, Vol. 2, p. 258. As to the construction of this clause, I have not been able to find any reported decision either under the Indian Act or under the English Statute. The meaning of the clause appears to be that the accused cannot be called upon to account for the property in his possession until the prosecution prove to the satisfaction of the Court that there are reasonable grounds for suspecting that the property is stolen, or fraudulently obtained. There is no such proof offered in the present case. The conviction is, therefore, bad.

There was no appearance for the Crown.

JUDGMENT.

JARDINE, J.—An important question of construction arises in this case as to the meaning of s. 35, cl. 1 of Act XIII of 1856, which is as follows :—"Whoever has in his possession, or conveys in any manner, anything which may be reasonably suspected of being stolen or fraudulently obtained, shall, if he fails to account satisfactorily how he came by the same, be liable to a penalty not exceeding one hundred rupees or to imprisonment, with or without hard labour, for any term not exceeding three months." These words are taken from 2 and 3 Vic., c. 71, s. 24, as appears from comparison and from the discussion in the Legislative Council of India. The assiduity of Mr. Macpherson, who appears for the accused, has failed to discover any case dealing with the construction of the clause either in the Indian Act or the Act of Parliament, or of the similar clause in the English Statute about naval stores. We have, therefore, to construe the words by principle without the help of direct authority. It being a penal enactment which shifts the burden of proof of innocence at a certain point on to the accused, it has to be construed strictly. We are of opinion that, before the accused can be called on to account for the property, there must be evidence amounting to proof to the satisfaction, not of the **[350]** police officer or witness, but of the Court,

(1) Section 35, cl. (1', Act XIII of 1856, provides as follows :—"Whoever has in his possession, or conveys in any manner, anything which may be *reasonably* suspected of being stolen or fraudulently obtained, shall, if he fails to account satisfactorily how he came by the same, be liable to a penalty not exceeding Rs. 100, or to imprisonment' with or without hard labour, for any term not exceeding 3 months."

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that the accused possessed or conveyed a thing of which this may be predicated—we mean after judicial consideration by the Court—*viz.*, that the thing "may be reasonably suspected of being stolen or fraudulently obtained." This phrase is used as an adjective; and unless it applies, accused ought not to be called upon to account nor to be convicted. The phrase is different to that used about the information on which the police may under s. 93 proceed to search—"reasonable cause for suspecting, &c." The words in both sections imply reasonable grounds for suspecting that there has been a theft or fraud.

In the present case no evidence was given that any theft of articles of the sort found with the accused had taken place at the docks; nor that the accused had been seen under any circumstances of suspicion near the place where the merchants keep such things; or had concealed the things found with him, or that they were articles of a sort so unique or strange or precious as might raise reasonable suspicion of his honesty. We are of opinion that the case of *Reg.* v. *Spencer* (1), though more apposite to the words of s. 95, is in accordance with our view. There the words in 25 and 26 Vic., c. 114, s. 2, "good cause to suspect" used as regards the powers of the police to search poachers are interpreted. Baron Martin said: "Good cause to suspect means a reasonable ground of suspicion upon which a reasonable man may act." That case makes it doubtful whether in the one now before us the police were justified in making the search. The ground of suspicion is not disclosed in the evidence.

The Court, therefore, sets aside the conviction and sentence.

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[351] FULL BENCH—APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine, and Mr. Justice Candy.

RAMCHANDRA SUBRAO (*Original Defendant*), *Applicant v.* RAVJI BIN VITHU PARIT (*Original Plaintiff*), *Opponent.**

[4th March, 1895.]

Execution—Decree—Decree for possession—Execution of decree—Dispossession of a third person not a party in execution—Possessory suit by third person, against decree holder—Cause of action—Mamlatdar's Act (Bom. Act III of 1876)—Jurisdiction of Mamlatdar—Civil Procedure Code (Act XIV of 1882), ss. 263 and 332.

Where in execution of a decree a person not a party to the suit is dispossessed, his dispossession does not give him a cause of action within the jurisdiction of the Mamlatdar. Section 332 of the Civil Procedure Code (Act XIV of 1882) applies.

The delivery of possession under s. 263 of the Civil Procedure Code contemplates the decree-holder being placed in actual possession by possibly dispossessing, in the eye of law, a third person who is not affected by the decree. The mere formal delivery of possession cannot of itself effect such dispossession unless the deprivation of possession be complete as a fact, a conclusion which the Court has to form on the whole of the evidence. It does not make any difference if such a decree is in a partition suit.

[R, 21 B. 98 (101); 27 M. 262 (268, 269); **D.**, 16 C.P.L.R. 107 (110); **D. & N.F.**, 24 B. 397 (399).]

THIS was an application under the High Court's extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against

* Application No. 50 of 1894 under the extraordinary jurisdiction.

(1) 3 F. and F. 857.

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the decision of Rao Saheb K. B. Bhide, Mamlatdar of Chikodi in the Belgaum District.

The applicant Ramchandra Subrao obtained a Civil Court's decree against Ramchandra Shripat and another for partition of certain lands and recovery of possession of a third share therein, and in execution of that decree recovered possession through the Collector of Belgaum.

The opponent Ravji bin Vithu Parit then brought a possessory suit against the applicant in the Mamlatdar's Court, alleging that he had been in possession and enjoyment of the lands for many years, and that the applicant (defendant) Ramchandra wrongfully obstructed his enjoyment thereof. He prayed for the removal of the obstruction.

[352] The Mamlatdar finding, on the evidence, that the opponent (plaintiff) had been in actual enjoyment of the lands, and was not present when possession was given to the applicant (defendant), awarded the claim and passed a decree for the plaintiff.

The applicant thereupon applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling on the opponent Ravji to show cause why the Mamlatdar's decree should not be set aside.

Balaji A. Bhagvat appeared for the applicant (defendant) in support of the rule.

Manekshah J. Taleyarkhan appeared for the opponent (plaintiff) to show cause.

The case came on for argument before a Division Bench composed of Bayley, Acting C. J., and Fulton, J., who referred the point involved in the case to a Full Bench with the following remarks :—

Judgment.—Entertaining some doubt whether in this case we ought to follow the decision in *Ramaji Govind* v. *Yaswada* (1) we refer to a Full Bench the following questions which appear to arise in this application :—

Whether a delivery of possession in execution of a decree for partition has the effect of dispossessing a third person not a party to the suit who was previously in possession and was not present when the delivery took place ?

If so, whether such dispossession constitutes a cause of action under the Mamlatdars' Act ?

Attention is called to the decisions in *Gulabbhai* v. *Jinabhai* (2) and *Vinayak* v. *Jankibai* (3).

The point was argued before a Full Bench consisting of Sargent, C. J. and Jardine and Candy, JJ.

Balaji A. Bhagvat, for the applicant (defendant).—Where a party is dispossessed in execution of a decree of a Civil Court, **[353]** a Mamlatdar has no jurisdiction to entertain a possessory suit filed by that party. Even when a decree-holder is put in formal possession of the property, the remedy of the person in actual possession is under the Civil Procedure Code and not in the Mamlatdar's Court. The fact that the person dispossessed in execution of a Civil Court's decree was not present at the time of the delivery of possession is immaterial—s. 332 of the Civil Procedure Code ; *Ramaji Govind* v. *Yaswada* (1).

Manekshah J., Taleyarkhan, for the opponent.—We had nothing to do with the Civil Court's decree, as we were not a party to that decree.

(1) P J. (1878), p. 56. (2) 13 B. 213. (3) P. J. (1894) p. 195.

We had been for a long time in possession of the land. Our possession was legal, and it was wrong to deprive us of our possession in our absence by proceedings of which we had no notice and with which we were in no way connected.

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C.J.—The delivery of possession, which is directed to be given by s. 263 of the Civil Procedure Code, contemplates the decree-holder being placed in actual possession, and the language of s. 332 of the Civil Procedure Code shows that the possibility is assumed that in effecting such delivery a third person may become dispossessed, by which must be understood that such a state of things may have occurred as would amount to his dispossession in the eye of law, or what is sometimes called juridical dispossession. The mere formal delivery of possession, which consists in the reading by the officers on the land of the order for putting the decree-holder in possession, and taking a receipt from him, cannot of itself effect such dispossession. Whether what occurs on the occasion of giving such formal delivery has that effect, is a question of law and fact; but it is clear, we think, on the authorities, that there is no dispossession in the eye of the law, unless the deprivation of possession is complete as a fact, a conclusion which the Court has to form on the whole of the evidence—see Lindley's Jurisprudence, p. cxxiii—although what may occur may amount to a disturbance or obstruction of possession.

[354] Again, he who occupies land in the absence of the possessor does not, according to Savigny, "at the moment acquire juridical possession:" Savigny, p. 261. In other words, it must be followed up by other acts of possession of which the third party has notice. This would seem to afford the only possible answer to the abstract question referred to us; for as regards a third person—assuming, as we do, that he was not affected by the decree—it cannot matter that the decree was in a partition suit. In *Ramaji Govind* v. *Yaswada* (1) it is quite possible that the Court considered that the third person was present and did not obstruct.

With respect to the second question, we are of opinion that, in the case of dispossession of a third party in execution of a decree, s. 332 of the Code of Civil Procedure applies, and that it does not constitute a cause of action within the jurisdiction of the Mamlatdar.

(1) P.J. (1878), p. 56.

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FULL BENCH—APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine and Mr. Justice Candy.

VENKAJI KRISHNA NADKARNI AND OTHERS (*Original Plaintiffs*), *Appellants v.* LAKSHMAN DEVJI KANDAR (*Original Defendant No.* 1), *Respondent.** [12th March, 1895.]

Landlord and tenant—Notice to quit—Land Revenue Code (Bom. Act V of 1879), s. 84† —Transfer of Property Act (IV of 1882), ss. 111 and 117—Annual tenancy—Denial of lessor's title prior to suit—Sufficient cause to enable lessor to recover possession without notice to quit—Landlord's right of forfeiture.

In cases not falling under s. 117 of the Transfer of Property Act (IV of 1882), a denial of the lessor's title prior to suit is, notwithstanding s. 84 of the [355] Land Revenue Code (Bom. Act V of 1879), a sufficient cause of action to enable the lessor to recover possession without notice to quit.

The object of s. 84 of the Land Revenue Code is to define the nature of contract of tenancy, but the landlord's right of forfeiture arising from denial of his title is no part of the contract of tenancy, but is a right which the law implies in all cases from the relationship of landlord and tenant. If the Legislature had intended to exclude the right of forfeiture in cases of annual tenancies, there would have been express provision to that effect.

[F., 24 B. 426 (434); R., 2 C.L.J. 399=9 C.W.N. 928 (933).]

SECOND APPEAL from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge of Ratnagiri with Appellate Powers, reversing the decree of Rao Saheb S. M. Karandikar, Second Class Subordinate Judge of Devgad.

Suit by the plaintiffs to recover possession with mesne profits of certain land leased to defendant No. 1 and for the removal of a cattle-shed erected by him. The plaintiff based his claim on a rent-note of 1887 executed by defendant No. 1 as principal and defendant No. 2 as surety, or in the alternative on his general title.

The Subordinate Judge passed a decree for the plaintiff, holding defendant No. 1 was an ordinary yearly tenant of the plaintiff under Bombay Act I of 1880, s. 8.

Defendant No. 1 appealed and at the hearing of the appeal contended that the plaintiff had given him no notice to quit, and that without such notice he could not be ejected.

The plaintiff on the other hand alleged that in a previous suit brought by him against the defendant he (the defendant) had denied his title, and that, therefore, notice was not necessary.

The appellate Court reversed the decree and dismissed the suit, holding that the plaintiffs were not entitled to eject the defendant without giving him notice to quit. The following is an extract from the judgment:—

"My finding on the said issue (namely, Is the plaintiff entitled to eject the defendant without giving him notice to quit?) is in the negative; for,

* Second Appeal No. 883 of 1892.

† Section 84 of the Land Revenue Code (Bom. Act V of 1879):—

"84. An annual tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March.

"An annual tenancy shall require for its termination a notice given in writing by the landlord . . . at least three months before the end of the year of tenancy, at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of sch. E, or to the like effect."

under s. 84 of the Revenue Code (Bom. Act V of 1879), every landlord can turn out his tenant only upon giving him a formal notice in time. The plaintiff-respondent's pleader urges that the defendant denied his title in the written statement filed in the suit which he withdrew with permission to bring the present suit. The pleader files a copy of the written statement (*vide* Ex. 11 of the appeal record). I do not think that the former written statement or the written statement filed in the present suit contains any disclaimer of the plaintiff's title to sue for rent. The **[356]** defendant admits that he has been paying an amount of rent to meet the *dasta* or assessment, and the defendant admits that, as mortgagee, at least of the khoti, the plaintiff is entitled to receive some rent. The defendant doubtless denies the plaintiff's absolute ownership and possession, but he concedes to the plaintiff being mortgage-owner of the khoti, and thus entitled to treat the defendant as his khoti tenant. The tenant-defendant is, therefore, entitled to a notice before he can be ousted. The plaintiff's former suit and the present are, however, a continuation of the same suit, and if a disclaimer is entered at any stage of the suit, the plaintiff cannot plead the non-necessity of a formal notice to quit according to the ruling in I. L. R., 15 Bom. 407."

The following is the translation of the defendant's written statement in the previous suit referred to in the above extract :—

"Written statement of Lakshman Devji Kandar, defendant No. 1, is as follows :—

"1. The *thikan* (plot) mentioned in the plaint does not belong to the plaintiff by right of ownership, nor is it under his *vahavat*, nor did I pass to the plaintiff the *kabulayat* referred to in the plaint, and there was no reason for me to give it in writing. As there is disagreement between plaintiffs and us, the plaintiffs with the aid of persons acting in collusion with them and their debtors fabricated the said *kabulayat* with the intention of taking away my property.

"2. The village of Mauje Bavsi is a vatan khoti village belonging to us and other bhaubands; and out of the said village, the plot in dispute belongs to us by right of *khasgi* (private) ownership, and the possession thereof has been with us by right of ownership from the time of our ancestors.

"3. The khoti right in connection with our village has gone to the plaintiffs by mortgage from the ancestors of us and other bhaubands, and they have been carrying on the *vahivat* of the khoti as such (*i.e.*, mortgagees). Therefore we have paid to the plaintiffs every year 0—3¾, three maunds and three quarters of paddy and rupee one in cash as assessment of the land in dispute. Accordingly we offered the amount of assessment for the year in dispute, but the plaintiffs did not take it. I am willing to pay the same to the plaintiffs.

"4. As I am not a private tenant of the plaintiffs, I am not liable to pay them the amount of *khand* or income, and no statement made in the plaint is true.

"5. The suit filed by the plaintiffs without ground may be rejected and my costs awarded from them."

The plaintiff preferred a second appeal.

Manekshah J. Taleyarkhan appeared for the appellants (plaintiffs).

Nagindas T. Marphatia appeared for the respondent (defendant No. 1).

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JUDGMENT.

The second appeal came on for hearing before Bayley, Acting C. J., and Fulton, J., and the following judgment referring the case to a Full Bench was delivered by

[357] FULTON, J.—In this case the plaintiffs sued to recover possession of land leased to the defendant under a rent-note and for rent and mesne profits. The Second Class Subordinate Judge, while holding that the rent-note was not proved, awarded the claim on the ground that the defendant was an ordinary or yearly tenant within the meaning of s. 8 of Bombay Act I of 1880. On appeal, the First Class Subordinate Judge, A. P., reversed the decree for want of the notice, which, under s. 84 of the Land Revenue Code, was required to terminate the tenancy. The plaintiffs have now appealed; and on their behalf Mr. Manekshah has urged that no notice was necessary, as previous to the institution of the suit the tenant had disclaimed the landlord's title. The question then arises, whether there has been a legal termination of the tenancy.

The 84th section of the Land Revenue Code (Act V of 1879) is as follows:—

"An annual tenancy shall in the absence of proof to the contrary be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March.

"An annual tenancy shall require for its termination a notice given in writing by the landlord to the tenant or by the tenant to the landlord at least three months before the end of the year of tenancy at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of sch. E or to the like effect."

It will be observed that unlike the corresponding provisions of s. 106 of the Transfer of Property Act (IV of 1882), which declare a tenancy from year to year to be "terminable" by notice without excluding the operation of the other modes of termination recited in s. 111, s. 84 of the Land Revenue Code enacts that an annual tenancy shall require a notice for its termination, and thus uses language which seems to preclude the suggestion that it can be terminated otherwise. Mr. Manekshah endeavoured to distinguish between the termination of a tenancy and its forfeiture; but we are unable to see how it can be held that any proceeding which brings to an end the relationship [358] of landlord and tenant does not involve a "termination" of the tenancy. The phraseology of s. 111 of the Transfer of Property Act, and the remarks in s. 9 of chap. VIII of Woodfall's Treatise on the Law of Landlord and Tenant, show that where the doctrine of forfeiture prevails, a disclaimer of title is treated as determining the tenancy at the election of the landlord.

Consequently, as the law of this Presidency provides that an annual tenancy shall require a written notice for its termination, it seems at least doubtful whether such a tenancy can be terminated in any other way, unless there has been an agreement between the parties (as in the case of a surrender accepted by the landlord) to waive the requirements of the section.

It was contended, however, that apart from the section the decisions of this Court showed that a tenancy can be terminated in consequence of a disclaimer of title prior to suit. The subject is very fully discussed in *Vithu* v.

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Dhondi (1), in which the learned Judges, dissenting from *Baba* v. *Vishvanath* (2), held that a plaintiff seeking to dispossess an annual tenant must allege a cause of action prior to suit and could not rely on a subsequent disclaimer, and doubted whether the setting up of a permanent tenancy was such a disclaimer as would work a forfeiture. In *Krishna* v. *Ladu* (3) Sargent, C.J. and Telang, J., said : " We agree in the opinion expressed by the Court in *Vithu* v. *Dhondi* that the setting up by the defendant of a permanent lease does not constitute such a denial of title as to relieve the owner from giving notice to the tenant." The question, however, still remains, whether by a denial of title prior to the suit there can be a termination, in this Presidency, of an annual tenancy of an agricultural holding. No decision expressly on the point has been cited to us, and, apart from the cases, of which *Baba* v. *Vishwanath* is the type, in which the defendant in his written statement denied the annual tenancy, and was, therefore, held to have waived his claim to notice, we have not been able to find any case in which an annual tenant has been ejected on the **[359]** ground that he had denied his landlord's title prior to the institution of the suit. *Gopalrao* v. *Kishor* (4) may perhaps be relied on ; but it is not clear whether the decision that the plaintiff was under no obligation to prove notice was based on the defendant's plea or on the fact of his previous denial of title. It must, however, be conceded that in *Vithu* v. *Dhondi*, *Raghunath* v. *Kika* (5) and *Krishna* v. *Ladu* it appears to have been assumed that an express disclaimer of the landlord's title by the tenant prior to suit would operate as a forfeiture ; but it is to be observed that the wording of s. 84 was not discussed.

Under these circumstances it seems, having regard to the uncertain state of the law in India about forfeiture as shown by the conflicting nature of the decisions noticed in *Purshotum* v. *Dattatraya* (6) and further illustrated in *Vithu* v. *Dhondi* and subsequent cases, desirable to refer to a Full Bench the question now under consideration. On the one hand, there has been a considerable expression of opinion that under certain circumstances a disclaimer may work a forfeiture of an annual tenancy, and on the other there are the terms of s. 84, which may have been intended to place the relationship of landlord and tenant on a secure basis and to prevent unnecessary litigation by removing all uncertainty as to the method by which it may be terminated. The corresponding provisions of s. 43 of Bombay Act I of 1865 were differently worded.

In case it be held that a disclaimer of title may operate as a forfeiture of an annual tenancy, the further question will arise whether Ex. 11, on which Mr. Manekshah relies, contains such a disclaimer. On this point the recent decision that the mere setting up of a permanent tenancy is not such a denial of title as to relieve the owner from giving notice to the tenant (which seems to show that in this respect *Vivian* v. *Moat* (7) cannot safely be followed in India) leaves it uncertain whether such a statement as is recorded in Ex. 11 can be looked upon as sufficient to justify the landlord in determining the tenancy without notice.

[360] The questions to be referred are :—

(1) Whether in this Presidency a disclaimer of the lessor's title by the annual tenant of a holding to which s. 84 of the Land Revenue Code (Bom. Act V of 1879) applies, is, if made prior to suit, a sufficient cause

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(1) 15 B. 407.
(2) 8 B. 228.
(3) P. J. (1893), 292.
(4) 9 B. 527.
(5) P.J. (1892), 421.
(6) 10 B. 669.
(7) 16 Ch. D. 730.

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of action to enable the lessor to recover possession without proof of notice to quit ?

(2) If so, whether the statements contained in Ex. 11 constitute a disclaimer of title ?

If these questions are decided in favour of the plaintiffs, the appeal will have to be remanded on the other points raised in it ; and in any case it will have to go back for decision as to the plaintiffs' right to recover rent for the years in dispute. This point appears to have been overlooked in the lower appellate Court. It was also passed over in the memorandum of second appeal ; but as Mr. Manekshah has explained that the omission was due to oversight, we have allowed him to raise it in argument.

The reference was argued before a Full Bench composed of Sargent, C.J., and Jardine and Candy, JJ.

Manekshah J. Taleyarkhan, for the appellants (plaintiffs).—The defendant did not admit his tenancy but set up his title as absolute owner. He denied our title before the suit. He thus waived his right to notice to quit—*Vithu* v. *Dhondi*(1); *Jamsedji* v. *Lakshmiram* (2); *Vivian* v. *Moat*(3). There are various modes of terminating a tenancy, and a notice to quit is only one of those modes—Woodfall on Landlord and Tenant, Chap. VIII.

Nagindas T. Marphatia, for the respondent (defendant No. 1).—The Judge has found that there was no denial on our part of plaintiff's title. Section 84 of the Land Revenue Code (Bom. Act V of 1879) is applicable to the present case, and the tenancy must be put an end to in the way mentioned in that section—*Vithu* v. *Dhondi* (1). The language of the section is imperative, and no tenancy can be determined without notice. See also ss. 111 and 117 of Act IV of 1882.

[361] The next point is whether the defendant's written statement (Ex. 11) amounts to a denial of the plaintiff's title. We submit that it does not. We say in it that we are entitled to hold the land on payment of the assessment. Under the Khoti Act (Bom. Act I of 1880) assessment is considered as rent. The fact that there is a dispute between the parties does not amount to a denial of the landlord's title—*Krishna* v. *Ladu* (4).

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C. J.—The first question for determination is, whether by a denial of the lessor's title prior to suit there is in this Presidency, having regard to s. 84 of the Land Revenue Code (Act V of 1874), a sufficient cause of action to enable the lessor to recover possession without notice to quit in the case of an annual tenant to which that section applies. The object of s. 84 is to define the nature of the contract creating an annual tenancy, which, it is to be remarked, may be for agricultural or other purposes both as regards the period during which it runs and the landlord's power of determining it. The landlord's right of forfeiture, however, arising from disclaimer of his title, although it is treated as determining the tenancy at his election, is no part of the contract of tenancy, but is a right which the law implies in all cases from the relationship of landlord and tenant. Had it been the intention of the Legislature to exclude the right of forfeiture in the case of all annual tenancies, we should have expected to find it expressly provided for.

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(1) 15 B. 407.
(2) 13 B. 323.
(3) 16 Ch. D. 730.
(4) P. J. (1893), 292.

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Section 111 of the Transfer of Property Act (IV of 1882), which gives the right of forfeiture, is, in common with all the provisions of Chap. V of the Act, declared to be inapplicable by s. 117 of the Act in the case of all leases for agricultural purposes, except so far as the Local Government may have otherwise declared. That Act, however, did not become the law of this Presidency before January, 1893, subsequent to the institution of this suit. In *Vithu* v. *Dhondi* (1), which was a case in which it was assumed that notice was required by s. 84 of the Land Revenue Code, it was not contended that the right of forfeiture had been taken away by the section.

[362] We think, therefore, that the first question should be answered in the affirmative assuming the case not to be governed by s. 117 of the Transfer of Property Act. To the second question, *viz.*, whether the disclaimer contained in Ex. 11 constituted a disclaimer of title, the only answer we can give to it is that it depends upon the construction of Ex. 11 read in connection with the evidence in the case.

The Full Bench having sent back the case to the Division Bench which had made the reference to the Full Bench for final disposal, the following judgment was given :—

JUDGMENT OF THE DIVISION BENCH.

The First Class Subordinate Judge A. P. has not found as to the nature of the defendant's tenure, and it, therefore, is impossible for us, having regard to the judgment of the Full Bench, to determine whether the statements in Ex. 11 constitute a disclaimer of title such as to enable the plaintiffs to recover possession without notice to quit.

Under these circumstances we must reverse the decree of the lower appellate Court and remand the appeal for a fresh decision on the various points which arise, including the question as to the plaintiffs' right to recover rent for the years in dispute. Costs to follow the result.

Decree reversed and case remanded.

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20 B. 362.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine, and Mr. Justice Fulton.

KYTE (*Petitioner*) *v.* KYTE (*Respondent*) AND COOKE, *Co-respondent.**

[12th March, 1895.]

Divorce—Husband and wife—Indian Divorce Act—(IV of 1869)—Jurisdiction of District Court—Place of marriage—Marriage by petitioner before decree of District Court confirmed by High Court—Ignorance of law—Damages against co-respondent—Practice.

Under s. 2 of the Indian Divorce Act (IV of 1869) a District Court has jurisdiction to make a decree for dissolution of marriage upon being satisfied that the adultery charged has been committed in India without going into evidence as to the place of the marriage of the parties.

[363] After the District Court had passed a decree for dissolution of marriage, but before the confirmation of the decree by the High Court, the petitioner, in

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*Civil Reference, No. 9 of 1894.

(1) 15 B. 407.

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ignorance of the law, married another woman, but he ceased to cohabit with the woman on discovering his mistake. Under the circumstances the High Court made the decree absolute, holding that under s. 14 of the Indian Divorce Act (IV of 1869) it had a discretion to do so.

The decree having awarded damages against the co-respondent, and he not having appealed on the question of damages, it was contended that the High Court could only deal with that part of the decree which dissolved the marriage.

Held, under the Indian Divorce Act (IV of 1869), that the Court had the fullest power to deal with the case according as justice might require, including the award of damages by the Court below.

Ravenscroft v. *Ravenscroft* (1) followed.

THIS was a reference by W. H. Crowe, District Judge of Poona, submitting for confirmation his decree in suit No. 2 of 1894 under s. 17 of the Indian Divorce Act (IV of 1869).

Suit by the plaintiff for dissolution of his marriage on the ground of his wife's adultery with the co-respondent, or, in the alternative, for judicial separation on the ground of desertion. He also claimed damages from the co-respondent.

The respondent did not appear in the lower Court.

The co-respondent denied the adultery charged.

The Judge found that the alleged adultery with the co-respondent was proved ; that the petitioner was entitled to a decree for dissolution of marriage, and that he was entitled to damages to the extent of Rs. 500 from the co-respondent. The following are extracts from his judgment :—

"This is a suit brought by petitioner C. J. Kyte for a dissolution of his marriage with K. Kyte on the ground of her adultery with the co-respondent T. C. Cooke. The fact of the adultery having been committed by the respondent is not disputed. She admits in her deposition that she was married on the 9th February, 1891 ; that she left her husband about four months after, that she returned to him subsequently for a few days at a time, and finally left him on the 15th October, 1891. She admits also that she was delivered of a child in the month of January, 1893, in Bombay. She denies that it is the child of the co-respondent, as she states other friends visited her and came up to her sitting-room after her shop was closed. The birth of the child fifteen months after the respondent left the petitioner is conclusive proof that adultery has been committed. The question now arising is whether it is proved that the respondent committed adultery with the co-respondent. * * * The [364] acts of familiarity of the co-respondent and the daily intimacy deposed to, afford the strongest grounds for believing that adultery must have been committed. The petitioner under s. 34 of the Divorce Act has claimed Rs. 5,000 as damages. It has also been contended that the petitioner is not entitled to any damages, as there is no proof that he has suffered any loss in reputation, comfort, happiness, &c., and that the parties had lived separate for so long a time, and further that there has been unjustifiable delay in bringing his petition. I do not find that there is any unreasonable delay in seeking the aid of this Court. The child was born in January, 1893, and the petition was filed within a year. The separation of the parties was due to the respondent leaving her husband's roof. There is nothing to show that he consented thereto. There is no doubt that the loss of the companionship of his wife must have caused the petitioner considerable mental pain and disturbance, and his domestic happiness has been destroyed. The measure of damages in these cases is

(1) L.R. 2 P. and M. 376.

the value of the wife. Looking at all the circumstances as disclosed by the correspondence between the petitioner and the respondent during the short period of their married union, I am of opinion that the sum of Rs. 500 will be an appropriate amount to be paid by the co-respondent to the petitioner, and I decree accordingly that the petitioner is entitled to a dissolution of his marriage with the respondent and to recover the sum of Rs. 500 from the co-respondent as damages. Costs on co-respondent. The decree is subject to the decision of the High Court."

The case came up for confirmation under s. 17 before a Full Bench consisting of Sargent, C. J., and Jardine and Fulton, JJ.

Mahadeo V. Bhat appeared for the co-respondent.—There is no evidence produced to prove the marriage and the place where it took place. No issue was raised with respect to the fact of the marriage.

[FULTON, J.—No one denied the marriage.]

Marriage must be proved. Non-denial or even mere admission of marriage would not do—*Bai Kanku* v. *Shiva Toya* (1).

[SARGENT, C. J.—Strict proof of marriage is not necessary. The mere fact that people apply to a Court for divorce raises a presumption of marriage.]

This is not a case for damages. Damages are awarded "for the injury done to the husband in alienating his wife's affections, destroying the comfort he had from her company and raising children for him to support and provide for." See Mayne on Damages, p. 490. Here the evidence shows that the petitioner and his wife had not lived happily together before the co-respondent knew them. No damages should, therefore, be awarded.

[365] The respondent, who appeared in person, being at this stage called on to state what she had to say, informed the Court that the petitioner had married a second wife since the decree, and she produced papers to support her statement. The petitioner's pleader, who was not aware of this fact, thereupon asked for time to inquire into the matter. The Court granted a fortnight's adjournment. The petitioner in the meanwhile filed an affidavit stating that he was ignorant that he could not re-marry before the confirmation of the decree by the High Court, and that as soon as he came to know that it was illegal for him to do so, he had ceased cohabiting with his second wife.

Manekshah J. Taleyarkhan for the petitioner.—The petitioner has filed an affidavit alleging complete ignorance of law forbidding him to marry again before the confirmation of the District Judge's decree by the High Court. He has ceased to cohabit with the woman whom he has married.

Under these circumstances the decree should be made absolute. It is within the discretion of the Court to do so—*Wickham* v. *Wickham* (2).

The question of damages cannot be gone into in this Court, as the co-respondent has not appealed against the award of damages (ss. 17, 34, 39 and 55 of the Indian Divorce Act IV of 1869). There is no reason to interfere with the order of the lower Court. In England the damages are assessed by the jury, and they are not interfered with.

Mahadev V. Bhat in reply.—The order awarding damages is part and parcel of the decree for dissolution of marriage. This Court has to examine the decree as a whole. No appeal is necessary against the order for damages under the Divorce Act.

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(1) 17 B. 624.

(2) 6 P. D. 11.

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JUDGMENT.

The judgment of the Full Bench was delivered by

JARDINE, J.—The District Court took no evidence as to the place of the marriage of the petitioner and the respondent. It had, however, jurisdiction under s. 2 of Act IV of 1869 to make a decree for dissolution upon being satisfied of the adultery being committed in India.

Two points of law arose at the hearing, which, following s. 7 of the Act, we determined upon the practice of England. It was objected for the respondent that, since the District Court passed its decree, the petitioner went through a form of marriage [366] with another woman. He has filed an affidavit, alleging *bona fide* ignorance of the law, and that on discovering his mistake he ceased to cohabit with that woman. The question is whether the Court should refuse now to make the decree absolute. This is within its discretion—*Noble* v. *Noble* (1) ; *Wickham* v. *Wickham*(2). Looking at the publicity of the fact of the marriage, we give credence to the statement of the petitioner that he acted *bona fide*, believing that he had been released by law from his previous wife, and with an absence of any intention to commit adultery. The adultery ought not, therefore, to stand in the way of a decree absolute. Our discretion under s. 14 of the Act is similar to that of the English Court under s. 31 of 20 and 21 Vic., c. 85.

The other point of law was raised by Mr. Manekshah for the petitioner, to the effect that as the co-respondent had not appealed against the award of damages, this Court could only deal with the part of the decree which dissolves the marriage. Sections 17, 34, 39 and 55 of the Indian Act were referred to and compared with 20 and 21 Vic., c. 85, s. 33, and 23 and 24 Vic., c. 144, s. 7. We ruled—following the Judge Ordinary in *Ravenscroft* v. *Ravenscroft* (3)—that the intention of the Act of 1869 was to give the Court the fullest power to deal with the case according as justice might require, including the award of damages by the Court below.

The merits of the case are to be considered in two aspects. First as regards the respondent. There is evidence that in January, 1893, she gave birth to a child, which must have been conceived in adulterous intercourse, a fact substantially admitted. The decree for dissolution must, therefore, be made absolute.

Then we have to consider the case of adultery as regards the co-respondent. There is evidence of a long continued familiarity, extending over periods both before and after the birth of the child. The respondent deposed that during November and December, 1892, she lived in a hotel at Byculla under the name of Stewart. The manager and butler of the hotel depose to a man [367] paying her weekly visits under the name of Mr. Stewart ; the butler identifies the co-respondent, and the manager thinks he is the same person. Cooke has not called his sister or other person to explain his frequent visits at Poona.

On the whole the conclusion of the District Judge is supported by the evidence ; and the decree as against the co-respondent must be confirmed, and he must pay the petitioner's costs in this Court.

Decree made absolute.

NOTE.—Any marriage by one of the parties, the other living, before the expiration of six months from the date of the decree or before the time for appealing has expired is null and void. See Macrae on the Indian Divorce Act.—Notes to s. 57, p. 146.

(1) L. R. 1 P. and M. 691. (2) 6 P. D. 11. (3) L. R. 2 P. and M. 376.

ORIGINAL CIVIL.

Before Chief Justice Farran and Mr. Justice Starling.

MOTI GULABCHAND AND OTHERS (*Original Plaintiffs*), *Appellants* v. MAHOMED MEHDI THARIA TOPAN (*Original Defendant*), *Respondent.**

[2nd August, 1895.]

Evidence—Burden of proof—Promissory notes—Proof of consideration—Suit by professional money-lender against a young man recently come of age—Presumption—Negotiable Instruments Act (XXVI of 1881), ss. 44, 45 and 118—Evidence Act (I of 1872), s. 114, illus. (c).

Professional money-lenders sued a young man recently come of age to recover certain loans of money alleged to have been advanced by them to him on promissory notes. The defendant, who under the will of his father was entitled to a large property but had not yet come into possession of it, was of an extravagant and reckless character. He pleaded, as to part of the consideration for the notes, that he did not receive it, and as to a further part, that the consideration was immoral. In dealing with the case the Court laid down the following propositions, not as rules of law, but as guides in considering the evidence in such a case :—

(1) That upon the above facts the ordinary presumption that a negotiable instrument has been executed for value received was so much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money-lenders (the plaintiffs) the obligation of satisfying the Court that they had paid the consideration in full. That is the practical effect of illus. (c) to s. 114 of the Evidence Act (I of 1872).

(2) Where the plaintiff, in answer to such a defence, affirmed that he had paid [368] the consideration in full, and was corroborated by his books and witnesses, the *onus* of proof again shifted over upon the defendant.

(3) The burden of proof thus thrown upon the defendant could only be met by a perfectly truthful and harmonious statement which the Court felt able to rely upon with confidence. In the absence of this, the ordinary presumption laid down in s. 118 of the Negotiable Instruments Act (XXVI of 1881) must prevail, *viz.*, until the contrary is proved the presumption should be made that every negotiable instrument was made for consideration.

[F., 133 P.L.R. 1901; R., 5 O.C. 307 (311, 312); D., 9 P.R. 1906=19 P.L. R. 1906.]

SUIT to recover Rs. 4,500 on three promissory notes for Rs. 1,500 each executed by the defendant (respondent) to the plaintiffs on the 15th June, 1894.

The defendant admitted execution of the notes, but alleged that he had received only Rs. 1,080 in respect of them, and he submitted that the plaintiffs were, "in any event, only entitled to the said sum of Rs. 1,080, with reasonable interest thereon, such sum being the only valid consideration for the said notes."

At the hearing, issues were raised as to whether the defendant received any valid consideration for the notes except the sum of Rs. 1,080, and whether the plaintiffs were entitled to recover anything more than that amount.

The defendant was a young man, only recently come of age. The plaintiffs were professional money-lenders.

The lower Court (Fulton, J.) found the first of the above issues in the defendant's favour, and passed a decree for the plaintiffs for Rs. 1,080 with interest, and ordered the parties to pay their own costs.

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The plaintiffs appealed, and contended that a decree ought to have been passed for the full amount claimed, with interest and costs.

Macpherson (Acting Advocate General) and *Kirkpatrick* for the appellants (plaintiffs).

Inverarity and *Russell* for defendant (respondent).

JUDGMENT.

FARRAN, C. J.—This was a suit in which the plaintiffs sought to recover the amount of three promissory notes for Rs. 1,500 each from the defendant. The defence was that, as to part of the consideration for the notes, the defendant did not receive it, and as to a further part that the consideration was immoral. The defendant admitted that he had received consideration to the extent of Rs. 1,080, and **[369]** brought that sum into Court, his doing so having been made a condition of his being granted leave to defend the suit. The plaintiffs allege, on the other hand, that they paid full consideration for the notes. The question between the parties is thus one of pure fact.

The law which allows the defendant to dispute the consideration for the notes is contained in ss. 44 and 45 of the Negotiable Instruments Act (XXVI of 1881). It is unnecessary in this case to have recourse to the doctrine of equity, which relieves expectant heirs from unconscionable bargains. The Division Court accepted the defendant's version of the transaction as correct. From that finding the plaintiffs have appealed.

Before adverting to the facts, which it will be necessary for us to do in some detail, we desire to state how the *onus* of proof in a case like this, irrespective of the order in which the evidence is given, substantially lies. The defendant, when he executed the notes sued upon, was a young man who had only attained his majority nine months previously. He appears to have been of an extravagant and reckless character. He was entitled to a large amount of property under the will of his father, the late Sir Tharia Topan of Zanzibar, but had not come into possession of it, as on account of family disputes it was, in common with the rest of the family estate, in the hands of a receiver appointed by this Court. The plaintiffs are a Marvadi firm who are by profession money-lenders.

These facts being admitted (apart from the technical rule laid down in s. 118 of the Negotiable Instruments Act) the ordinary presumption that a negotiable instrument has been executed for value is so much weakened, that the allegation of the young man that he has not received full consideration is sufficient to shift the burden of proof and to throw upon the money-lender the obligation of satisfying the Court that he has paid the consideration in full. This is, we think, the practical effect of illustration (*c*) to s. 114 of the Evidence Act, and its explanation. Where the plaintiff in answer to such a defence affirms that he has paid the consideration in full, and is corroborated by his books and witnesses (if any), the *onus* again shifts. The strength of the case to be rebutted will depend upon the credit to be given to the testimony adduced by the plaintiff as tested by cross-examination, the weight to be attached to his **[370]** books arising from the manner in which they are kept, and the presence or absence of suspicious circumstances in connection with them, and upon its inherent probability. When these circumstances concur in the plaintiff's favour, a heavy *onus* is thrown upon the defendant which can only be met by a perfectly truthful and harmonious statement which the Court feels able to rely upon with confidence. In the absence of this,

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the ordinary presumption laid down in s. 118 of the Negotiable Instruments Act must prevail: "Until the contrary is proved. . . . . the presumption shall be made that every negotiable instrument was made for consideration." We do not lay down the above propositions as rules of law, but we state them as the guides which we have placed before us in examining the evidence which has been recorded. [His Lordship then examined the evidence at length, and the appellate Court varied the decree and gave judgment for the plaintiff for the amount claimed.]

Decree varied.

Attorneys for the appellant (plaintiff).—Messrs. *Nanu and Hormasji.*

Attorneys for the defendant (respondent).—Messrs. *Roughton and Byrne.*

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TESTAMENTARY JURISDICTION.

Before Mr. Justice Starling.

A. M. KER (*Plaintiff,*) *v.* A. MEAKIN AND OTHERS (*Defendants*).*
[14th October and 6th November, 1895.]

Probate—Will—New page of will not duly executed substituted by testator after execution of will—Defendant relative—Revocation.

After the death of the testator (H. G. Meakin) his will was found among his private papers in a sealed envelope with the words "H. G. Meakin's will, not to be opened until after death" written in his handwriting on the face of the envelope. The will was wholly in his writing and was written on four separate sheets of paper pinned together. The first, third and fourth pages were of blue paper and of the same size, and each of them was signed at the bottom by the testator and by two witnesses. The fourth page stated the date of the will (28th November, 1892) and was signed by the testator and was duly attested by the said two witnesses. The actual execution of the will took place (as was proved by [371] evidence) in March or April, 1894. The second page, however, was of a different kind of paper from the other pages and of smaller size and was signed by the testator, but not by witnesses. This second page contained a bequest to a child who was born in May, 1894, *i. e.*, some months after the will was executed. The executor propounded the will.

Held, that probate must be refused.

APPLICATION for probate. This was an application by an executor for the probate of the will of one Henry George Meakin, of Poona, who died on the 1st June, 1895, at Carlsbad in Austria, leaving a large amount of property in India.

The will in question was wholly in the testator's handwriting and was written on four separate pages of foolscap paper pinned together. The first, third and fourth pages were of blue paper and of the same size, and each of them was signed at the bottom by the testator, and each page also bore the signature of two witnesses, *viz.*, S. Armstrong and R. W. Hughes. The fourth and last page stated the date of the will as the 28th November, 1892, and bore the signature of the testator, and the attestation clause signed by the above two witnesses.

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The second page, however, was of white paper and of smaller size than the others, and was headed "Sheet No. 2," the other papers having no such headings. It was signed by the testator at the bottom like the others, but it did not bear the names of any witnesses. There were no corrections in the will, nor any break of sentence between the first and second pages or between the second page and the third.

The whole document was found, all the pages being pinned together, after the testator's death among his private papers in a sealed envelope with the words "H. G. Meakin's will, not to be opened until after death," written on the face of the envelope in the testator's writing.

As above stated, the date of the will on the fourth and last page was the 28th November, 1892. The attesting witnesses, however, deposed that they saw the testator sign the several pages of the will at the end of March or beginning of April, 1894, and that they, on that occasion, wrote their names at the foot of the attestation clause at the end of the will, and also on several preceding pages. Neither of them, however, could say how many pages of the will were signed by the testator or by themselves, nor could they say what was [372] written on any of the pages, as they saw nothing but the blank space at the bottom of each page where they signed their names, and the attestation clause at the end of the will.

At the time of the execution of the will, the testator's family consisted of his wife, two sons and three daughters, all of whom survived him.

From the evidence it appeared that, immediately after the will had been thus executed in March or April, 1894, the testator (on the 12th April, 1894) went from Poona to Ootacamund, where he stayed for some time, and there in May, 1894, his wife gave birth to a daughter who was afterwards named Doris May. This child died a few weeks after the testator, *viz.*, on the 13th July, 1895. The second page of the will contained a bequest to Doris May.

Lowndes, appeared for the executor.

Russell, for the testator's children.

Inverarity, for the testator's widow.

The following issues were raised :—

1. Whether the document propounded by the executor, or any and what part thereof, is the last will and testament of H. G. Meakin, deceased ?

2. Whether the same, or any part thereof, is entitled to probate ?

Inverarity, for the widow.—We wish, if possible, that probate should be granted of the will as it stands, but if that cannot be done, then we say there is no will at all of which probate can be granted, and there is an intestacy. The second page is not duly executed and was evidently written by the testator after the birth of Doris May, and substituted for a page which he destroyed. The new page is probably identical with the old, except that it contains the legacy to the recently born daughter Doris May. But we say that the testator although he removed and destroyed the old second page, did not intend to revoke it except in the belief that the new page which he substituted for it would form part of his will. But the new page is not duly executed, and cannot, therefore, form part of the will. The result is that there was no effectual revocation of the old page, and, therefore, although it is not forthcoming it still forms part of [373] the will. It is, however, not propounded, and there is no evidence of what it contained.

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The matter then stands thus. The executor is asking for probate of a will a substantial part of which he cannot prove. Probate, therefore, cannot be granted. It is a case of dependent relative revocation—Williams on Executors (9th Ed.), p. 126, *et seq.*; *In the goods of McCabe* (1). The document now before the Court cannot be said to be the last will of the testator, or, if it is, there is an important part of it missing and of which there is no evidence. It is as if the will had been lost, and the Court was asked to grant probate of such parts of it as could be remembered. The Court cannot grant probate of a part even by agreement— *In the goods of Pearse* (2); *Woodward* v. *Goulstone* (3).

Russell (for the testator's children).—We ask that probate should be granted of the will as it stands. The Court will struggle against an intestacy—Succession Act (X of 1865), s. 25; *Cooper* v. *Bockett* (4); *Greville* v. *Tyler* (5); *In re Gaussen* (6); *Singleton* v. *Tomlinson* (7); *In the Goods of Pearse* (2).

JUDGMENT.

6*th November*, 1895. STARLING, J.—In this case, the plaintiff, as one of the executors, propounds in solemn form a paper alleged to be the last will of H. G. Meakin, and asks for probate thereof. All the parties are willing that probate should go of the will as it now stands if the Court can see its way to follow that course. Although, as at present advised, assuming this to be a "suit," a compromise between the parties thereto would be admissible—see *Norman* v. *Strains* (8)—yet no compromise has apparently been come to, and counsel do not suggest that such is the case, but simply that the parties are willing that the Court should grant probate of the will as it stands, if in law that can be done. A compromise to that effect would raise different considerations, because I should have to consider, amongst other things, whether it was for the benefit of the infant children that that course should be pursued, and it seems to me, at first sight, that such a compromise would not be for the benefit of the infant daughter at any rate. I must, therefore, decide the case on the merits.

[374] The will is wholly in the handwriting of the testator, and is written on three half-sheets of foolscap and the first page of another whole sheet. It, therefore, consists of four pages. The first page is headed "The will of H. G. Meakin;" the second, "sheet No. 2;" and the third and fourth pages have no heading. It is properly executed and attested at the end, and the first and third pages bear at the foot the signatures of the testator and the two attesting witnesses. These three pages are of blue foolscap. The second page at the foot bears only the signature of the testator, is slightly smaller than the others, and is of white foolscap. The whole document was found, all the pages being tied together, after the testator's death, amongst his private papers, in a sealed envelope, with the words "H. G. Meakin's will, not to be opened until after death" on the front in the testator's handwriting.

The attesting witnesses deposed to having, in Poona, seen the testator sign the will at the end, and also some preceding sheets in the presence of both of them, and to having themselves subsequently signed at the end of the will, and on certain preceding sheets, but neither of them

(1) L. R. 3 P. and M. 94.
(2) L.R. 1 P. and M. 382.
(3) 11 App. Cas. 469 (477, 485).
(4) 4 Moo. P. C. 419.
(5) 7 Moo. P. C. 320.
(6) 16 W.R. 212.
(7) 3 App. Cas. 404.
(8) 6 P. D. 219.

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can say how many preceding sheets were so signed by the testator or by them, nor can they say what was on any of the sheets, as they saw nothing but the blank spaces where they were to sign, and the attestation clause at the end.

The will is dated the 28th November, 1892, but was signed and attested at the end of March or beginning of April, 1894; and on the 12th April, H. G. Meakin went from Poona to Ootacamund, where he remained several months, and there on the 25th or 28th May, 1894, his wife gave birth to a daughter, who was subsequently named Doris May. The testator died on the 1st June, 1895.

Now looking at sheet No. 2, it is evident that it could not have been part of the will of the testator which was executed by him and signed by the attesting witnesses in March or April, 1894, because there is in it a legacy to Doris May, who was not then born. That and the facts that the sheet is of a different colour and size, and is signed at the foot by the testator only, point to the conclusion that it must have been inserted by him subsequently to the execution of the rest of the will, and consequently it cannot be admitted to probate. **[375]** Looking further to the fact that the clauses at the top of sheet No. 2 run on naturally and sensibly from those at the bottom of p. 1, and that those at the bottom of sheet No. 2 run on naturally and sensibly to those at the top of p. 3, the natural inference to be drawn is that the testator removed the original p. 2, and substituted for it the present "sheet No. 2," in which he inserted the name of Doris May as a legatee, but whether he made any other and what alterations therein cannot be determined, as there is no evidence forthcoming as to what were the contents of the original p. 2.

Looking at the facts disclosed in this case, this seems to me to be a case of dependent relative revocation, and that the testator removed the original p. 2, and substituted the present one under the impression that he was thereby making a substitution which was good in law, and that he would not have revoked what was in the original page except under that belief; consequently, if there had been any evidence as to what the contents of the original page were, I should have granted probate of the will as it originally stood, as was done in the case of *Duncan* v. *Crabb* (1) and in the goods of *McCabe* (2). If there had been such evidence, this case would have been on all fours with the former of those just cited. There being no such evidence, what remains of the original will consists of a legacy to Mrs. Meakin of the testator's plate and household effects and stores, the appointment of trustees, and a bequest to them of his real and personal estate not otherwise disposed of, directions for the management of such estate, a residuary clause distributing the residue among his sons and daughters, the appointment of his wife and the trustees as executrix and executors, and a bequest to each of the trustees who should act as executors. We have, therefore, little more left than the appointment of trustees and executors and the residuary clause, while there is evidence in the document as propounded that there were in the original will legacies to the sons and daughters at any rate, and no provision is now made for the maintenance of the testator's widow, although he and his wife lived together on affectionate terms up to the time of his death. Can I, then, grant probate of the will as it would stand after removing sheet No. 2? Mr. Inverarity argued that I could **[376]** not, relying on the *dicta* of Lords Herschell and

(1) L.R. 3 P. and D. 98.

(2) L. R. 3 P. and M. 94.

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Fitzgerald in *Woodward* v. *Goulstone* (1). The *dicta* in that case seem to have been referred to in the case of *Treloar* v. *Lean* (2), the facts of which were very similar to those of the present one, except that three sheets had been substituted in an already executed will instead of one. In that case, Butt, J., refused to grant probate of the will or any part of it. Since then there seems to have been no other case on this point.

Acting upon the opinion of Lords Herschell and Fitzgerald in the House of Lords case above cited, and following *Treloar* v. *Lean*, I feel bound to refuse probate of that portion of the will now propounded which remains after removing sheet No. 2. To hold otherwise would be to give effect to a portion only of the testator's last will under a state of circumstances in which the Court would be unable to determine whether the part missing was the most or least important of the whole will, and in many cases the result would be to give the bulk of the testator's property to persons on whom he had intended to bestow only what remained after others had been made partakers of his bounty. This distinguishes this case from *In the goods of Woodward* (3) and *In the goods of Maley* (4), in both of which cases it was apparent that the portions destroyed were small or unimportant so far as the distribution of the testator's property was concerned. Costs of all parties, taxed between attorney and client, to come out of the estate.

Attorneys for the executors and the children.—Messrs. *Crawford, Burder and Bayley.*

Attorneys for Mrs. Meakin.—Messrs. *Craigie, Lynch and Owen.*

Suit dismissed.

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20 B. 377.

[377] ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

JAYNARAYAN MEGHRAJ AND ANOTHER (*Plaintiffs*) *v.* ISMAIL KARAMALI AND OTHERS (*Defendants*).* [12th December, 1895.]

Execution—Decree—Property attached in execution of decrees of Small Cause Court and High Court—Execution proceedings in Small Cause Court transferred to High Court—Property realized in execution—Civil Procedure Code (Act XIV of 1882), s. 295.

The plaintiffs obtained a decree in the High Court against the defendant and in execution attached goods in the defendant's shop. These goods, however, were already under attachment in execution of certain decrees obtained in the Small Cause Court against the defendant. On the 4th September, 1895, by an order of the High Court made on the application of the plaintiffs the execution proceedings in the Small Cause Court suits were transferred to the High Court, and it was ordered that the attached property should be realized by the High Court. The records of the execution proceedings in those suits were lodged in the Prothonotary's office. On the 26th September, 1895, the decree-holder in one of the Small Cause Court suits obtained an order from the Judge in chambers directing the Sheriff to take charge of the attached property and realize it by sale. The Sheriff accordingly sold the property and certified the sale to Prothonotary's office. The plaintiffs subsequently (under the rules of the Sheriff's office) applied to the Prothonotary for payment to them of the amount realized or so much

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* Suit No. 143 of 1894.

(1) 11 App. Ca. 469 (477, 485). (2) 14 P.D. 49=58 L.J. N.S. P. and M. 39.
(3) L.R. 2 P. and M. 206. (4) 12 P. D. 134.

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thereof as should satisfy their decree. The plaintiffs were directed to give notice of their application to the holders of the Small Cause Court decrees.

Held, that the holders of the Small Cause Court decrees were entitled to share rateably with the plaintiffs in the High Court suit in the proceeds of the property sold in execution by the Sheriff.

IN chambers.

This was an execution matter arising as follows :—On the 21st January, 1895, the plaintiffs obtained a decree in the High Court against Karmali Khakibhai (father of defendant) for Rs. 5,839 and costs, and in execution attached certain goods in the defendant's shop. These goods, however, were already under attachment in execution of a Small Cause Court decree (No. 346/27498 of 1895) obtained by one Rajbai against Karmali and also in another decree in another Small Cause Court suit. The plaintiffs' attachment was, therefore, effected under s. 272 of the Civil Procedure Code (Act XIV of 1882) by a letter, dated 20th July, addressed to the **[378]** Registrar of the Small Cause Court requesting him to hold the property until the further order of the High Court. By a similar letter dated the 1st March, 1895, other goods in a godown belonging to the said Karmali were also attached by the plaintiff.

By an order of the High Court, on the Appellate Side, made on the 4th September, 1895, on the application of the plaintiff, the execution proceedings in the Small Cause Courts suits were transferred to the Original Side of the High Court, and it was ordered that the attached property should be realized by the High Court. The records of the execution proceedings in those suits were accordingly lodged in the Prothonotary's office.

The Small Cause Court suits having thus been transferred, Rajbai, the decree-holder in one of them, applied *ex parte* on the 26th September, 1895, to the Judge in chambers, and obtained an order directing the Sheriff to take charge of the attached property and realize the same by sale. The Sheriff accordingly sold the property and filed his certificate certifying the sale in the Prothonotary's office, dated 30th November, 1895.

Rules Nos. 4, 7 and 8 of the Rules of the Sheriff's office are as follows :—

(4) Such certificate shall be filed in the office of the Prothonotary and the Prothonotary shall at the request of the judgment-creditor at whose instance the realization was made, certify what persons, if any, have within twelve months prior to the realization applied to the Court for execution of decrees for money against the same judgment-debtor, together with the amount appearing in the Register of Suits to be payable under such decrees.

(7) Should the judgment-creditor at whose instance the realization was made, neglect or refuse to apply for the certificate, or to serve the notice hereinbefore mentioned, any other person entitled to share in the assets shall he at liberty to apply for such certificate and serve such notice.

(8) If the Prothonotary shall certify that no person has within twelve months prior to the realization applied to the Court for execution of a decree for money against the judgment-debtor, the judgment-creditor may at once apply to the said Prothonotary for an order directing the Sheriff to pay to him the amount realized or so much thereof as may be sufficient to satisfy his decree.

No application having been made by Rajbai or the other Small Cause Court decree-holder under the above Rule No. 4, the decree-holder in the

High Court suit (Jaynarayan) applied under the above Rule No. 7 for the certificate required under Rule 4, and on the 27th [379] November, 1895, the Prothonotary granted the certificate stating that Jaynarayan was the only person who had applied.

Under the above Rule No. 8, Jaynarayan then applied to the Prothonotary for an order for payment. The Prothonotary referred the matter to the Judge in chambers, who directed Jaynarayan to give notice of the application to Rajbai.

The matter now came on for hearing before the Judge in chambers.

Macpherson, for the plaintiff, admitted that the plaintiffs in the Small Cause Court suits had applied for execution in that Court in those suits.

Starling (Acting Advocate-General) for Rajbai and the other Small Cause Court decree-holder.

Reference was made to *Jetha Madhavji* v. *Najeralli* (1); *Krishna Sankar* v. *Chandra Shankar* (2); *Dattatraya* v. *Rahimtulla* (3); *Pallonji S. Mistry* v. *E. V. Jordan* (4); *Gopinath Acharya* v. *Achcha Bibee* (5); *Nimbaji Tulsiram* v. *Vadia Venkati* (6); *Muttagiri Nayak* v. *Muttayyar* (7); Civil Procedure Code (Act XIV of 1882), ss. 25, 230, 235, 245, 295 and 647.

JUDGMENT.

B. TYABJI, J.—I do not intend that my judgment in this case should in any way throw doubt upon the cases cited by Mr. Macpherson, as, in my opinion, they do not touch the state of facts which exists here. In this case this Court has made an order consolidating all the execution proceedings in the two cases in the Small Cause Court and brought them up here to be dealt with in conjunction with the case now before me in this Court. Under these circumstances, I hold that this Court has adopted all the proceedings in execution in the Small Cause Court, and will deal with them as if they had taken place here. Consequently I must hold that the applications for execution made in the Small Cause Court by the plaintiffs in the suits in that Court are applications for execution under s. 295 of the Civil Procedure Code (Act XIV of 1882), and enure to the benefit of these plaintiffs in the same manner as if they had themselves transferred their decrees to this Court, and [380] thereafter made applications for execution here. These plaintiffs are, therefore, entitled to share rateably with the plaintiffs in this suit in the proceeds of the property sold in execution by the Sheriff.

Attorneys.—Messrs. *Matubhai and Jamietram*; Messrs. *Payne, Gilbert and Sayani*; and Messrs. *Chalk, Walker and Smetham*.

(1) 4 B. 472. (2) 5 B. 198. (3) 18 B. 456. (4) 12 B. 400.
(5) 7 C. 558. (6) 16 B. 688. (7) 6 M. 357.

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APPEL-LATE CIVIL.

20 B. 380.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

R. A. HILDRETH (*Original Defendant*), *Applicant v.* SAYAJI PIRAJI CONTRACTOR (*Original Plaintiff*), *Opponent.** [21st February, 1895.]

*Civil Procedure Code (Act XIV of 1882), ss. 100, 108 and 157—Presidency Court of Small Causes—Adjourned hearing—Absence of defendant—*Ex parte *decree—Practice—Procedure.*

A defendant is entitled to avail himself of s. 108 of the Civil Procedure Code (Act XIV of 1882) where an *ex parte* decree is passed against him at an adjourned hearing.

[F., 31 M. 505=4 Ind. Cas. 1167=19 M.L.J. 222=4 M.L.T. 216; R., 2 N.L.R. 179 (189).]

THIS was an application, under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882), against the decision of the Full Court (consisting of C. W. Chitty, First Judge, and M. H. Hakim, Fifth Judge) of the Bombay Court of Small Causes.

The applicant (defendant) was sued by the opponent (plaintiff) in the Court of the Fifth Judge of the Bombay Court of Small Causes to recover the sum of Rs. 507. At the first hearing of the case on the 7th May, 1894, the defendant appeared, denied the plaintiff's claim, and applied for a postponement to enable him to produce his witnesses. The case was consequently adjourned till the 14th June. The defendant did not appear in the Court on that day, and a decree was passed in the plaintiff's favour.

On the 16th June the defendant went to the Court, and he was then informed that a decree had been passed against him. On the 11th July he applied to the Judge that the decree should be set aside, and obtained a rule *nisi* for a new trial. The rule was subsequently made absolute, and a day was fixed for the re-trial of the case.

[381] In the meantime the plaintiff applied to the Full Court to set aside the order for re-trial under s. 108 of the Civil Procedure Code (Act XIV of 1882), and obtained a rule *nisi* calling on the defendant to show cause why the order for re-trial should not be set aside, and after argument of the rule the Full Court set aside the order for re-trial, holding on the authority of *Sitalal Hari* v. *Hiralal* (1) that as the decree was passed at an adjourned hearing it was not *ex parte*.

The defendant now applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling on the plaintiff to show cause why the order of the Full Court should not be set aside.

R. A. Hildreth (the applicant) appeared in person in support of the rule.—The Full Court was wrong in holding that the decree was not *ex parte*. I submit that the decree is *ex parte*, and I am entitled to relief under s. 108 of the Civil Procedure Code. Section 157 of the Civil Procedure Code (Act XIV of 1882) is applicable to the present case, and it provides that the Court should dispose of the suit in one of the modes prescribed by chap. VII. Section 108 is included in chap. VII, and, therefore, I am entitled to the benefit of that section. See *Doyal Maistree*

* Application No. 219 of 1894 under the extraordinary jurisdiction.

(1) 21 C. 269.

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v. *Kupoorchund* (1) ; *Ramtahal Ram* v. *Rameshar Ram* (2), *Hira Dai* v. *Hira Lal* (3).

B. R. Bamanji (with *S. F. Billimoria*), appeared for the opponent (plaintiff) to show cause.—It was at the request of the defendant that an adjournment was granted in order that he might be able to produce his witnesses. He had, therefore, notice of the adjourned hearing, and having failed to appear on the appointed day it is not now open to him to say that the decree is *ex parte*. The reference in s. 157 to Chap. VII of the Code indicates merely the procedure to be followed. It does not necessarily give to the defendant the relief which he would have been entitled to if the decree had been passed under that chapter. The Privy Council have in *Zain-ul-abdin Khan* v. *Ahmad Raza Khan* (4) pointed out the distinction between a case [382] decided *ex parte* in the absence of one of the parties at the first hearing and a case decided in the absence of the defendant on the date to which the hearing of the suit was adjourned at the defendant's request. The Calcutta High Court followed the Privy Council ruling in *Sital Hari* v. *Hiralal* (5) which, we submit, is applicable to this case.

JUDGMENT.

SARGENT, C. J.—The Small Cause Court has decided on the authority of *Sital Hari* v. *Hiralal* (5) that s. 108 does not apply where an *ex parte* decree has been made at an adjourned hearing.

The question turns upon the construction to be put on the words in s. 157, that the "Court may proceed to dispose of the suit in one of the modes directed in that behalf by Chap. VII or make such other order as it thinks fit." Section 100 is the only section in that chapter applicable to the case under which the Court could proceed to dispose of the suit, and one of the modes which the Court may adopt as provided by clause (*a*) of that section is that it may make a decree *ex parte*. Section 108 of the same chapter, however, says that "in any case in which a decree is made *ex parte* against a defendant he may apply to the Court for an order to set it aside." The Calcutta Court say that "the reference in s. 157 to Chap. VII is merely to indicate the procedure of the Court and not to give a defendant the privilege to which he is entitled, if the suit was decided *ex parte* strictly within the terms of s. 100." No doubt it provides for the procedure of the Court, but if such procedure includes the making an *ex-parte* decree, there would appear to be no sufficient reason for holding that the decree is not subject to the usual incident of such decrees (*viz.*, an application by the absent defendant to set it aside and have the suit restored, as provided by s. 108 of the chapter). It is plain that the absent defendant may be able to show a perfectly good reason for his absence on the day of the adjourned hearing, and if he can do so, the injustice of deciding behind his back would be just as great as on the first hearing.

We think that, in the absence of clear words to show a contrary intention, the defendant is entitled to avail himself of s. 108. This is the view taken by the Allahabad High Court in *Hira Dai* [383] v. *Hira Lal* (3). In the judgment of Oldfield, J., it is pointed out that the decision of the Privy Council in *Zain-ul-abdin Khan* v. *Ahmad Raza Khan* (4), to which the Calcutta Court refers, is only a decision on the words of s. 111 of Act VIII of 1859, and has no bearing on the point in question. In this

(1) 4 C. 818.
(2) 8 A. 140.
(3) 7 A. 538.
(4) 5 I A. 233.
(5) 21 C. 269.

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view of s. 157, Civil Procedure Code (Act XIV of 1882), the Small Cause Court has wrongly refused to exercise the power given it by that section, and it is, therefore, a proper case for the exercise of our extraordinary jurisdiction.

We must discharge the order refusing the application, and send back the case for a decision on the merits. Costs to be costs in the application.

Order discharged.

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20 B. 383.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Fulton.

GOVINDRAM AND OTHERS (*Decree-holders*) *v.* TATIA (*Judgment-Debtor.*)* [12th March, 1895.]

Limitation Act (XV of 1877), ss. 7 and 8, and art. 179—Decree—Execution—Joint decree-holder—Minority of joint decree-holder—Application for execution after attaining majority—Civil Procedure Code (Act XIV of 1882), s. 231.

Govindram and his two minor nephews, Shankarlal and Davlatram, obtained a decree on 1st December, 1885. Govindram applied for execution on the 24th November, 1886, and died in May, 1887. Shankarlal attained majority on the 15th December, 1891, and on the 24th July, 1894, applied for execution, no application having been made since November, 1886.

Held, that the application was not barred by limitation. Under s. 231 of the Civil Procedure Code (Act XIV of 1882), Shankarlal was entitled equally with the other judgment-creditors to apply for execution of the whole decree for the benefit of all the decree-holders; and as he was a minor when the decree was passed, and when the last application for execution was made, he was entitled to the benefit of s. 7 of the Limitation Act (XV of 1877), and could apply for execution within three years of attaining majority. Section 8 of the Limitation Act, (XV of 1877) applies only to those cases in which the act of the joint owner is, *per se*, a valid discharge. Section 7 applies where only some of the judgment-creditors, and not all, are affected by a legal disability.

[F., 22 A. 199 (F.B.)=20 A.W.N. 8; 28 C. 465 (469, 471)=5 C.W.N. 767; 6 Bom. L.R. 647; 7 C.L.J. 308; 3 O.C. 316 (320); 9 O.C. 269 (270); R., 34 B. 672=12 Bom. L.R. 682=7 Ind. Cas. 939; 25 M. 26; 12 Ind. Cas. 695=21 M.L.J. 1041=(1911) 2 M.W.N. 450=10 M.L.T. 418; 15 Ind. Cas. 664; Dis. Appr., 25 M. 431=12 M. L.J. 166 (F.B).]

[384] THIS was a reference made by Rao Saheb Ezra Reuben, Acting Subordinate Judge of Rahuri, in the Ahmednagar District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

One Govindram and his two minor nephews, Shankarlal and Davlatram, obtained a decree against Tatia on the 1st December, 1885. Govindram died on the 21st May, 1887, leaving a minor son. Shankarlal attained majority on the 15th December, 1891, and on the 24th July, 1894, applied for the execution of the decree. The last preceding application for execution having been made on the 24th November, 1886, the question now arose whether the application was time-barred. The Subordinate Judge, therefore, referred the following question to the High Court:—

"Whether the minority of one of several judgment-creditors saves the execution of the decree from being time-barred during the period of minority of the minor *plus* three years?"

The opinion of the Subordinate Judge was in the affirmative.

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* Civil Reference No. 1 of 1895.

Shivram V. Bhandarkar (*amicus curiæ*), for the decree-holders, relied on *Anando Kishore Dass* v. *Anando Kishore Bose* (1).

H. C. Ooyaji (*amicus curiæ*), for the judgment-debtor, cited *Seshan* v. *Rajagopala* (2).

JUDGMENT.

SARGENT, C. J.—The facts of this case are stated to be as follows:—The decree, of which execution is now sought by an application dated 24th July, 1894, was passed on the 1st December, 1885, in favour of Govindram and his undivided minor nephews Shankarlal and Davlatram. The last preceding application for execution was made on the 24th November, 1886. Govindram died on the 21st May, 1887, leaving a minor son. Shankarlal came of age on 15th December, 1891, and within three years of that date presented the application for execution now under consideration. The question referred is—whether the minority of one of several judgment-creditors saves the execution of the decree from being time-barred during the period of minority of the minor *plus* three years?

[385] To this question the answer must be in the affirmative, in the circumstances of the case now before us. Under the provisions of s. 231 of the Civil Procedure Code, Shankarlal was entitled equally with the other judgment-creditors to apply for execution of the whole decree for the benefit of all the decree-holders; and as he was a minor when the decree was passed, and when the last application for execution was made, he is entitled to the benefit of s. 7 of the Limitation Act, and can apply for execution within three years of attaining majority.

We agree with the opinion expressed in *Seshan* v. *Rajagopala* (2) that s. 8 of the Limitation Act applies only to those cases in which the act of the adult joint owner is, *per se*, a valid discharge. But we are unable to hold that s. 7 does not apply where only some of the judgment-creditors, and not all, are affected by a legal disability. The reasoning in *Perry* v. *Jackson* (3) referred to by the Madras High Court does not really touch the point under consideration, inasmuch as s. 7 applies to an application like the present one, which any one of the judgment-creditors may present by himself under the provisions of s. 231 of the Civil Procedure Code.

For these reasons, we agree with the Subordinate Judge in holding that Shankarlal is, in the circumstances, entitled to obtain execution of the decree. This is also the view of the Calcutta High Court in *Anando Kishore Dass* v. *Anando Kishore Bose* (1).

Order accordingly.

(1) 14 C. 50. (2) 13 M. 236. (3) 4 T. R. 519.

20 B. 385.

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APPELLATE CIVIL.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

20 B. 385.

UMED HATHISING (*Original Opponent*), *Applicant v.* GOMAN BHAIJI, MINOR, BY HIS GUARDIAN AND NEXT FRIEND HIS WIDOWED MOTHER CHANDA (*Original Applicant*), *Opponent.** [12th March, 1895.]

Hindu law—Joint family—Money decree against father—Execution against son after the death of the father—Ancestral property in the hands of the son liable—Civil Procedure Code (Act XIV of 1882), ss. 234, 244 and 278.

[386] A money-decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality. If the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under s. 244 of the Civil Procedure Code (Act XIV of 1882).

Ariabudra v. *Dorasami* (1) and *Lachmi Narain* v. *Kunji Lal* (2) not followed.

[**Diss.**, 6 C.W.N. 223; **N.F.**, 1 N.L.R. 173 (177); 6 O.C. 271 (272); **F.**, 33 C. 676=3 C.L.J. 131=11 C.W.N. 163; 34 C. 642=5 C.L.J. 491=11 C.W.N. 593=2 M.L.T. 207; 16 C.P.L.R. 19 (26); **Appl.**, 11 Bom.L.R. 699 (705); **R.**, 28 B. 383=6 Bom.L.R. 344; 32 B. 348=10 Bom. L.R. 297; 33 B 39 (42)=10 Bom. L.R. 939; 3 Bom. L.R. 322 (340); 5 C.L.J. 80=11 C.W.N. 163; 14 C.L.J. 337=11 Ind. Cas. 280; 8 C.W.N. 843 (857); **D.**, 3 Bom.L.R. 97 (99).]

THIS was an application under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of J. B. Alcock, District Judge of Surat, confirming the decree of Khan Saheb J. E. Modi, Second Class Subordinate Judge of Oipad, in an execution proceeding.

Umed Hathising obtained a money-decree against one Bhaiji, the father of the minor opponent, and after Bhaiji's death proceeded to execute it by attachment and sale of his land in the hands of the opponent. The opponent through his mother and guardian applied to have the attachment removed on the ground that the land was ancestral undivided property, and was not liable for Bhaiji's debts after his death, and that the debt in dispute was not contracted by Bhaiji for family purposes. The applicant contended that the debt for which the decree was obtained had been incurred by Bhaiji for the benefit of the family and that the opponent succeeded to the ancestral estate burdened with the payment of his father's debt.

The Subordinate Judge treated the opponent's application as falling under s. 244 of the Civil Procedure Code (Act XIV of 1882) and removed the attachment.

On appeal by the applicant, the District Judge confirmed the decision of the Subordinate Judge.

The applicant now applied under the extraordinary jurisdiction of the High Court, and obtained a rule *nisi* calling on the opponent to show cause why the order of the District Court should not be set aside.

Govardhanram M. Tripathi, for the applicant, in support of the rule:—The question is whether a money-decree against a Hindu **[387]**

* Application No. 72 of 1894 under the extraordinary jurisdiction.

(1) 11 M. 413.

(2) 16 A. 449.

father is binding on the sons after the death of the father to the extent of the assets they have received. The authorities on the point are in conflict. The High Courts at Madras and Allahabad have held that it is not binding, while the High Courts at Bombay and Calcutta have held that it is binding.

There was no appearance for the opponent.

The following authorities were cited in argument :—*Maganlal* v. *Soma Hirachand* (1) ; *Sakharam Ramchandra* v. *Govind Vaman* (2) ; *Jagabhai Lalubhai* v. *Vijbhukandas* (3); *Cooverji Hirji* v. *Dewsey Bhoja* (4) ; *Nanomi* v. *Modun Mohun* (5); *Punchanun Bundopadhya* v. *Rabia Bibi* (6) ; *Lachmi Narain* v. *Kunjilal* (7) ; *Karnataka Hanumantha* v. *Andukuri Hanumayya* (8) ; *Ariabudra* v. *Dorasami* (9) ; Mayne's Hindu Law, arts. 321 to 323 : White's Act (Bom. Act VII of 1866), s. 5.

JUDGMENT.

SARGENT, C. J.—The question which we have to decide is whether when a money-decree has been obtained against the father of an undivided Hindu family, execution can be had after his death against his sons to the extent of the ancestral property that has come into their hands. The matter has recently been considered, and the question answered in the negative by the Allahabad High Court in the case of *Lachmi Narain* v. *Kunjilal* (7) ; but the decision cannot be reconciled with the judgment of this Court in *Jagabhai* v. *Vijbhukandas* (3), in which it was held that ancestral property in the hands of sons could be attached in execution of a money-decree against their deceased father with whom they had remained united until his death.

It cannot be denied that the wording of s. 234, Civil Procedure Code, presents an obstacle to proceedings in execution against the sons as the legal representatives of their father in respect of the ancestral property as it vests in them by birth and survivorship, and cannot be described as the property of the deceased which has come into their hands. But the answer to the question turns upon the inference to be drawn from the recent [388] decisions of the Privy Council as to the right of creditors to realize their claim against the father out of the entire estate. In *Jagabhai* v. *Vijbhukundas* Mr. Justice West says, in reference to the decision of the Privy Council in *Mussamut Nanomi* v. *Modun Mohun* (5), which it is to be observed was the case of a money-decree, "The father in fact is made the representative of the family, both in transaction and suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part." It will be safer perhaps to rely on the language of Lord Hobhouse, who delivered the judgment of the Privy Council in the above case, as to the principle laid down by the decisions of that Court. He says : "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality." Again His Lordship says : "If the debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can

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(1) P. J. (1889), 191.
(2) 10 B.H.C.R. 361.
(3) 11 B. 37.
(4) 17 B. 718.
(5) 13 I.A. 1.
(6) 17 C. 711.
(7) 16 A. 449.
(8) 5 M. 232.
(9) 11 M. 418.

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claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact of the nature of the debt in a suit of their own."

Such being the general principle as to the power of the father to bind the interest of the sons in a suit against the father, there may doubtless be cases in which having regard to the execution proceedings it is to be inferred that it was only the father's estate which was intended to be sold, such as *Deendyal* v. *Jugdeep* (1), *Hurdey Narain* v. *Baboo Rooder*(2), *Mahabir* v. *Rai Markunda*(3), which are important decisions as showing the nature of the distinctions which may be drawn having regard to the nature of the suit and the execution proceedings; but it being distinctly established by the Privy Council's decisions that the creditor can attach and sell the entirety of the estate in execution of a money-decree against the father, we are unable to agree **[389]** with what is said by the Madras High Court in *Arnabudra* v. *Dorasami*(4), and which is much relied on in the judgment of the Allahabad High Court in *Lachmi Narain* v. *Kunjilal* (5), that the obligation of the sons to satisfy their father's debts is not within the scope of the decree against the father. On the contrary it appears to us that the judgment of Lord Hobhouse above referred to treats it throughout as being so, whether on the ground of representation of the sons by their father as stated by West, J., in *Jagabhai* v. *Vijbhukandas*(6) or on the ground that the creditor has the power to attach and sell the entire interest in the land in execution proceedings against the father. If the son, against whom the decree is sought to be executed, as the representative of his father, takes the objection that the debts were tainted with immorality, he can do so under s. 244 as decided by the majority of the Full Bench in *Seth Chand* v. *Durga Dei*(7) in the analogous case in which the objection was taken by the sons, that the property sought to be attached was not assets in their hands or at any rate under s. 278, Civil Procedure Code (Act XIV of 1882), which Tyrrel, J., considered to be the proper course. The Subordinate Judge has noticed that in the case of *Jagabhai* v. *Vijbhukandas* the debt was incurred for the benefit of the family, but the result would have been precisely the same if it had been incurred for the sole purposes of the father, provided it was not tainted with immorality or illegality.

Under these circumstances we think that in refusing in this case to entertain the execution proceedings against the sons to the extent of the ancestral property that had come into their hands, the lower Courts failed to exercise a jurisdiction vested in them by law, inasmuch as it was their duty to grant execution to such extent unless the sons who had been made parties to the record as representatives of their deceased father succeeded in proving that the debt was not one for which they could be made liable by Hindu law.

We accordingly discharge the orders of the lower Courts and direct the Subordinate Judge to restore the *darkhast* to his file **[390]** and dispose of it in conformity with the above remarks. The applicant to have his costs of this application if he should succeed in the execution proceedings.

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(1) 4 I.A. 247. (2) 11 I. A. 26. (3) 17 I. A. 11. (4) 11 M. 413.
(5) 16 A. 449. (6) 11 B. 37. (7) 12 A. 313 (314).

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Before Mr. Justice Jardine and Mr. Justice Ranade.

DESAI LALLUBHAI JETHABHAI (*Original Defendant No.* 7), *Appellant v.* MUNDAS KUBERDAS (*Original Plaintiff*), *Respondent.**

[12th March, 1895.]

Mortgage—Priorities—Registration Act III of 1877, *s.* 50—*Sale in execution of decree on prior unregistered mortgage—Rights of purchaser—Claim of subsequent mortgagee in possession under registered mortgage—Rights of such subsequent mortgagee where he was not a party to the suit on prior mortgage—Transfer of Property Act* (*IV of* 1882), *s.* 75.

In October, 1887, the plaintiff purchased certain lands at a sale held in execution of a decree passed on an unregistered mortgage effected in 1862. The defendant was in possession as mortgagee under a subsequent registered mortgage of 1867. He was not a party to the suit and decree of 1887. The plaintiff sued for possession. The defendant claimed that the plaintiff could not recover possession without paying off his (the defendant's) claim.

Held, that at the execution sale the plaintiff bought the property in dispute free from all subsequent incumbrances, subject only to the right of the defendant, if he so desired, to retain possession.

Held, also that the plaintiff as purchaser stood in the place of the prior mortgagee and had a right to possession; that the defendant as subsequent mortgagee could not compel the plaintiff to pay off his (the defendant's) mortgage, but that the defendant not having been a party to the suit on the prior mortgage had a right, if he wished to retain possession, to pay off the plaintiff's claim.

Mohan Manor v. *Togu Uka* (1) referred to and followed.

Registration under Act III of 1877 does not operate so as to exclude instruments executed before Act XX of 1864 came into operation on the ground of their non-registration.

Tirumala v. *Lakshmi* (2) referred to and followed.

[F., 23 A. 1 (3); 23 A. 25 (31); 28 A. 607 (609) = 3 A.L.J. 320 = 26 A.W.N. 113; 28 B. 153 = 5 Bom. L.R. 892; 28 C. 139 31 C. 737 (743); 26 M. 537 (539); 1 N L.R. 158 (163); 1 S.L.R. 172; **Disappr.**, 9 Ind. Cas. 513 = 21 M.L.J. 213 = 9 M.L.T. 431 (F.B) = (1911) 1 M.W.N. 165.

SECOND appeal from J. Fitz Maurice, Assistant Judge of Ahmedabad.

Suit for possession of a godown and certain lands.

In February, 1862, one Nathubhai and his sons mortgaged the property in question by an unregistered *san*-mortgage-deed to Bhogilal and Kalidas.

[391] In 1887 the mortgagees obtained a decree on the mortgage, and on the 30th October, 1887, sold the property in execution to plaintiff.

In attempting to obtain possession the plaintiff was resisted by Desai Lallubhai Jethabhai (defendant No. 7) and two others (defendants Nos. 8 and 9).

The plaintiff, therefore, brought this suit against the original mortgagors (defendants Nos. 1—6) and Desai Lallubhai (defendant No. 7) and defendants Nos. 8 and 9.

Lallubhai (defendant No. 7) claimed possession of some of the land under a registered mortgage from Nathubhai and his sons, dated 1st January, 1867, which was renewed in May, 1883, and of the godown under registered mortgages dated 1873 and 1883. He contended that he

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* Second Appeal No. 880 of 1893.

(1) 10 B. 224. (2) 2 M. 147.

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being in possession under a registered mortgage the plaintiff had bought subject to his claim, and that the plaintiff must satisfy his mortgage-debt before he could recover possession.

Defendants Nos. 8 and 9 claimed other parts of the property sold at the execution sale in 1887, but the plaintiff compromised the suit as against them, and sold them the land they claimed.

The Subordinate Judge held that as Lallubhai had not been a party to the mortgagee's suit in 1887 he should be permitted to redeem the mortgage under which the plaintiff claimed, and directed that he should pay within six months the full amount (Rs. 1,448) of the decree of 1887 into Court to the credit of the plaintiff, and in default that the plaintiff should recover possession.

On appeal the Assistant Judge varied the decree by permitting the defendant Lallubhai to redeem on payment Rs. 751-8-0 instead of the whole amount of the decree in 1887 on the ground that Lallubhai had possession of only part of the lands comprised in the original mortgage, the rest being in the possession of the defendants Nos. 8 and 9 with whom the plaintiff had compromised his claim by selling these lands to them. He said :—

"I think, however, that the Subordinate Judge erred in requiring defendant No. 7 to redeem by payment of the full amount of the decree obtained against the mortgagors. For under the **[392]** decree other property besides that with defendant No. 7 was sold ; that other property was also the subject of the prior mortgage. It was in the possession of defendants Nos. 8 and 9 in this suit, and plaintiff has compromised the suit as against them by selling that property to them for Rs. 600 (*vide* purshis in appeal). I think, therefore, it would be inequitable to throw the whole burden of the amount decreed on the prior mortgage on the portion of the property which is with defendant No. 7."

Defendant No. 7 was, therefore, permitted to redeem on payment of Rs. 751-8-0 only within six months from the date after the decree in appeal.

Against this decision Lallubhai (defendant No. 7) preferred a second appeal to the High Court.

Govardhanram M. Tripathi, for the appellant.

Chimanlal H. Setalwad, for the respondent (plaintiff).

JUDGMENT.

RANADE, J.—There are only two points which demand consideration in this case, the first being concerned with the relative rights of prior and subsequent incumbrancers *inter se*, and the second has reference to the operation of s. 50 of the Registration Act III of 1877.

The respondent (original plaintiff) purchased the property in dispute at a Court sale held on 30th October, 1887, in execution of a decree on an unregistered *san*-mortgage-bond of 1862. When he proceeded to take possession of the land, the appellant (original defendant No. 7) obstructed him on the ground that he was in possession under a registered mortgage-bond of 1887, renewed in 1883, and that respondent was bound to satisfy his mortgage before he could recover possession of the lands under his certificate of sale. The contest is thus between the purchaser in execution of a decree on a prior unregistered *san*-mortgage of 1862, and the defendant in possession under a subsequent registered mortgage of 1883, a renewal of one effected in 1867.

The authorities—*Namdar Chaudhri* v. *Karamraji* (1). *Muhammad* v. *Man Singh* (2), *Gajadhar* v. *Mul Chand* (3), *Mohan Manor* v. *Togu Uka* (4) —are quite clear on the points (1) that the purchaser **[393]** stands in the place of the prior mortgagee, and (2) that he has a right to recover possession, (3) that the subsequent mortgagee cannot compel him to redeem his own mortgage, but (4) has a right himself, in case he has not been made a party to the suit on the prior mortgage, to pay off the prior incumbrance if he desires to retain possession. The case of *Gaya Prasad* v. *Salik Prasad* (5) had special features, but even in that case Oldfield, J., admitted that he had seen reason to change the view once held by him, and stated, following the ruling in *Gopee* v. *Kalee* (6) that the subsequent incumbrancers have only a right to pay off the debt on account of which the estate was sold, and to treat the purchaser as the owner of the estate subject to their claim.

The facts of the present case are on all fours with those in *Mohan Manor* v. *Togu Uka* (4), and on the authority of that decision and the cases referred to therein—*Kasandas* v. *Parajivan* (7), *Damodar* v. *Naro* (8) —we must hold that the respondent bought at the execution sale the property in dispute free from all subsequent incumbrances, subject only to the right of the appellant to redeem him if he so desired—*Wasudev* v. *Narayan* (9) ; *Mansukh* v. *Turbhovan* (10). The law under s. 75 of the Transfer of Property Act (IV of 1882) is the same—*Venkata* v. *Kannam*(11) ; *Shivaram* v. *Genu* (12) ; *Naran* v. *Dolatram* (13) ; *Sankana* v. *Virupakshapa* (14), *Radhabai* v. *Shamrav* (15).

The question of registration appears to present no difficulty. Registration under Act III of 1877 does not operate so as to exclude instruments executed before Act XX of 1864 came into operation, on the ground of their non-registration—*Tirumala* v. *Lakshmi* (16). The Bombay decision in *Khandu* v. *Tarachand* (17), is to the same effect. As the execution-sale took place in respect of a *san*-mortgage in Gujarat, the question of want of possession can have no significance. We accordingly confirm the decree. Appellant to pay all costs.

Decree confirmed.

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[394] APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* LATIFKHAN.* [12th March, 1895.]

Penal Code (Act XLV of 1860), s. 330—Using violence for the purpose of extorting a confession—Abetment—Illegal omission to act—"Respondeat superior"—Bombay Police Act (IV of 1890, ss. 51 and 52—Duty of a police officer to shelter a person in custody.

A policeman who stands by, acquiescing in an assault on a prisoner committed by another policeman for the purpose of extorting a confession, is guilty of abetment of an offence under s. 330 of the Indian Penal Code.

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* Criminal Appeal, No. 16 of 1895.

(1) 13 A. 315. (2) 9 A. 125. (3) 10 A. 520. (4) 10 B. 224.
(5) 8 A. 682. (6) 23 W.R. 338. (7) 7 B.H.C.R. A.C.J. 146.
(8) 6 B. 11. (9) P. J. (1882), 21 (10) *Ibid.* 213. (11) 5 M. 184.
(12) 6 B. 515. (13) *Ibid.* 538. (14) 7 B. 146. (15) 8 B. 168.
(16) 2 M. 147. (17) 1 B. 574.

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Nothing but fear of instant death is a defence for a policeman who tortures any one by order of a superior. The maxim *respondeat superior* has no application in such a case. Under the Bombay Police Act (IV of 1890) every police officer is bound to shelter a person in custody, and to arrest persons committing assaults likely to cause grievous bodily injury. If he omits to perform this duty, he is guilty of abetment.

When the law imposes a duty to act on a person, his illegal omission to act renders him liable to punishment.

APPEAL from the conviction and sentence recorded by A. H. Unwin, Sessions Judge of Nasik, in the case of *Queen-Empress* v. *Chunilal and Latifkhan*.

The accused No. 1 (Chunilal), a police constable, was charged with voluntarily causing hurt to extort a confession, under s. 330 of the Indian Penal Code (Act XLV of 1860).

Latifkhan (accused No. 2), who was also a police constable, was charged with abetment of the offence.

The facts of this case were briefly as follows:—

One Chandri reported to the police patil and to the two constables (the accused in the present case) that her neighbour Mahadu had committed theft of her property during her absence from her house. Mahadu was thereupon arrested and remained in close custody. His house was searched after 11 P.M., but no part of the stolen property was found. Then ashes were spread on the ground, and he was made to walk or stand on them. Accused No. 1 (Chunilal) beat him with his fist and kicked him with his booted foot for the purpose of extorting a confession. But no confession could be [395] extracted from him. Accused No. 2 (Latifkhan), who was present at the beating, did not remonstrate with accused No. 1, or prevent him from offering violence to Mahadu. Mahadu remained a prisoner on his verandah guarded by accused No. 2. Within a short time after the beating, Mahadu died.

The Civil Surgeon who examined the corpse was of opinion that the immediate cause of death was rupture of the spleen. He attributed the rupture to some external violence, such as blows and kicks, although there were no external marks of injury.

The Sessions Judge, differing from the assessors, found both the accused guilty of the offences charged, and sentenced accused No. 1 to rigorous imprisonment for four years, and accused No. 2 to rigorous imprisonment for two years.

Against these convictions and sentences the accused appealed to the High Court.

Manekshah Jehangirshah, for accused.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

JUDGMENT.

JARDINE, J.—Before dealing with the questions of law, I will state the views I take of the facts which in most points are those expressed by this Court in its oral judgment upholding the conviction and sentence passed on Chunilal. I gave great weight to the remarks of the learned Judge on the demeanour of the witnesses; he heard them, and that is one recognized way of estimating them. His estimation is confirmed by several things. 1st, the assessors have nothing to say against Sukrani, whom he believes. 2nd, she has not varied her story in any substantial particular. 3rd, the other witnesses, Chandri and Yesha, after first denying the assault, have sworn to her story in most details. The patil who

denies any assault, is not to be believed. He and Yesha are both police officers and took a part in the improper, and seemingly unreasonable, arrest and search which preceded the death of Mahadu; in screening the prisoners they screen themselves. It is possible, as no marks were found on the skin, that Sukrani has exaggerated the assault: one blow or kick near the spleen might have produced the rupture, but the evidence is that several were given: this also is possible. Everything [396] shows that there was no circumstance showing a reasonable ground of suspicion that Mahadu was guilty of the theft alleged by Chandri; the whole evidence is that the endeavour of Chunilal was to induce a confession, in lieu of evidence, from Mahadu, and that he denied it. It was not the interest or intention of any one to do serious bodily harm such as would leave marks. Such behaviour is full of risk. It was the intention by threats, and gestures full of threats, such as light blows or kicks, to get the man to confess. This is the evidence.

Section 163 of the Criminal Procedure Code (X of 1882) forbids every policeman whosoever to do such a thing; and no superior is to be obeyed who dares to set himself above the law. Sections 165 and 103 require the police officer to use some publicity in making a search: he must require two or more respectable inhabitants of the locality to be present. This is a certain check on malpractices. It was not observed; and these dark proceedings went on at night. The prisoner Latifkhan was present, and the first question about him is, what did he do? It is admitted that he did not strike the deceased. His presence is consistent with the absence of any *mens rea* as to torture, or extortion of confession. It is easy to depose to words or gestures of a sort to implicate him in this crime. Therefore, the evidence must be carefully and cautiously examined. I attach no great importance to the discrepancy in Sukrani's two statements as to whether the slap she says Latifkhan gave her was before or after the first blow given by Chunilal to Mahadu. I do not regard her as a false witness. The more reluctant witness, Chandri, says Latifkhan waved her off. The other reluctant witness, Yesha, says he waved his right hand at her, saying don't make a row, but whether his hand touched her or not, he did not see. From the mouths of such persons, I treat these statements as unwilling corroboration. The common intention of Chandri, Yesha, the patil and Chunilal was to induce a confession. The waving off of Sukrani, the telling her not to make a row, seem to me things done by Latifkhan to effect that result. I see nothing improbable in Sukrani's assertion that Latifkhan said "Let us beat them both and then they will confess." The Sessions Judge was in a better position than this Court to say whether she is a truthful witness or not. I take it that she is.

[397] Taking this view of the facts, I am of opinion that Latifkhan was rightly convicted, and I would sustain the conviction on two grounds: his proved encouragement of Chunilal, his proved omission to perform his legal duty. Under the Bombay Police Act IV of 1890 every police officer is always on duty in his district—s. 32, and bound to shelter every person in custody--s. 52, and to arrest persons committing assaults like that on Mahadu—s. 51. He has not pleaded the order of a superior or coercion by a superior; and there is nothing to show that Chunilal had authority over him, both being ordinary constables, Chunilal being of the first class, but neither of them head constables. Mr. Justice Ranade thinks, however, that the prisoner was under Chunilal's orders. Mahadu was in their joint custody when the kicks and blows were given, which caused rupture

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of the spleen. After such a horrible occurrence, the remarks of the Sessions Judge on the illegal doings of the men will doubtless receive serious attention.

To prevent such disgraceful malpractices in future, it will be well for the Bench to declare what the law is and on what doctrine founded. The Indian Penal Code (Act XLV of 1860), ss. 329, 330 and 331, punishes those who use torture to extort discovery or confession. The following are two of the illustrations to s. 330:—(1) A, a police officer, tortures B in order to induce Z to confess that he had committed a crime. A is guilty of an offence under this section. (2) A, a police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section. The punishment may extend to seven years' imprisonment and fine. Both of these illustrations might have been framed from the evidence in the case before us. In such matters, Mr. Mayne in his commentary on s. 79 of the Indian Penal Code points out that the command of a superior, whatever his rank, is no defence. Where by command of a jamadar then present some constables tortured a woman, they were held guilty—*Queen* v. *Behary Singh* (1). No such excuse is a defence at law unless it is definitely accepted by the law itself as a defence; and then it is usually enacted as a general or special exception to the ordinary law. Nothing but fear of instant death is a defence for a policeman who tortures a man or woman by superior order. This interpretation is placed on s. 94 of the [398] Penal Code in *Queen* v. *Sonoo* (2), where the prisoners pleaded that a police inspector had coerced them to make false statements. This case is quoted with approval in the leading case, *Queen-Empress* v. *Maganlal* (3), where the same interpretation is placed on s. 94 by Bayley, J., and myself. When the law places a duty to act on a person, his illegal omission to act is to be judged by the same principles. It may be a form of abetment under s. 107; while s. 116 takes particular notice of the omission of a police officer whose duty it is to prevent a crime. So where a police officer purposely kept out of the way, knowing that some persons were likely to be tortured to get confessions out of them, he was pronounced guilty of abetment—*Queen* v. *Kali Churn* (4). In the present case, the law required Latifkhan to prevent Chunilal using torture, but he did not even expostulate. The law, therefore, punishes his failure to act. Otherwise any single policeman might by overawing the Queen's subjects by surrounding them with a force of acquiescing constables proceed to torture and murder one person after another, the presence of these officers of the law being the means of breaking the law. See Lord Macaulay's note cited at p. 132 of *Maganlal's* case (3). It would, therefore, have been no defence, if pleaded by Latifkhan, that he acted under some sort of obedience to Chunilal. There may be a habit of thought of this kind among the police, a tradition to this effect, a feeling of helplessness diffused among them. These are the excuses made for the corrupt Mamlatdars by Sir Raymond West, which were considered in *Maganlal's* case (see p. 130), and were pronounced vain before the law. The police no more than the Magistrates will be allowed to plead cowardice: the law by the threat of punishment compels them to act up to their duty and forces each one of them to interpose his authority and prevent the other torturing their prisoner. Here the maxim *respondeat superior* has no application; the only superior is the law. This telling

(1) 7 W.R. Cr. R. 3.
(2) 10 W.R. Cr. R. 48.
(3) 14 B. 115.
(4) 21 W.R. Cr. R. 11.

a prisoner that he is guilty and using threats or violence to make him confess, are treated by Lord Coke as malpractices contrary to the great provision of the Great Charter which forbids any judgment or punishment of the subject except by the Courts of law—2 Inst. 54 on Magna Charta, Cap. 29. Even when the words *legam terræ* were held to [399] import the prerogative (see David Jardine's Reading on Torture) and to sanction the practice of torture by the King's command, they were never held to sanction it on the part of lower officers. This great provision is at the foundation of our law ; and, as an old lawyer says quaintly, Magna Charta is so troublesome a fellow that he will have no superior.

It behoves the District Magistrate to make due inquiry into the behaviour of the police patil and his reasons for reporting that Mahadu died of fever. He is the officer on whom the law imposes the duty, in cases of violent death, of holding an inquest and finding a verdict. Although he may rightly have left the inquest to the Magistrate called upon specially by s. 176 of the Code to make solemn inquiry whenever a person dies in police custody, he had no right to report anything untrue. I say that when a man is killed under torture, even by such an unforeseen thing as rupture of a diseased spleen, especially if the torture is applied by the agents of the law, it is solemn duty of Her Majesty's servants, to fulfil her Coronation oath, to make such use of our criminal law and procedure as will prevent such offences taking place again. It is not creditable that, on the mere suspicion of the women Chandri, both village and district policeman should proceed to such violent measures as to arrest Mahadu, keep him in custody for hours, search his house at night, threaten him to make him confess, and then not state the true facts or lay them before the inquest.

Coming to the sentence passed, I think it right to say that in several recent cases where murders have occurred the petty officials have shirked their duty or falsified the evidence, pleading laziness or cowardice or showing corrupt or partial behaviour. It is not to be tolerated that the lowest class of officers shall in these ways interfere with the due detection and punishment of the highest crimes known to the law. I have doubts, however, whether until *Maganlal's* case (1) came before this Court, the frailty, as a defence, of such excuses as cowardice, helpness and traditional ways of thought was fully understood. It was even urged by the Advocate General in a later case (*Queen-Empress* v. *Chagan* (2)) that the Government of Bombay believed that much considered judgment has misled the Magistrates. I do not think that was the case, as s. 94 of the Penal [400] Code is clear, and no lawyer had ever suggested, until the matter of the Mamlatdars arose, that cowardice or corruption amounted to legal necessity unless fear of instant death were proved. I am glad that there is no doubt now on the doctrine of the laws : for it is of course the plain duty of every police officer actively to prevent any other from doing such an act as torture, which everyone knows to be criminal, which often causes far more serious injury to the body than the criminal intends, and which is so likely to impair the bond of allegiance between the subject and the Crown.

The view of the facts taken by my learned colleague logically induces him to propose some reduction of the sentence, and though not disposed

(1) 14 B. 115.

(2) 14 B. 331.

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to interfere with the discretion of the Judge on that ground, I do not think it necessary to burden the time of a third Judge on this point, but concur for reasons to which we both give weight. The chief offender has been brought to justice as a result of the prompt inquiry by the magistracy and police of Nasik. The prisoner may not have been fully aware of the law about abetment, where one policeman stands by acquiescing in an assault on a prisoner committed by the other. It may possibly be that there was some foundation for the unusual argument of Mr. Latham in *Chagan's* case that even the Magistrates did not fully understand the law about accomplices.

As the judgments in *Mayanlal's* case (1) and *Chagan's* case (2) declare it clearly in regard to corrupt offers of money, so this judgment now delivered will, we hope, remove any doubts that the inferior police may have as to their duty when another policeman assaults a prisoner to induce him to confess. The result will be to deter people from such doings in the future. We, therefore, reduce the sentence to one year of rigorous imprisonment.

RANADE, J.—We have already disposed of the appeal of accused No. 1, Chunilal. The case as against Latifkhan, accused No. 2, was reserved for fuller consideration. He was charged with having been present at and abetted the torture, under ss. 330 and 114 of the Code. It is admitted that accused No. 1 was a police constable, first class, and Latif was a constable, second class. The committing Magistrate had charged both accused with offences under ss. 331 and 304, but they were actually tried in the Sessions Court, the first accused under s. 330, and the second as abetting under **[401]** s. 114, the offence committed by accused No. 1. The committing Magistrate in his statement of the reasons for committal observed that No. 2 accused was not only in company with No. 1 accused when he assaulted the deceased Mahadu, but that, by giving a slap on the face of the prosecutrix, he prevented her from interfering with accused No. 1 when he committed the assault on the deceased. The Sessions Judge, differing from the assessors, found it proved that accused No. 2 was not only present when No. 1 accused kicked the deceased Mahadu, but that he suggested the idea that both the prosecutrix and the deceased should be beaten to make them confess, and that accused No. 2 struck the prosecutrix, not with a view to make her speak, but to prevent her from interposing for Mahadu's protection. I have accordingly to consider how far this story that No. 2 accused actively encouraged No. 1 in the fatal assault, and that he himself co-operated in it by slapping the prosecutrix on her face, is supported by the evidence.

In the case of No. 1 accused, the testimony of the prosecutrix Sukrani was corroborated by the evidence of Chandri and Yesha, who, though they had denied the alleged beating before the police and the Mamlatdar, stated in the Sessions Court that accused No. 1 gave blows with the fist, and two or three kicks with his boot. This agreement between the evidence of the three prosecution witnesses evidently influenced the Sessions Judge in coming to the conclusion he did as regards the guilt of No. 1 accused. In regard to No. 2 accused, however, there is not only no such agreement, but a positive contradiction between the evidence of Sukrani and that of Chandri and Yesha. Chandri stated that accused

(1) 14 B. 115.

(2) 14 B. 331.

No. 2 did not strike Sukrani. He warned her off with his hand to lie down at a little distance and that he did not touch her person. Chandri also did not state that accused No. 2 used any words suggesting that both Mahadu and the prosecutrix should be beaten to make them confess. Yesha also stated that accused No. 2 waved his hand, saying to Sukrani "do not make a row," and Yesha did not see if this hand touched Sukrani or not. He also did not state that accused No. 2 suggested that both should be beaten. When both Chandri and Yesha made these statements, they were not under any fear of the accused. They had apparently under fear at first denied all knowledge of the beating and kicking charged to No. 1 accused, but before the Sessions Court [402] there was no such fear. There was, if possible, the strongest motive to exaggerate the offence, and it cannot easily be conceived why, when they gave evidence so freely against No. 1 accused, they should have contradicted Sukrani as regards both the statement and the act which Sukrani attributes to accused No. 2. This contradiction between Sukrani's statement and the evidence of Chandri and Yesha materially diminishes the credibility of Sukrani's allegations against No. 2 accused. The Sessions Judge appears to have formed a favourable impression of Sukrani's honesty, but he does not notice the fact that, in so far as accused No. 2 is concerned, not only is she contradicted by Chandri and Yesha, but the story told by her to the Mamlatdar is in flat contradiction to her statements in the Sessions Court. Before the Mamlatdar she stated that "First the Musalman constable slapped me on the cheek." Thereupon Mahadu remonstrated, and "afterwards the sepoys began to beat Mahadu." Her story in the Sessions Court was that the slap on her face was the last act of assault, and that it was resorted to after Mahadu had been beaten, chiefly to make her remain silent. Sukrani was unable to explain away this contradiction. It is plain, therefore, that this whole story of accused No. 2 having beaten Sukrani to make her remain silent was an afterthought, and had no foundation in fact.

This examination of the evidence leaves no room for doubt that the two particular allegations made against accused No. 2 to prove that he abetted No. 1 accused cannot be accepted as proved by any consistent or reliable testimony. There still remains the fact that No. 2 accused was in the company of No. 1 accused when the latter committed the assault. Mere presence at the commission of an offence cannot be construed as instigation or abetment unless such presence was intended or calculated to have that effect. Thus it was held that while the priest who officiates at a bigamous marriage abets the offence, strangers casually present at the celebration are not abettors of the same. No 2 accused was no doubt a subordinate of No. 1 accused, but his presence on the occasion, if not intended, was certainly calculated to give countenance to the offence committed by accused No. 1. He cannot plead coercion, for this excuse is only good under s. 94, Indian Penal Code—*Empress* v. *Sonoo* (1); [403] *Queen-Empress* v. *Maganlal* (2)—when the fear is of instant death. In less serious cases, this circumstance can only be pleaded in mitigation of the punishment. The Sessions Judge would certainly not have sentenced the accused No. 2 to two years' rigorous imprisonment but for his conviction that No. 2 accused actively supported No. 1 accused, and that he took part himself in the torture. Even though I hold that the evidence does not support this view, yet as he was a police officer on duty at the time,

(1) 10 W. R.Cr.R. 48.

(2) 14 B. 115.

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and as he joined with No. 1 accused in the illegal search at night without the usual precautions of a panch to watch the proceedings, the accused No. 2 by his silent acquiescence was an accessory to the offence of his principal. In the view I have taken of the facts I think a sentence of one year's imprisonment would be sufficiently deterrent punishment under the peculiar circumstances of the case.

20 B. 394.

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20 B. 403.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

CHARLES AGNEW TURNER, OFFICIAL ASSIGNEE AND ASSIGNEE OF THE ESTATE AND EFFECTS OF A.G. ALMOND, AN INSOLVENT (*Applicant*) *v.* PESTONJI FARDUNJI AND OTHERS (*Original Plaintiffs*), *Opponents.** [12th March, 1895.]

Insolvency—Attachment before judgment—Insolvency of defendant whose property has been attached before judgment—Right of Official Assignee to attached property—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), *ss.* 278, 281, 487, 351—*Indian Insolvent Act (Stat.* 11 *and* 12 *Vic., C.* 21).

Plaintiffs filed a suit in a subordinate Court and attached before judgment some moveable property of the defendant. Before the hearing of the suit, the defendant filed a petition in Bombay under the Insolvency Act, and a vesting order was made.

Held, that the Official Assignee was entitled by an application to the Court, in which the suit was filed, to have the attachment raised before the defendant was declared an insolvent.

Where a vesting order is made after attachment, and before decree, the title of the Official Assignee takes effect, and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. In such a case the Official Assignee can move by an ordinary motion instead of a regular suit.

[404] *Java* v. *Jadowji* (1), referred to.

Shib Kristo v. *Miller* (2) and *Sadayappa* v. *Ponnama* (3), referred to and followed.

APPLICATION under s. 622 of the Civil Procedure Code (Act XIV of 1882) to the High Court in its extraordinary jurisdiction.

In a suit brought against one Almond in the Court of the First Class Subordinate Judge of Surat, certain property belonging to him was attached before judgment by the plaintiffs (Dinshaw Fardunji and Co.)

On the 26th June, 1894, before the suit came on for hearing, Almond filed his petition in insolvency in the High Court of Bombay, and by the vesting order made on that day all his estate became vested in the Official Assignee under s. 7 of the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21).

On the 30th June, the Official Assignee applied in the Surat Court under ss. 278 and 487 of the Civil Procedure Code (Act XIV of 1882) to have the attachment before judgment removed, and the attached property handed over to him for the benefit of the insolvent's creditors.

The Subordinate Judge, Khan Bahadur M. N. Nanavati, rejected the application as being premature, because Almond had not yet been declared

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* Application No. 235 of 1894 under extraordinary jurisdiction.

(1) 1 B.H.C.R. 224. (2) 10 C. 150. (3) 8 M. 554.

an insolvent under s. 351 of the Civil Procedure Code (Act XIV of 1882), and he observed: "If the attachment be raised now, and if Almond's application be dismissed, or he be not declared an insolvent, the attaching creditors would lose all the benefit of the attachment before judgment to the defeat of the principle *vigilantibus non dormientibus leges et æquitas subveniunt.*"

The Official Assignee then applied to the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882) and obtained a rule *nisi* calling upon the plaintiff in the suit (Dinshaw Fardunji and Co.) to show cause why the decision of the Subordinate Judge of Surat should not be set aside.

Macpherson (with *A. V. Sakhardande*), for the applicant (the Official Assignee) in support of the rule.—An attachment before **[405]** judgment is void as against a vesting order. See *Gamble* v. *Bholagir* (1), *Shib Kristo* v. *Miller* (2) and *Sadayappa* v. *Ponnama* (3).

The application was not premature.

The case of *Java* v. *Jadowji*(4) relied upon by the Subordinate Judge was decided under s. 246 of the former Civil Procedure Code (Act VIII of 1859). That s. 246 has been split up into ss. 278, 280, 281 and 282 of the present Civil Procedure Code (Act XIV of 1882), and those sections only apply to property attached in execution of decrees, the words "Or under any order for attachment passed before judgment" in s. 246 of the old Code having been omitted in the new Code. The Official Assignee can, therefore, apply under s. 487 of the new Code. Section 278 merely shows the manner in which the investigation of his claim is to be made. The later sections, *viz.*, 279, 280 and 281, do not apply to attachments before judgment at all.

In the case of insolvents under the Indian Insolvent Act (Statute 11 and 12 Vic., c. 21), the title of the Official Assignee is finally completed by the vesting order. The words "*declared insolvent*" in s. 351 of the Civil Procedure Code (Act XIV of 1882) are not to be found in the statute. The lower Court's order, therefore, is erroneous.

JUDGMENT.

CANDY, J.—Dinshaw Fardunji and Co. having filed a suit against A. G. Almond in the Subordinate Court, Surat, attached before judgment certain moveable property of the defendant. Before the hearing of the suit, Almond filed his petition in Bombay under the Insolvency Act, and the usual vesting order was at once made. The Official Assignee then applied to the Subordinate Judge, Surat, under ss. 487, 278, Civil Procedure Code (Act XIV of 1882) to raise the attachment; but the Subordinate Judge dismissed the application on the grounds that (*a*) Almond had not been declared an insolvent; (*b*) in the case of *Java* v. *Jadowji* (4), the application, under s. 246, Act VIII of 1859, (answering to s. 278, present Code) had been dismissed. He, therefore, rejected the application as premature, the Official Assignee being at liberty to make it on Almond being declared an insolvent.

[406] On the Official Assignee applying to this Court under s. 622, a rule *nisi* was granted, and notices were issued. Dinshaw Fardunji and

(1) 2 B. H. C. R. 146.
(2) 8 M. 554.
(2) 10 C. 150.
(4) 1 B.H.C.R. 224.

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20 B. 403.

Co. have intimated that they have no objection to the attached property being handed over to the Official Assignee. But it is expedient to intimate our views on both the points taken by the Subordinate Judge.

(*a*) Almond having himself made a petition in insolvency, it was impossible to hold that the Official Assignee's application was premature till Almond had been declared an insolvent. This was not a case in which a creditor had asked the debtor to be declared an insolvent, or where a declaration of insolvency could be made under s. 351, Civil Procedure Code.

(*b*) In the case of *Java* v. *Jadowji* (1), the facts were as stated by the Subordinate Judge. But it is clear that in the opinion of the Chief Justice, Sir M. Sausse, it was the duty of the Court, on the fact of the vesting order being brought to its notice, to remove the attachment. So here the Subordinate Judge shoud have adjudicated on the question, and not declined to deal with the facts brought to his notice, on the ground that the application was premature.

We agree with the majority of the Judges of the Calcutta High Court in *Shib Kristo* v. *Miller*(2) and with the Madras High Court in *Sadayappa* v. *Ponnama*(3) that where a vesting order has been made after attachment and before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. But the right of the Official Assignee to have the attachment before judgment removed, and his right to resist the claim of the attaching creditor to have the decree satisfied by the sale of the attached property, would seem to stand or fall together. We can see no reason, on principle, why the Official Assignee should be forced to assert his right by a regular suit instead of bringing the facts to the notice of the Court by ordinary motion. The latter procedure is apparently followed by the Calcutta High Court (see *Bank of Bengal* v. *Newton* (4)). It has, as **[407]** shown above, been followed on the Original Side of this Court; and we see no reason why it should not be followed in the Subordinate Courts of the Presidency.

This conclusion seems consistent with the provisions of the Civil Procedure Code. By the terms of s. 487, any claim to property attached before judgment shall be investigated in the manner before provided for the investigation of claims to property attached in execution of a decree for money. The section dealing with the manner of investigating such claims is s. 278, which directs that the Court shall proceed to investigate the claim with the like power as regards the examination of the claimant and in all other respects as if he were a party to the suit, and the provisions of this section must be applied to the investigation of claims to property attached before judgment. But s. 281, which in certain cases prevents the release from attachment of property attached in execution of a decree, has not been applied to claims to property attached before judgment, for s. 487, which prescribes the manner of investigation, is silent as to the result. If, then, it be found that by operation of law, the defendant has ceased to have any interest in the property, and that there is nothing left to justify the maintenance of the attachment, it is clear that the attachment ought to be raised, for when the law directs the claim to be investigated, it

(1) 1 B. H. C. R. 224.
(2) 10 C. 150.
(3) 8 M. 554.
(4) 12 B. L. R. App. 1.

manifestly implies that if the claim is made good, the attachment, which was intended merely to preserve the defendant's interest from the effect of private alienations, shall come to an end.

Having regard to these considerations, we must make the rule absolute, and discharge the order of the Subordinate Judge, and direct the attachment to be removed. The Official Assignee does not ask for costs.

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20 B. 403.

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20 B. 408 (F.B.).

[408] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine, Mr. Justice Farran, Mr. Justice Ranade and Mr. Justice Fulton.

DATTO DUDHESHVAR (*Original Plaintiff*), *Appellant v.* VITHU BIN TULJAJI, DECEASED, BY HIS WIDOW AND HEIRESS HARIBAI AND ANOTHER (*Original Defendants*), *Respondents.**

[13th March, 1895.]

Limitation Act (*XV of* 1877), *sch. II, arts.* 132 *and* 147—*Bond—Mortgage—Security pledge* (taran gahan)—*Hypothecation—Charge—Simple mortgage without possession.*

Where a bond given for a loan contained the following condition as to security and repayment of the money:—

"The security-pledge (*taran gahan*) for this is our own property, Survey Nos. 170 and 778 in the village Ped, on all the land of which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction."

Held, that the transaction was a mortgage governed by art. 147, sch. II of the Limitation Act (XV of 1877) and not a charge governed by art. 132.

Khemji v. *Rama* (1), *Rangasami* v. *Muttukumarappa* (2) and *Girwar Singh* v. *Thakur Narayan Singh* (3), dissented from.

Motiram v. *Vitai* (4), *Venkatesh* v. *Narayan* (5) and *Bavaji* v. *Tatya* (6) followed.

[**Overruled**, 30 M. 426 (**P.C.**)=4 A.L.J. 625=9 Bom. L.R. 1104=6 C.L.J. 255=11 C.W.N. 1005=2 M.L.T. 333; **N. F.**, 34 C. 941=6 C.L.J. 237=11 C.W.N. 959; **F.**, 11 Ind. Cas. 629=21 M.L.J. 562; 3 O.C. 156 (162); **R.**, 33 C. 985=4 C.L.J. 219 (224); 25 M. 220 (241) (**F.B.**); 12 C.P.L.R. 26 (31); **D.**, 10 N.L.R. 81 (88).]

SECOND appeal from the decision of John Fitz Maurice, Assistant Judge of Satara, confirming the decree of Rao Saheb S. B. Gole, Subordinate Judge of Vita.

The plaintiff Datto was the assignee of a bond executed to one Babajibhat by the defendant Vithu, who had borrowed a sum of money from Babajibhat, and had given the bond, dated the 12th September, 1876, as security. The plaintiff in 1891 sued to recover the money due on the bond by a sale of the lands mentioned in it.

The bond provided that both principal and interest were to be paid within a year from its date, and that, in case of default, the creditor should recover the amount from the land which was in the possession of the debtor. The following is a translation of the provision in the bond:—

[409] The security-pledge (*taran gahan*) for this (is) our own property, Survey Nos. 170 and 778 in the village Ped, on all the land of

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* Second Appeal No. 764 of 1892.

(1) 10 B. 519. (2) 10 M. 509. (3) 14 C. 730.
(4) 13 B. 90. (5) 15 B. 183. (6) P.J. (1891), 35.

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which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction"

The lower Court held that the bond merely created a charge on the lands and was not a mortgage; that art. 132 and not art. 147, sch. II of the Limitation Act (XV of 1877) applied; and that the suit was barred.

Balaji A. Bhagvat appeared for the appellant (plaintiff).

Vishnu K. Bhatavdekar, appeared for the respondent (first defendant).

The second appeal came on for hearing before a Division Bench, consisting of Jardine and Ranade, JJ., who, in view of the conflict of decisions on the point as to whether the transaction in suit should be held to be a charge on immoveable property or mortgage, made a reference to a Full Bench in the following terms:—

JARDINE, J.—After hearing able arguments we determine to refer to a Full Bench the question whether art. 132 or art. 147 of the Limitation Act (XV of 1877) applies to the present suit. The suit is based on a bond which contains the following condition as to security and repayment:—"The security-pledge (*taran gahan*) for this is our own property, Survey Nos. 170 and 778 in the village Ped, on all the land of which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction."

This bond resembles that in *Khemji* v. *Rama* (1), in that it gives no possession, nor right of entry, nor, in our opinion, power to sell without the intervention of a Court. There it was held by Birdwood and Jardine, JJ., that art. 132 applied. But in *Onkar Ramshet* v. *The Firm known as Govardhan Parshotamdas*(2), Scott and Telang, JJ., in a similar case, took the contrary view, holding art. 147 to apply. In *Venkatesh* v. *Narayan* (3), which also is on all fours, Sargent, C.J., and Telang, J., held art. 147 to apply. The decisions in these two cases are influenced by the views expressed by Sargent, C.J., and Nanabhai, J., in the Full Bench case **[410]** *Motiram* v. *Vitai*(4), which, though, as expressly remarked in *Venkatesh* v. *Narayan*, it was not necessary for the decision of the case to consider what limitation applies to a bond like the present, throw some doubt on the decision in *Khemji* v. *Rama*. In *Bavaji* v. *Tatya* (5), Sargent, C.J., and Candy, J., treat the Full Bench case as if it overruled the latter.

There is thus a conflict of decisions on the very question on which the decision of the present appeal depends.

The conditions of the bonds in the Full Bench case and in *Bulakhi* v. *Tukaram* (6) are, in our opinion, distinguishable and have been correctly distinguished by the Courts below.

The learned Judges who have expressed opinions doubting the correctness of the decision in *Khemji* v. *Rama* do not appear to have had their attention drawn to the judgment of the Full Bench at Madras in *Rangasami* v. *Muttukumarappa* (7) on the same point. It has since been determined by a Full Bench at Calcutta in *Girwar Singh* v. *Thakur Narayan Singh* (8). Both of these judgments dissent from the majority of the Full Bench in the Allahabad Court in *Shib Lal* v. *Ganga Prasad* (9) whose views are expressly followed in the Bombay Full Bench case. These Full Bench decisions at Madras and Calcutta support the views expressed in *Khemji* v. *Rama*. In order that the important question may, as regards this Presidency, be solemnly determined, we refer it to a Full Bench of this Court.

(1) 10 B. 519. (2) 14 B. 577. (3) 15 B. 183.
(4) 13 B. 90. (5) P.J. (1891), 35. (6) 14 B. 377.
(7) 10 M. 509. (8) 14 C. 730. (9) 6 A. 551.

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RANADE, J.—A series of decisions of this Court commencing with the ruling in *Tukaram* v. *Khandoji* (1) and ending with *Venkatesh* v. *Narayan* (2) have been (with the exception of the decision in *Khemji* v. *Rama* (3)) in favour of treating simple hypothecation bonds as mortgages, and not as charges, in so far as the application of art. 132 or 147 of the Limitation Act is concerned. The authority of the decision in *Khemji* v. *Rama* (3) has been much questioned, if not overruled, in the later decisions, one of them a Full Bench decision, *viz.*, *Kane Lakshman Prabhu* v. *Lakshman* (4) ; *Onkar Ramshet* v. [411] *The Firm known as Govardhan Parsholamdas* (5) ; *Firm known as Nanaji Madhavrav* v. *Pandu* (6) ; *Bavaji* v. *Tatya* (7) ; *Motiram* v. *Vitai* (8), and *Venkatesh* v. *Narayan* (2). The Allahabad High Court has also taken the same view as that of this Court in the cases cited above. See *Shib Lal* v. *Ganga Prasad* (9). On the other hand, the High Courts of Madras and Calcutta have taken the opposite view, that which found support in *Khemji* v. *Rama* (3), and one of these decisions was passed after a full review of the authorities on the other side, *viz.*, *Girwar Singh* v. *Thakur Narayan Singh* (10) and *Davani* v. *Ratna* (11).

In this state of the law on the point, the Courts in this Presidency are bound to follow the rulings of this Court in preference to those of the other High Courts. If that view were followed, the decisions of the lower Courts in the present case will have to be reversed. As, however, the authority of the decision in *Khemji* v. *Rama* (3) has not been expressly overruled by the later decision in *Motiram* v. *Vitai* (8), I think the present is a fit case for reference to a Full Bench, and I, therefore, agree with Mr. Justice Jardine in his order of reference.

The reference was argued before a Full Bench composed of Sargent, C.J., Jardine, Farran, Ranade and Fulton, JJ.

Balaji A. Bhagvat, for the appellant (plaintiff).—The expression *taran gahan* in the document literally means 'security mortgage,'—that is, mortgage without possession. With respect to payment, the words in the document are *zaminivar aple rupayacha ulagada karun ghyava*,—that is, "you should realize your money on the land." The expression *taran gahan* has been held to mean "mortgage without possession"—*Onkar Ramshet* v. *The Firm known as Govardhandas Parshotamdas* (5). The current of decisions of this High Court has been that bonds which contain no power of sale or right of entry are mortgage transactions—*Venkatesh* v. *Narayan* (2). The Full Bench ruling in *Motiram* v. *Vitai* (8) has practically decided the question. There it has been distinctly held [412] that transactions like the one in dispute are mortgages governed by art. 147, sch. II of the Limitation Act.

[SARGENT, C. J.—If the money is to be realized from the land, that means that the money is to be realized by the sale of the land.]

Yes. If the money is to be realized by the sale of the land under the document, then the transaction is a mortgage and not merely a charge on immoveable property. This contention is strengthened by a subsequent clause in the document, namely, *ani kami alyas mi jativar bharun dein*,—that is, "and if less be realized, I will pay (the balance) personally." The decisions which are in conflict with the aforesaid current of authorities are

(1) 6 B. H.C.R.O.C.J. 134. (2) 15 B. 183. (3) 10 B. 519.
(4) P.J. (1889) 182. (5) P. J. (1890) 79=14 B. 577. (6) P. J. (1891) 16.
(7) P. J. (1891) 85. (8) 13 B. 90. (9) 6 A. 551.
(10) 14 C. 780. (11) 6 M. 417.

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Khemji v. *Rama* (1), *Rangasami* v. *Muttukumarappa* (2), *Girwar Singh* v. *Thakur Narayan Singh* (3). The practice of the Calcutta and Madras High Courts is different from the practice of this and the Allahabad High Court, which takes the same view as this Court does—*Krishnalal* v. *Gangaram* (4).

Narayan G. Chanadavarkar (for *Vishnu K. Bhatvdekari*) appeared for respondent No. 1 (defendant No. 1).—The documents in the cases relied on, contain one or other of three conditions, namely, either a right of entry or a right of redemption, or a right of sale. As the document in the present case contains none of these conditions, we submit that it is not a mortgage, but it merely creates a charge on immoveable property. The term 'charge' is defined in s. 100 of the Transfer of Property Act (IV of 1882). A charge differs from a mortgage—*Barlinson* v. *Hall* (5); *Ramdin* v. *Kalka Pershad* (6).

[RANADE, J.—The document in dispute does contemplate a sale for the recovery of the money.]

No doubt it does contemplate a sale, but that circumstance alone would not make the transaction a mortgage.

[JARDINE, J.—The words in the document are *taran gahan*; the word *gahan* means mortgage.]

[SARGENT, C. J.—We are all agreed that we should follow the ruling in *Motiram* v. *Vitai* (7).]

JUDGMENT.

[413] The judgment of SARGENT, C. J., and FARRAN and FULTON, JJ., was delivered by

SARGENT, C. J.—We think that the instrument in question would probably be regarded by an English lawyer as a hypothecation bond falling under s. 132 of the Statute of Limitations, and such we cannot doubt would be the view taken of it by the Madras High Court—*Rangasami* v. *Muttukumarappa* (2). But, as regards this Presidency, the question as to the article of the Statute of Limitations applicable to such an instrument must, we think, be regarded as concluded by the decision of the Full Bench in *Motiram* v. *Vitai* (7) subsequent to the decision in *Khemji* v. *Rama* (1). In that case it was held (differing doubtless from the Calcutta High Court) that the object of the Legislature by the introduction of art. 147 was to provide a special article for suits by mortgagees, leaving art. 132 in its original form to apply to charges other than those which arise from loans, and further that the article was applicable to simple mortgages without possession on right of entry, on the ground that they constituted a large class of instruments which were not only in every-day use, but regarded and described by the natives of this country as mortgages, and treated as such by all the Courts of the Mofussil. These conclusions enunciated in the judgment of the majority of the Court were acted upon in *Venkatesh* v. *Narayan* (8) and *Bavaji* v. *Tatya* (9) The principle of *stare decisis* is one of the utmost importance in questions of this nature as producing uniformity of practice. We must, therefore, answer the question by holding that art. 147 is applicable to the instrument in question.

JARDINE, J.—The material part of the bond is the following:—"The security-pledge (*taran gahan*) for this is our own property, Survey Nos. 170

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(1) 10 B. 519. (2) 10 M. 509. (3) 14 C. 730. (4) 13 A. 28.
(5) L.R. 12 Q.B.Div. 347 (350). (6) 12 I. A. 12. (7) 13 B. 90.
(8) 15 B. 183. (9) P. J. (1891) 35.

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and 778, in the village Ped, on all the land of which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction." *Zaminivar rupayacha ulgada karun ghyava; ani kami alyas mi jativar ulgada karun dein.*

The Maratha words used are terse and vague; but after consideration, it is admitted by the pleaders on both sides that the meaning [414] is that the debt is to be realized out of the land, and if not so realized, the debtor is to be personally responsible. The words do not say *how* the debt is to be realized from the land; but as there is no power of entry, nor possession given, and as it is not the practice of the creditor to sell without first obtaining a decree, it is also admitted that the necessary implication is that the debt might be recovered by sale through a Court. We all concur in these constructions of the bond.

The question for decision of the Full Bench is whether art. 132 or art. 147 of the Limitation Act of 1877 applies to the suit to recover the debt by sale of the property. The conflicting decisions of this Court are noticed in the referring minutes. With regard to them the question may be stated to be whether the bond creates, a charge or a mortgage within the meaning of the above articles.

Until the new enactment, art. 147, became law, the bond would have been treated by the High Courts as coming under the word "charge," and covered by art. 132 of the Limitation Act of 1871. In the Full Bench case —*Rangasami* v. *Muttukumarappa*(1)—the learned Judges treat such bonds as hypothecations, to be distinguished from mortgages, and coming under art. 132 of the Act of 1877. Their reasons are largely special, much influenced by the maxim *stare decisis*, a rule based on policy and of great weight in the quieting of titles. Applied to Bombay the result is different, as bonds like that in suit have for long been treated by this Court as mortgages and dealt with on the same principles. Let it be admitted that, as pointed out by the learned Judges at Calcutta in the Full Bench case—*Girwar* v. *Thakur Narayan Singh* (2)—the word "charge" in art. 132 may be applied to this bond. It may yet be urged that art. 147 by its language includes this suit specifically and thus excludes it from art. 132 impliedly. The transaction, as such, may be called a mortgage, following the remark in the first page of Coote, that for the ordinary purposes of conveyancers a mortgage has been considered as a pledge of real or personal estate evidenced by deed for securing the repayment of money. The word "charge" unaided by context may in an Act drawn by English lawyers be conceived to mean such provisions as are found in family [415] settlements, rent-charges and other incumbrances to which redemption and foreclosure do not apply. Where the language of a statute is doubtful, the argument derived from convenience has weight in determining the meaning. It coincides with the maxim above quoted and the apparent breadth of the term mortgage. This argument may be based on two considerations. The Judicial Committee of the Privy Council have in *Ramdin* v. *Kalka Pershad* (3) noticed the inconvenience which would be caused if mortgagees were by reason of short terms of limitation forced into litigation. Our own experience tells us that prolonged and expensive Litigation will increase if this Court requires the Courts under its superintendence to draw fine distinctions between mortgage and hypothecation in the construction of bonds. The simplicity and vagueness of those

(1) 10 M. 509. (2) 14 C. 730 (739). (3) 12 I. A. 12.

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executed in the Mofussil of this Presidency cause misunderstandings between parties and difficulties to the interpreting Courts. These inconveniences will be greatly increased if such distinctions are encouraged.

For these reasons, I am of opinion that the decision in *Khemji* v. *Rama* (1), though based on a possible construction of the enactment, does not declare the correct construction ; and it ought, therefore, to be overruled.

The opinion taken by the learned Judges in *Girwar Singh* v. *Thakur Narayan* (2) was partly influenced by special circumstances of Bengal legislation and partly by a mode of interpreting art. 147, which was dissented from by the Full Bench here in *Motiram* v. *Vitai* (3). In a case of equitable mortgage by deposit of title deeds—*Manekji* v. *Rustomji* (4)—Parsons, J., and myself followed our own Full Bench on this point. The correct view of the law is stated there by Sargent, C. J.

"Under the prior Limitation Act of 1871, the only article applicable to suits for sale of mortgaged property under any mortgage instrument was art. 132 by treating mortgages as creating a charge. It may be fairly doubted whether it was the intention of the Legislature, when the Act of 1871 was passed, to include mortgages **[416]** in that article ; but in the absence of any article expressly referring to mortgages, art. 132 was, as a matter of practice—with which we may presume the framers of art. 147 of the Act, 1877, were acquainted—applied to the case of mortgages, and, therefore, art. 147 of that Act, which in terms applies to mortgages generally, doubtless introduced a very important change in the relation of mortgagee and mortgagor ; but we do not feel the force of the argument much relied on by the Calcutta High Court, that such a change, if intended, would have been made by an alteration in art. 132 itself. On the contrary, the more obvious and natural mode of effecting that intention would seem to be to introduce a special clause for suits by mortgagees, leaving art. 132 in its original form to apply to all other charges."

I would, therefore, answer the question stated by saying that art. 147 applies.

RANADE, J.—The questions invovled in this reference are two : one relates to the proper construction and legal import of the document on which the claim is based, and the other is concerned with limitation. The document is called a security mortgage, or *taran gahan*, *i.e.*, mortgage without transfer of possession. There is a personal covenant to repay the money within one year, at the end of which period the creditor is authorized to take satisfaction of the debt due on (or from) the land, and in case there is a deficiency, the debtor holds himself personally responsible for the balance. The first question to be considered is whether, as far at least as this Presidency is concerned, such an instrument with such covenants is a mortgage of immoveable property, or whether it creates only a charge. The Calcutta and Madras High Courts have held that such instruments are not mortgages in the sense of being transfers of interest in immoveable property by way of security for the payment of debt —*Girwar Singh* v. *Thakur Narayan Singh* (2) ; *Aliba* v. *Nanu* (5) ; *Davani* v. *Ratna* (6). A Division Bench of this Court also in *Khemji* v. *Rama* (1) took the same view, and held that where the bond did not expressly confer a power of sale, or transfer possession, or allow a

(1) 10 B. 519. (2) 14 C. 730 (733). (3) 13 B. 90 (95).
(4) 14 B. 269. (5) 9 M. 218. (6) 6 M. 417.

right of entry to the creditor, there was no mortgage, and only a charge was created by it. This view was admittedly based on the definition [417] of mortgage contained in s. 58 of the Transfer of Property Act. The instrument in the present case is not governed by that Act, and it may be noted that it is unlike the instrument which was considered in *Khemji* v. *Rama* (1), in that it does provide for a satisfaction of the debt on or from the land, which was not the case in the second of the two documents chiefly considered in that case. The definition of a mortgagee-deed in the Stamp Act is more general in its terms than that in s. 58 of Act IV of 1882, and all instruments transferring, or creating a right over specified property, to, or in favour of, a creditor, are there stated to be mortgages. The right of bringing a particular property to sale with a preferential claim to the proceeds (*vide* s. 295 of Civil Procedure Code and s. 97, Act IV of 1882) is a right over specified immoveable property conferred on the creditor within this definition.

The four classes of mortgages expressly defined in s. 58 of Act IV of 1882 do not, moreover, exhaust all possible kinds of mortgage instruments, for s. 98 provides for what it calls anomalous mortgages, which do not fall under any of the four principal classes. These considerations lead to the conclusion that instruments which create a right in favour of a creditor over specified immoveable property are mortgage instruments. The present instrument, as creating such a right of compulsory sale, and preferential claim in favour of the creditor, must be regarded as a mortgage. The narrower view taken by the High Courts of Madras and Calcutta has not much been favoured on this side of India, and long before, as also since the decision of the Division Bench noticed above, it has been ruled that simple bonds securing the repayment of money advanced on specified immoveable property were mortgages. This was expressly held to be the case in *Tukaram* v. *Khandoji* (2) by Sir R. Couch, C. J. In *Parmaya* v. *Sonde Shrinivasapa* (3), Sir Michael Westropp affirmed the same view, and noticed that such instruments were in constant use. West and Nanabhai, JJ., took the same view in *Mahabaleshwarbhat* v. *Ratnabai* (4), where the bond did not confer any right of possession. The decision in *Khemji* v. *Rama* (1) was thus in conflict with many previous decisions, none of which were referred to by the Judges who decided that case, and it was disapproved in [418] many subsequent rulings, chief of which were the Full Bench decision in *Motiram* v. *Vitai* (5) followed in *Onkar Ramshet* v. *The Firm known as Govardhan Parshotamdas* (6); *Venkatesh* v. *Narayan* (7); *Kane* v. *Lakshman* (8); *Bavaji* v. *Tatya* (9); *Firm known as Nanoji Madavarav* v. *Pandu* (10).

In all these cases, the instruments were of the nature of simple mortgages, *nazar* or *taran gahan*, or security mortgages without immediate transfer of possession. There was, indeed, in *Motiram* v. *Vitai* (5) a right of entry on default, and on this account Mr. Justice Birdwood, who was one of the Judges who decided that case, gave in his adhesion to the views of the present Chief Justice and other Judges. In the other cases noticed above, there was only a power of sale through process of Court, as in the present case. These decisions must, therefore, be held to have clearly established the position that the bond sued upon in the present case is of

(1) 10 B. 519.
(2) 6 B. H. C. R. O. C.J. 134.
(3) 4 B. 459.
(4) P. J. (1884), 29.
(5) 13 B. 90 (91).
(6) 14 B. 577 (578).
(7) 15 B. 193.
(8) P. J. (1889), 182.
(9) P. J. (1891), 35.
(10) P. J. (1891), 16.

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the nature of what has been all along generally understood in this Presidency to be a mortgage, and is not a mere money-bond which created a charge, but transferred no interest to, or created no right in favour of, the creditor in specific immoveable property. This Court has generally been in agreement on this point with the rulings of the Allahabad High Court—*Shib Lal* v. *Ganga Prasad* (1). It may be that the current of decisions in the Madras and Bengal Presidencies has been influenced by the special peculiarities of the course of dealings in those provinces, and the authority of their decisions cannot, therefore, be accepted as binding on the Courts on this side of India for the reasons mentioned above.

The question of limitation still remains to be considered, and as the inquiry into the legal import of such documents comes up chiefly for consideration in connection with the question of limitation, it is of importance to have an authoritative decision on this aspect of the case also. The same considerations which led the High Courts of Madras and Calcutta to hold what were called hypothecation bonds to be not included under mortgages, led them to hold that art. 147, which provides a period of sixty years for suits by mortgagees for foreclosure or sale of mortgaged property, did not apply to suits **[419]** on such bonds, when the relief allowed by the bond was by way of Court-sale, and that art. 147 applied only to English mortgages. It was further held that, in respect of suits on simple mortgages, art. 132 applied, and the period of limitation was twelve, and not sixty, years. This was also the view taken by the Division Bench which decided *Khemji* v. *Rama* (2). This Court has, however, all along agreed with the Allahabad High Court in its view that art. 147 applied to all mortgages, and that art. 132 had reference only to charges as distinguished from mortgage transactions. Previous to Act XV of 1877 there was no room for this conflict of views, for there was no special article which provided a separate period of limitation for suits brought by mortgagees to recover the debt due to them by the sale of mortgaged property. The old art. 132 of the Act of 1871 was, in the absence of any specific provision, held to apply to charges and mortgages alike—*Sheoratan Kuar* v. *Mahipal Kuar* (3); *Lallubhai* v. *Naran* (4); *Davani* v. *Ratna* (5); *Ramdin* v. *Kalka Pershad* (6). The Limitation Act of 1877 for the first time inserted a new article for suits by mortgagees for foreclosure or sale, and also made very significant changes in the wording of the old arts. 132, 148. The High Courts of Madras and Calcutta have held that this new insertion and these changes were not intended to have any wide range, and that, in so far as simple mortgages were concerned, they left the law on this point where it stood before Act XV of 1877 was passed. Except the ruling in *Khemji* v. *Rama* (2), this Court, agreeing with the Allahabad High Court, has taken a contrary view of the effects of this change, and held that charges and mortgages were intended to be separately provided for by the two arts. 132, 147. The decision of the Division Bench noticed above, though dissented from and distinguished in subsequent cases, has not, however, been expressly overruled, and this circumstance suggested the necessity of the present reference. The various considerations which have been urged in support of the narrower and the more liberal interpretation of these articles, in the several Full Bench rulings of the different High Courts, may with

(1) 6 A. 551, F. B.
(2) 10 B. 519.
(3) 7 A. 258.
(4) 6 B. 719.
(5) 6 M. 417.
(6) 12 I.A. 12.

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advantage be brought together here to see on which side the balance of arguments leans.

[420] (1) The usual rule of construing statutes in their natural and ordinary sense is certainly violated when the general words used in art. 147 are held only to relate to one class of mortgages, namely, to English mortgages, as has been done in the Bengal and Madras decisions. These English mortgages are not very numerous even in Presidency towns, and are absolutely unknown in the Mofussil. If the Legislature had intended this restricted application of art. 147, it would certainly have used qualifying words to that effect.

(2) The narrower interpretation does violence to the wording of art. 147 in another way when it reads suits for foreclosure or sale, not distributively, but as if the words used were suits for foreclosure and sale, as remedies open to the mortgagee on an English mortgage-bond.

(3) It is not absolutely necessary in English mortgages that the mortgagee should bring a suit for the sale of mortgaged property. He can exercise his right of private sale, which does not appear to be contemplated in art. 147, coupled as suits for sale are with those for foreclosure. The words must, therefore, obviously refer to suits for sale by mortgagees generally, *i.e.*, in the Mofussil by process of Court, private sales being unknown, and held to be undesirable—*Keshavrav* v. *Bhavanji* (1).

(4) The narrower interpretation takes no account of the admitted reciprocity of the rights of mortgagors and mortgagees. The Legislature, in inserting the new art. 147 immediately before art. 148, appears to have recognized this reciprocity, and the two articles must be read together, and when so read, art. 147 must be construed as being as general in its scope as art. 148 admittedly is, for sixty years is the period for all redemption suits.

(5) This view is further strengthened by the fact that the words "to redeem" have been expressly added in the new art 148, in which the words before used were confined to mortgagors' suits to recover possession.

(6) While too great importance need not be attached to the contemporaneous drafting of the Bill, which subsequently became Act IV of 1882, with the Limitation Act of 1877, it certainly cannot be lost sight of that the words "monies charged" used in art. 132 **[421]** were intended to refer to charges other than mortgages as defined in ss. 58 and 100 of Act IV of 1882. The intention is still more clearly manifested by the illustration to art. 132 referring to malikana and other haks. The other charges must clearly refer to similar claims, such as those referred to in s. 95 of the Transfer of Property Act, or to dower, or maintenance charged on land, or the claim for unpaid purchase-money, &c. The changes made in law appear thus to have been intended to remove the doubts and anomalies formerly felt in applying art. 132 to mortgage claims, and this could best be done by adding a new article distinguishing mortgages from charges by a clear line of separation.

(7) The smaller periods of time provided for suits for possession brought by mortgagees furnish no analogy in respect of suits for sale, because suits for possession do not deprive the mortgagor of his rights, which is the effect of a sale in execution of a mortgage decree. The analogy of suits for sale is more complete with foreclosure suits, with which they are linked distributively.

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(1) 8 B. H. C. R. A. C. J. 142 (147).

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(8) Limitation laws must always be strictly construed in the interest of the party prejudicially affected by these limits.

(9) The shortening of the periods of limitation in England from twenty to twelve years furnishes no reason of policy for a similar contraction in this country, where the circumstances are so different, and where, since 1871 at least, it has been the steady policy of the Legislature to protect the indebted classes by discouraging, as far as possible, premature or forced sales. The narrower interpretation would force mortgagees to sell up their debtors' lands, when otherwise they would prefer to wait.

These considerations satisfy me that, both on grounds of policy and in accordance with will-accepted rules of construction, the interpretation which has been placed by this Court on arts. 132 and 147 of the Limitation Act of 1877 is correct, and that the arguments for narrowing the scope of art. 147 derive no support from general considerations such as those alluded to above.

On the whole, therefore, I feel satisfied that, both on the question of limitation, as also of the legal import of the document, the decisions of this Court favour the view that security mortgages, *nazar gahan* or *taran gahan* mortgages are mortgages proper, even though **[422]** there be no express power of sale, or right of entry, of words transferring possession, and that the power of compulsory sale to realize the debt implied in such a transaction, unless specially excluded, is itself a right and interest in immoveable property transferred to the creditor, which satisfies s. 58 of Act IV of 1882, and the requirements of the definition of mortgage under the Stamp Act, and that the period of limitation for suits for sale in respect of such mortgages is that laid down by art. 147, as such a transfer of right is not meant to be included in the charge transactions to which alone art. 132 applies. The correctness of the decision in *Khemji* v. *Rama*(1) has already been questioned in previous decisions, and it must now be held to be overruled both on the point of limitation and on the nature and scope of mortgage transactions.

The case subsequently came back to the appellate Court where the following decision was given:—

JUDGMENT.

As the Full Bench has decided that art. 147 of the 1st schedule to the Limitation Act (XV of 1877) applies to this suit, and the District Court had held the suit to be time-barred under art. 132, we reverse the Assistant Judge's decree, and remand the cause to the District Court for re-hearing of the appeal on the merits: costs to be allotted when a new decree is passed.

Decree reversed and case remanded.

(1) 10 B. 519.

20 B. 423 (F.B.).

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[423] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine and Mr. Justice Candy.

BHAU BIN POMMANNA, DECEASED (*Plaintiff*) *v.* RAMCHANDRARAO BIN MAHIPATRAO (*Defendant*).* [14th March, 1895.]

Vatan Act (Bom. Act III of 1874), *ss.* 5 (1), 10 (2) *and* 15 (3), *cl.* (2)—*Amending Act V of* 1886, *s.* 1 (4)—Deshamukhi *vatan—Commutation of service—Gordon Settlement.*

Section 10 of the Vatan Act (Bom. Act III of 1874) applies to *deshamukhi* service vatan with respect to which the liability to serve has been commuted under the Gordon Settlement.

[R., 37 B. 81=14 Bom. L.R. 797=17 Ind. Cas. 170; I Bom. L.R. 825 (827); D., 25 B. 470.]

[424] REFERENCE by R. E. Candy, Collector of Satara, under s. 10 of the Vatan Act (Bombay Hereditary Offices Act III of 1874).

One Ramchandrarao bin Mahipatrao Ghorpade, resident of Bahadurvadi in the Valva Taluka, Satara District, held certain "*deshamukhi*" service vatan lands in the villages of Bahadurvadi and Kanegaum in that taluka. The lands were mortgaged by him in March, 1873, to one Bhau

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* Reference by the Collector of Satara.

(1) No vatandar shall, without the sanction of Government, sell, mortgage or otherwise alienate or assign any vatan or part thereof or interest therein to any person not a vatandar of the same vatan.

(2) When it shall appear to the Collector that by virtue of, or in execution of, a decree or order of any British Court any vatan, or any part thereof, or any of the profits thereof, recorded as such in the revenue records or registered under this Act and assigned under s. 23, as remuneration of an officiator, has or have after the date of this Act coming into force, passed or may pass without the sanction of Government into the ownership or beneficial possession of any person other than the officiator for the time being; or that any such vatan or any part thereof, or any of the profits thereof, not so assigned has or have so passed or may pass into the ownership or beneficial possession of any person not a vatandar of the same vatan, the Court shall, on receipt of a certificate under the hand and seal of the Collector, stating that the property to which the decree or order relates is a vatan, or part of a vatan or that such property constitutes the profits or part of the profits of a vatan, or is assigned as the remuneration of an officiator, and is, therefore, inalienable, remove any attachment or other process then pending against the said vatan, or any part thereof, or any of the profits thereof, and set aside any sale or order of sale or transfer thereof, and shall cancel the decree or order complained of so far as it concerns the said vatan, or any part thereof or any of the profits thereof.

(3) *Clause 1.*—The Collector may, with the consent of the holder of a vatan given in writing, relieve him and his heirs and successors in perpetuity of their liability to perform service upon such conditions, whether consistent with the provisions of this Act or not, as may be agreed upon by the Collector and such holder.

Clause 2.—Any settlement made for this purpose before the date of this Act coming into force by any Collector or other officer acting on behalf of Government with the holder of any vatan shall have the same force as if made under this Act.

(4) (1) Without the sanction of Government it shall not be competent:

[425] (*a*) To a vatandar to mortgage, charge or alienate or lease, for a period beyond the term of his natural life, any vatan or any part thereof, or any interest therein to or for the benefit of any person who is not a vatandar of the same vatan;

(*b*) To a representative vatandar, to mortgage, charge, or lease or alienate any right with which he is invested, as such, under this Act.

(2) In the case of any vatan in respect of which a service commutation settlement has been effected, either under s. 15 or before that section came into force, cl. (*a*) of this section shall apply to such vatan, unless the right of alienating the vatan without the sanction of Government is conferred upon the vatandars by the terms of such settlement or has been acquired by them under the said terms.

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bin Pommanna as security for the repayment of loans amounting to Rs. 2,000. Subsequently both Ramchandrarao and Bhau having died, Bhau's son and heir Anna brought two suits in the Court of the District Judge at Satara against the heirs of Ramchandrarao, namely, his two widows Vithabai and Anandibai, the latter a minor represented by the Collector as her administrator, for the recovery of Rs. 2,000 as principal and Rs. 2,000 as interest by the attachment and sale of the mortgaged property if necessary.

The Judge on the 24th March, 1886, awarded the plaintiff's claims. The Collector in his representative capacity preferred appeals Nos. 67 and 68 of 1886 to the High Court at Bombay which confirmed the decrees of the Judge on the 28th September, 1888.

On the 13th August, 1891, the Judge issued an order for the attachment and sale of the lands in satisfaction of the plaintiff's decrees and sent the decrees to the Collector for execution. But as the lands to be attached and sold were *deshamukhi* service lands which could not be alienated beyond the lifetime of the mortgagor, the deceased Ramchandrarao, the Collector granted two certificates under s. 10 of the Vatan Act and forwarded them to the High Court in order that the order of the Civil (High) Court ordering the sale of the **[425]** lands might be set aside, and he asked for the cancellation of the orders of the District Court for the attachment and sale of the lands.

On receipt of the Collector's certificates the Court ordered that, before taking further action in the matter, notice should be given to the parties and the Government Pleader, as the question might arise as to whether the case fell under s. 10 of the Vatan Act (Bombay Act III of 1874).

Rao Saheb *Vasudev J. Kirtikar* (Government Pleader), appeared for the Government of Bombay.

Inverarity (with *Balaji A. Bhagvat*) appeared for the plaintiff (judgment-creditor).

Bhaishankar Nanabhai appeared for the defendants (judgment-debtors).

SARGENT, C.J.—In the present state of the authorities, I think it advisable that the question, whether the provisions of s. 10 of the Vatandar Act are applicable in the case of a vatan in respect of which a settlement has been made under Gordon's Settlement, should be referred to a Full Bench.

CANDY, J.—The question is whether this Court is compelled to act on the certificate submitted by the Collector under s. 10, Bombay Act III of 1874.

It is clear from the record of the case, in which the decree in question was passed, that the land which is to be sold under the decree is admittedly part of a *deshamukhi* service vatan, the liability to service connected therewith having been commuted by Gordon's Settlement.

The sanad granted under that settlement has not been produced in the present proceedings, but it is not disputed that in this case there was no condition of the settlement expressly allowing alienation of the vatan property.

The Division Bench of this Court, which confirmed the decree of the District Court permitting the attachment and sale of this property, as appears from the notes of the learned Judges, relied upon the ruling of

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the Full Bench in *Radhabai* v. *Anantrao* (1) on the third [426] question submitted to the Full Bench in that case, *viz.*, that lands of a service vatan become alienable when the services are abolished.

But, as pointed out in *Appaji* v. *Keshav*(2), the decision in the above case on that question had reference exclusively to a settlement under Bombay Act II of 1863 ; and the nature and effect of a Gordon Settlement was determined in the last quoted case, in which it was shown that at the time when the Gordon Settlements were made, service lands were regarded as the remuneration of the hereditary officer, and made inalienable by Reg. XVI of 1827 (as construed by the Courts) beyond the life of the actual incumbent, and that the settlements made by Gordon's Committee, unless it was otherwise specially provided by any particular settlement, were not intended by either party to those settlements to convert the vatan lands into the private property of the vatandars with the necessary incident of alienability, but to leave them attached to the hereditary offices, which, although freed from the performance of service, remained intact, as shown by the definition of hereditary office in the declaratory Act III of 1874.

The decision in *Jagjivandas* v. *Imdad Ali* (3), by Westropp, C.J., and Kemball, J., showed that the fact that the services appertaining to a vatan had been commuted would not make a vatan alienable ; and the intention of the Legislature to include within the terms of Bombay Act III of 1874 those vatans the services appertaining to which had been commuted by Gordon's Settlement, is, as shown in the case before quoted, apparent from the definition of hereditary office in Bombay Act III of 1874. It may be remarked that the expression "ceased to be demanded" with reference to the services originally appertaining to a vatan has apparently direct application to the terms of the sanad usually given in cases under Gordon's Settlement, in which it is recited that "the said lands and cash allowances shall be continued *without demand of service.*" (See Cordeaux's Compilation, p. 142.) The expression cannot apply to those vatans, the services appertaining to which were useful to the village community, but which have now fallen into desuetude, for the term "hereditary office" in Bombay Act III of 1874 is limited to offices held for the performance of *duties connected with the civil administration*, whether those duties are now demanded or not.

[427] The result of these considerations is that *prima facie* a vatandar under Gordon's Settlement is within the terms of Bombay Act III of 1874, which so far changed the old law that, whereas the prohibition against alienation under s. 20 of Reg. XVI of 1827 was restricted by the interpretations put on the section by the Sadar Adalat to alienations exceeding the lifetime of the incumbent or co-sharer, the alienation prohibited by s. 5 of Bombay Act III of 1874 was *any* alienation without the sanction of Government. By Bombay Act V of 1886 the prohibition was confined to alienations without the sanction of Government beyond the life of the alienor.

Now it is clear that the object of s. 10 of Bombay Act III of 1874 was to give practical effect to the prohibitions against alienations by vatandars as provided by ss. 5 and 7 (see *Shankar* v. *Babaji*(4). If, then, a vatandar under Gordon's Settlement comes within the provisions of s. 5, the Collector can, in his case, act under the provisions of s. 10.

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(1) 9 B. 198. (2) 15 B. 13 (22). (3) 6 B. 211. (4) 12 B. 550 (552).

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But, it is said, the object of the provisions of s. 10 is obviously to enable the Collector to preserve the vatan property for the purposes of the office. The general object is that land should be always forthcoming for the remuneration of the office—*Radhabai* v. *Anantrav* (1). But where the services have ceased to be demanded, what interest has the Collector in interfering to protect the property? The successive vatandars might assert their rights in the civil Courts under the law prohibiting alienation (whether generally or beyond the lifetime of the alienor), but there is no apparent reason why the Collector should interfere.

The answer to this argument is that, as shown above, vatandars under Gordon's Settlement were purposely included within the terms of Bombay Act III of 1874. Otherwise there was no object in the peculiar definition of "hereditary office." If, as the reports of the Gordon's Committee show, *Appaji* v. *Keshav* (2), the intention both of Government and of the vatandars was to leave the vatan lands attached to the hereditary offices, then there is no reason why the Collector should not intentionally have been given a discretion, enabling him to keep the lands so attached. Since Bombay Act V [428] of 1886 was passed, this discretion in the case of "unassigned" vatans would be limited to alienations without the sanction of Government and beyond the lifetime of the alienor. In the present case, the mortgage was effected in 1873 and by the then law was good only for the lifetime of the alienor. The alienor is now dead. It is clear that by the civil Court's order, dated 13th August, 1891, directing the attachment and sale of the property, part of the vatan in question may pass into the ownership or beneficial possession of a person not a vatandar. It is sufficient, then, for the Collector to certify that this property is part of a vatan. It "is, therefore, inalienable," and this Court must set aside the order for sale and cancel the decree. It has been held in *Kasturchand* v. *Balvantrav*(3), that the Collector acting under s. 10 acts judicially, and his certificate, therefore, cannot be questioned by the Court. (See also *The Queen* v. *Collins* (4).) It was argued that the use of the word *such* in describing "unassigned" vatans in s. 10 must be taken as showing that a vatan to come within the terms of that section must be *assignable*. I cannot agree with that argument. Read strictly the words would mean "any vatan assigned under s. 23, but not so assigned," which would be nonsense. I take it, therefore, that the word *such* is superfluous and must be rejected. As was said in *Radhabai* v. *Anantrav* (5). "By s. 5 of the Act the alienation of *any* vatan or part thereof is forbidden without the sanction of Government to any person not a vatandar of the same vatan, and by s. 10 power is given to the Collector to set aside any sale or transfer thereof." If vatans under the Gordon Settlement are within the terms of s. 5, then there is nothing to exclude them from the provisions of s. 10. No doubt after the decision of the Full Bench in *Radhabai* v. *Anantrav* (5), and dated January, 1885, that vatan lands become alienable when the services are abolished (a decision now admitted to have been founded on the erroneous idea that the settlement of a service vatan could be made under Bombay Act II of 1863), the idea was prevalent in some quarters that s. 5 of Bombay Act III of 1874 could not be applicable to vatandars settled under the Gordon Settlement. Comparing the general rules in force in the Revenue Department, known as "Cordeaux's Compilation,"

(1) 9 B. 198 (210). (2) 15 B. 13 (23). (3) P.J. (1887) 70.
(4) 2 Q.B.D. 30. (5) 9 B. 198 (209).

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p. 127, with [429] the edition of the same compilation now being issued, p. 192, it would seem that Government in Resolution No. 4235, dated 27th May, 1885, expressed that opinion, which naturally followed on the decision of the Full Bench just quoted, dated January, 1885. But the Legal Remembrancer had always held the contrary opinion (see Cordeaux's Compilation, pp. 141, 142), and accordingly Bill No. II of 1885 to amend Bombay Act III of 1874 was introduced and became law (Bombay Act V of 1886). If it is shown that vatandars under the Gordon Settlement did come within the provisions of Bombay Act III of 1874, and that the decision of the Full Bench on the 3rd question referred to them was founded on an erroneous idea, then the fact that Bombay Act V of 1886 was entitled an *amending* Act, instead of *amending* and *declaratory*, would not prevent the words of Bombay Act III of 1874 having the meaning which must be reasonably attached to them. As the difficulty in this case mainly arises from the decision of the Full Bench in *Radhabai* v. *Anantrav* (1) on the third question submitted to the Full Bench in that case, regard being specially had to the paragraph beginning "it seems that this result" on p. 214 of the report down to "landed property of the district" on p. 215, I concur in the proposed reference to a Full Bench of the question now before us, *viz.*, whether s. 10 of Bombay Act III of 1874 applies to a service vatan (*deshamukhi*) the liability to service connected therewith having been commuted under what is known as the "Gordon Settlement" without any condition as to power of alienation.

The question being referred to a Full Bench, it came on for argument before a Full Bench composed of Sargent, C.J., and Jardine and Candy, JJ.

Macpherson (with *Balaji A. Bhagvat*) appeared for the plaintiff (judgment-creditor)—The Collector was a party to the suit in his capacity as the administrator of the minor's estate, and he contended that the property being *deshamukhi* service vatan was inalienable under the provisions of the Vatan Act. We answered that as the service was commuted, the property became alienable like any other private property against the heirs of the mortgagors—*Radhabai* v. *Anantrav* (1). The service was commuted under the Gordon Settlement. [430] The effect of the Gordon Settlement is the same as that of the Summary Settlement Act. We submit that a commuted vatan does not fall under s. 5 or s. 10 of the Vatan Act. The amending Act (V of 1886) not being retrospective has no application to the present case, because the alienation in dispute was made in 1873—*Bai Hariganga* v. *Tulsidas Kasandas* (2).

[SARGENT, C. J.—If the service be commuted, the hereditary office ceases, and then what remains is the vatan property *minus* the hereditary office.]

Just so. The whole object of s. 10 is to secure and preserve the vatan property for the satisfactory performance of the duties of the office. Section 10 applies to vatans entered as such in the revenue records or under the Act, and assigned under s. 23 of the Act. When service has been commuted, the vatan is incapable of assignment under s. 23, and so we say that s. 10 has no application.

Rao Saheb *Vasudev J. Kirtikar* (Government Pleader) appeared for the Government of Bombay.—The Gordon Settlement has not the effect

(1) 9 B. 198.

(2) P. J. (1887), 69.

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of converting a vatan into the private property of the vatandar and alienable as such—*Appoji* v. *Keshav* (1). The object of the Vatan Act is to preserve the vatan property intact, whether service in connection with the vatan is rendered or not, and that being so, and the Gordon Settlement not having made any charge in the nature of the vatan property, s. 10 of the Vatan Act is applicable, and the Collector was justified in granting the certificates. The action of the Collector in granting the certificates was judicial, and the Court cannot question the validity of the certificates—*Kasturchand* v. *Balvantrao* (2).

Bhaishankar Nanabhai appeared for the defendants (judgment-debtors).

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C.J.—The question referred to us is whether s. 10 of the Vatandar Act III of 1874 (Bombay) is applicable to vatans, which had been the subject of the Gordon Settlement prior to the [431] passing of the Act. The object of s. 10 is to supplement the prohibition contained in s. 5 against alienation by a vatandar to a person not a vatandar by enabling the Collector to undo an alienation which may have been effected since the passing of the Act by a decree or order of a civil Court. It will apply, therefore, wherever s. 5 is applicable. By s. 1 of the Amending Act V of 1886, that section is amended by restricting the prohibition to an alienation beyond the life of the vatandar, and also by making the section so amended applicable in the case of any vatan in respect of which a service commutation settlement has been made prior to the Act of 1874.

The important question arises as to what was the object with which this last amendment was made, was it to extend the operation of the Act to such vatans or to remove a doubt as to their being included in the Act of 1874. We think that looking at the definition of a vatan in the latter Act, and having regard to the circumstance that doubts had been entertained whether such vatans were within the contemplation of the Act, the latter was the true object. The definition of a vatan in the Act includes the case of a vatan in which the services have ceased to be demanded—language which appropriately expresses the state of things existing in the case of a vatan, the subject of a Gordon Settlement, for it is worthy of remark that the language of the sanads issued under the Gordon Settlements is that Government undertake in the future not to require the services to be performed. But it remains to consider whether the Act was intended to have a retrospective effect. We think that such an intention is to be gathered from the language of s. 15, cl. (2), which would appear to have been introduced on the assumption that vatans, the subject of a settlement before the Act, were included in the Act, but required to be placed by express terms on the same footing as those which the Act contemplated becoming the subject of a settlement by virtue of the power in that behalf of the Act itself. We must, therefore, answer the question in the affirmative.

The Full Bench having decided the question, the case was sent back to the Division Bench (Sargent, C.J., and Candy, J.), which made the

(1) 15 B. 13 (22).

(2) P. J. (1887), 70.

reference to the Full Bench, and the Division Bench passed the following judgment :—

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JUDGMENT.

[432] Having regard to the judgment of the Full Bench, to which the question whether s. 10 of the Vatandar Act was applicable to the case of a vatan, in respect of which a settlement has been made under Gordon's Settlement, was referred, we must direct the District Court to cancel its order for the attachment and sale of the property in question.

District Court directed to cancel its order.

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20 B. 432.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine, and Mr. Justice Fulton.

CIVIL REFERENCE UNDER SECTION 46 OF THE INDIAN STAMP ACT.* [15th March, 1895.]

Stamp—Stamp Act (I of 1879), sch. I, art. 21—Company—Winding up—Transfer of property by old to new company—Conveyance.

An instrument, which is in terms a conveyance of property at an agreed value, is a sale of such property at that price, and is governed by art. 21, sch. I of the Indian Stamp Act (I of 1879). The circumstance that the transaction is a part of a larger transaction, cannot affect the character of the instrument.

THIS was a reference by J. M. Campbell, Collector and Superintendent of Stamps, Bombay, under s. 46 of the Indian Stamp Act (I of 1879).

A certain deed of conveyance proposed to be entered into between the Chartered Mercantile Bank of India, London and China, Limited, of the first part, the liquidators of the said bank of the second part, and the Mercantile Bank of India, Limited, of the third part, having been taken to the Collector under s. 30 of the Indian Stamp Act (I of 1879) for adjudication of the stamp duty which the deed required, and a question having arisen as to whether, for the purposes of the stamp duty, the deed was a conveyance or merely a transfer of property from one company to another for consideration, the Collector made a reference in the following terms :—

" By deed of conveyance proposed to be entered into between the Chartered Mercantile Bank of India, London and China, Limited, (hereinafter referred to as the old bank) of the first part, the liquidators **[433]** of the old bank of the second part, and the Mercantile Bank of India, Limited, (hereinafter referred to as the new bank), after reciting that the old bank was seized and possessed of certain immoveable property in the city of Bombay, and that the old bank, being a company registered under the English Companies Acts, 1862 to 1890, by a special resolution, resolved to wind voluntarily, and the liquidators (parties of the second part) appointed invested with power under s. 161 of the Companies Act of 1862 to enter into an agreement with the new bank under certain terms, and that by an agreement dated 3rd February, 1893, between the old bank

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* Civil Reference, No. 2 of 1895.

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and the liquidators of the one part and the new bank of the other part, it was agreed that the old bank and its liquidators should transfer to the new bank all the lands, buildings, goods, chattels, moneys, credits, debts, bills, notes, &c., of the old bank, the undertaking, business and the good-will thereof, with the full benefit of all contracts and engagements, &c., and all other real and personal property of the old bank, subject to all charges, liens and incumbrances. The new bank in consideration of such transfer agreed to pay and discharge all debts, liabilities and obligations of the old bank, to fulfil all its contracts and engagements, and to keep the old bank and its liquidators and contributories indemnified against such debts, liabilities, obligations, contracts and engagements, and against all actions and proceedings in respect thereof, and to pay the costs and expenses of winding up the old bank and of carrying the said transfer into effect, and in further consideration of such transfer it was agreed that every member of the old bank should, in respect of each share of £25 held by him or her, be entitled as of right to claim an allotment to himself or herself or his or her nominees of one B share of £25 in the new bank, with the sum of £12-10 per share audited and paid up thereon, and that the said new bank should allot the shares claimed. It also recited that to carry into effect the said agreement of the 3rd February, 1893, the old bank and its liquidators had agreed to transfer to the new bank its immoveable property at Bombay. Also that the premises stood in the books of the old company at the value of Rs. 1,50,000, which was the value at which the same were to be taken over, and was, therefore, the appropriate value of the consideration mentioned in the agreement of the 3rd February, 1893, which represented the transfer of the said hereditaments. [434] It witnessed that in consideration of the said agreement and of such proportionate part of the consideration mentioned in the agreement as represented Rs. 1,50,000, the old bank granted, and the liquidators confirmed to the new bank, its successors and assigns, all that piece of land measuring 532 square yards, &c., at Elphinstone Circle, Bombay, with the buildings thereon then in the occupation of the new bank, to hold the same unto and to the use of the new bank, its successors or assigns for ever. Then followed the usual covenants of title."

The Collector submitted the following question :—

"Whether the above-mentioned document required any and what stamp ?"

The opinion of the Collector was that the document should be stamped as a conveyance under art. 21 of the first schedule of the Stamp Act, and that it was not merely a transfer of the property from one company to another, in consideration of the exchange of shares of equal or less nominal value in the new company for shares in the old company share for share.

Lang (Advocate General with *Little*, Government Solicitor) appeared for the Government of Bombay.—We contend that the document is a conveyance on sale and not merely a reconstruction of the company. The stamp must cover the amount of Rs. 1,50,000, which is the value of the property belonging to the bank—*The Great Western Railway Company* v. *The Commissioners of Inland Revenue* (1); *Nagindas Jeychand* v. *Halalkore Nathwa Gheesla* (2).

The next question is whether, under the provisions of s. 24 of the Stamp Act, the stamp should also cover the liabilities of the old bank which the new bank has undertaken to pay.

There was no appearance on behalf of the bank.

(1) (1894) 1 Q.B. 512.

(2) 5 B. 470.

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JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C. J.—We think that the Collector is right in holding that the instrument in question is a conveyance, the stamp on which is fixed by art. 21 of sch. I to Act I of 1879. The instrument is by its very terms a conveyance of the property mentioned [435] in it at the agreed value of Rs. 1,50,000. In other words, it is a sale of such property at that price.

The circumstance that the transaction is a part of a larger transaction as provided by the agreement, between the banks, of the 3rd February, 1893, and that the Rs. 1,50,000 is a part of the larger consideration for that agreement, cannot affect the character of this particular instrument. The parties have fixed the price at Rs. 1,50,000, which by agreement between them is to be paid to the vendor's creditors. The remarks of the Judges of the Appeal Court in *The Great Western Railway Company* v. *The Commissioners of Inland Revenue* (1) are applicable to the present case as showing that it is substantially a purchase and sale of the property. The stamp will be determined on the Rs. 1,50,000 stated in the instrument to be the consideration for the conveyance.

Order accordingly.

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20 B. 435.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Parsons.

HARI VASUDEV KAMAT (*Plaintiff*) *v.* MAHADU DAD GAVDA (*Defendant*).*
[21st March, 1895.]

Hindu law—Joint family—Bond given in name of one member of joint family for loan made out of joint family funds—Suit on bond—Rights of such member to sue alone—Other members not necessary parties—Parties—Practice—Procedure.

A loan was made to the defendant out of joint family funds, and a bond for the amount was given in the name of one of the members of the joint family. He sued the defendant on the bond.

Held that the other members of the joint family were not necessary parties.

[R., 32 A. 183=7 A.L.J. 161=5 Ind. Cas. 767; 24 B. 123; 22 M. 326; 7 Ind. Cas. 584 =4 S.L.R. 2 (5); 127 P.R. 1906=58 P L R. 1907=10 P.W.R. 1907; D., 15 Bom. L.R. 577; 189 P.L.R. 1908.]

THIS was a reference by Rao Saheb Vishvanath Vaikunth Vagle, Subordinate Judge, Vengurla, in the Ratnagiri District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued to recover from the defendant Rs. 34-12-0 due in respect of a money-bond passed by him to the plaintiff alone on the 30th July, 1890. The following is a translation of the bond :—

"Debt-bond. (I) Mahadu Dad Gavda Dicholkar, residing at the sea-port town of Vengurla, give (this) debt-bond in writing as follows :— This day I took from you [436] for my use Rs. 20 (twenty) in cash of the Queen's currency. I received this amount from you in cash. Interest

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* Civil Reference, No. 3 of 1895.

(1) (1894) 1 Q. B. 512.

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thereon is agreed to be paid at the rate of 3 (three) pies per month per rupee. After paying, in one year from this day, the said principal sum of rupees twenty, together with interest thereon, I will take back this debt-bond released. Should I fail to pay the amount in the fixed time, and should there remain any balance, I will pay you whatever balance, including interest, may have remained due to you, together with interest thereon calculated at the aforesaid rate. I will plead no excuse whatever. To this effect I have duly given this debt-bond in writing of my free will."

The defendant admitted the bond, but pleaded non-joinder of parties. He alleged that the plaintiff had two undivided brothers, Vishnu and Govind; that all the three brothers were present when the loan was made and the bond executed; that Govind paid him the money, but took the bond in Hari's name, and that the money was advanced from the joint family funds. He contended that the plaintiff's brothers were necessary parties.

At the hearing it was admitted that the loan had been made out of the joint family funds, and that the bond was obtained in the plaintiff's name.

The Subordinate Judge referred the following questions:—

(1) Whether the plaintiff's brothers were necessary parties?

(2) Whether the plaintiff was entitled to recover the sum due on the money-bond sued upon."

The opinion of the Subordinate Judge was that the plaintiff's brothers were not necessary parties to the suit, and that the plaintiff alone was entitled to recover the debt.

Vasudeo G. Bhandarkar (amicus curiæ), for the plaintiff:—The bond was passed to the plaintiff in his individual capacity; he can, therefore, maintain the present suit. His brothers are not necessary parties —*Jagabhai Lallubhai* v. *Rastamji Nasarwanji* (1); *Yeknath Ramchandra* v. *Waman Brahmadev* (2).

Manekshah J. Taleyarkhan (amicus curiæ), for the defendant.—It is admitted that the loan was advanced to the defendant from the joint family funds; therefore, the plaintiff alone cannot sue. His brothers are as much interested in the recovery of money as he himself is, and as they are not joined as parties, the suit must fail.

[437] [PARSONS, J., referred to *Bungsee Singh* v. *Soodist Lall* (3).]

ORDER.

SARGENT, C. J.—The opinion of the Subordinate Judge that the plaintiff could sue alone on the bond is correct. Costs to be costs in the case.

Order accordingly.

(1) 9 B. 311. (2) 10 B. 241. (3) 7 C. 739.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Parsons.

BABASAB VALAD LODSAB, CURATOR AND MANAGER OF THE PROPERTY OF DECEASED DADASAB KANTY, (*Plaintiff*) *v.* NARASAPPA BIN IRAPPANNA (*Defendant*).* [21st March, 1895.]

Succession Certificate Act (*VII of* 1889), *s.* 4—*Curator—Act XIX of* 1841.

A curator appointed under the Curator's Act (XIX of 1841) is not a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage, and is not required to take out a certificate under s. 4 of the Succession Certificate Act (VII of 1889) before he can obtain a decree.

[R., 37 C. 754 (758)=12 C.L.J. 252=6 Ind. Cas. 416.]

THIS was a reference by Rao Bahadur G. V. Limaye, First Class Subordinate Judge of Dharwar, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff was appointed curator of the estate of one Dadamiya valad Hatelsaheb under Act XIX of 1841, and as such he sued to recover rupees ninety due on a bond passed to the deceased by the defendant on the 27th August, 1891.

The defendant contended (*inter alia*) that the plaintiff could not sue without a certificate under the Succession Certificate Act (VII of 1889).

The Subordinate Judge thereupon submitted the following question :—

"Is the curator entitled to sue without production of a succession certificate under Act VII of 1889 ?"

The opinion of the Subordinate Judge was in the negative.

[438] *Manchubhai N. Choksi* (*amicus curiæ*), for the plaintiff.—In the present case the certificate which has been granted to us under the Curator's Act (XIX of 1841) expressly authorizes us to institute suits. Therefore, a succession certificate is not necessary for the maintenance of the suit. Further, it is not necessary for a curator appointed under s. 9 of the Curator's Act to obtain a certificate contemplated by s. 23 of the Succession Certificate Act (VII of 1889), because a curator does not become entitled to the effects of the deceased as his representative, but as a person appointed by the Court to take charge of his property.

Dhondu P. Kirloskar (*amicus curiæ*), for the defendant.—Section 4 of the Succession Certificate Act (VII of 1889) applies to the case of a curator. The plaintiff sues in a representative capacity. He is identified with the persons eventually entitled to succeed to the estate of the deceased by right of inheritance or otherwise. He is thus a person claiming to be entitled to the effects of the deceased within the meaning of s. 4 of the Succession Certificate Act.

OPINION.

PERSONS, J.—We are of opinion that a curator appointed under Act XIX of 1841 is not a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage within the meaning of s. 4 of the Succession Certificate Act (VII of 1889), and that he is not required to take out a certificate under it before he can obtain

* Civil Reference, No. 4 of 1895.

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a decree. He is not a representative of the deceased person, but is merely entrusted by the Court with certain powers over the estate for a temporary purpose, amongst which is the power to sue in his own name given him by s. 9 of Act XIX of 1841. We are confirmed, in this opinion, by the provisions of s. 23 of the Succession Certificate Act, for which there would have been no necessity had the provisions of s. 4 applied to the curator, since it contemplates his exercising his authority until a certificate under the Act has been granted.

Order accordingly.

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20 B. 439.

[439] ORIGINAL CIVIL.

Before Mr. Justice Starling.

SARAFALI TYABALI (*Plaintiff*) *v.* SUBRAYA BATERAYA AND NAROTAMDAS CANDAS (*Defendants*).*

[13th, 15th and 17th September, 1895.]

Lease—Assignment—What amounts to—Terms appropriate to freehold and fazendari land—Forfeiture by assignment without license—Waiver of forfeiture, what amounts to—Result of waiver of forfeiture—Damages on forfeiture for breach of covenant to repair.

An assignment by way of mortgage of leasehold property in terms appropriate to fazendari property, the lease and mesne assignments being handed over to the mortgagee on execution of the deed, and a subsequent assignment of the equity of redemption of same property in terms appropriate to freehold property will, in the absence of any circumstances to lead the assignees to believe that the assignor had any further interest in the property, operate as assignments of the lease.

Where there is a proviso in a lease for forfeiture on assignment without previous license of the lessor, the acceptance by the lessor of rent or insurance premia from the assignee without license or the entering into an agreement with him in respect of repairs operates as a waiver of any and all causes of forfeiture of which the lessor is at the time aware.

Where assignments of leaseholds are invalid as being in breach of a covenant not to assign without previous license and so causing forfeiture of the lease, but are valid in all other respects, on waiver of the forfeiture the assignments become operative, and those taking under them become assignees of the lease with the consent of the lessor, and are subject to all the liabilities of such assignees.

The rule in *Joyner* v. *Weeks* (1) that when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to be left applies where a term has ceased by forfeiture as well as where it has expired by efflux of time.

BY a lease dated the 16th February, 1891, the plaintiff and his two brothers Mahomedali and Esofali demised to one Hariram Deoji and another certain land and premises in Bombay for the term of ninety-nine years from the 1st October, 1890, at the quarterly rent of Rs. 525 payable in advance by four quarterly payments in each year.

The lease contained (*inter alia*) the following covenants by the lessees, their executors, administrators and assigns :—

(1) to pay the rent on the dates specified ;

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* Suit No. 268 of 1895.

(1) (1891) 2 Q. B. 31 (43).

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[440] (2) within two months from the date of the lease to repair thoroughly the old chawls Nos. 1, 2 and 3 marked in the plan annexed thereto, and throughout the said term at their own expense well and sufficiently repair, maintain and keep the said premises and all fixtures and additions thereto in good and substantial repair and condition ;

(3) to insure and to keep the said premises insured against loss or damage by fire ;

(4) not to assign, mortgage and charge the said premises, or any part thereof, without the previous license in writing of the lessors, their heirs or assigns ;

(5) at the expiration or sooner determination of the said term to deliver up the said premises and all new fixtures and additions thereto in good and substantial condition and in such state and condition as should be consistent with the due performance of the said several covenants.

The said lease also provided that if the rent should be in arrears, or if and whenever the lessees, their executors, &c., should assign, mortgage or charge the said premises without such license as aforesaid, and whenever there should be a breach of any of the covenants aforesaid, the lessors, their heirs and assigns might at any time during the said term re-enter upon the said premises, and thereupon the term of ninety-nine years should absolutely determine.

In the year 1893 the said lease was with the lessors' consent assigned to one Shetiba Enkati Silam.

On the 28th September, 1893, the said Shetiba Enkati Silam mortgaged the said premises to the second defendant (Narotamdas Candas) for Rs. 7,000. The mortgage-deed contained no mention of the lease, and the mortgage was made without the knowledge or consent of the lessors. The lease and mesne assignments were, however, handed over to the second defendant on execution of the deed.

On the 2nd February, 1894, the said Shetiba Enkati Silam assigned the equity of redemption in the said leasehold to the [441] first defendant (Subraya Bateraya) without the knowledge and consent of the lessors.

The plaint alleged that the rent due under the said lease having fallen into arrear, and Shetiba Enkati having neglected to repair and insure the premises, the lessors through their attorneys sent him a letter on the 21st April, 1894, setting forth his breaches of the covenants in the lease and giving him notice that they intended to exercise their right of re-entry in accordance with the terms of the lease and calling upon him to give up possession within eight days from the service of such notice, &c.

On the same day the lessors having been informed of the mortgage to the second defendant sent him a notice stating that they did not in any way recognize him as having any interest in the property, as the mortgage to him was made in breach of covenant and without their consent.

On the 25th April, 1894, Shetiba Enkati Silam's solicitors sent a letter to the lessors informing them that he had assigned the said leasehold to the first defendant (Subraya), and on the same day they sent another letter to the second defendant (Narotamdas) calling upon him forthwith to comply with the covenants in the lease, and adding " in the event of your failing to do so, and if any steps are taken by the fazendars against our client in respect thereof, our client will hold you responsible for the costs and consequences."

On the 27th April, 1894, the solicitors for the first defendant wrote to the lessors' solicitors tendering the plaintiff Rs. 1,050 " being the ground

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rent now due by him together with Rs. 37-8, the premium paid by your client." On the 28th April the lessors' solicitor wrote a reply refusing to accept the amount tendered, unless the covenants of the lease in respect to repairs of the property were forthwith complied with or unless some guarantee was given that the premises would be repaired. A correspondence subsequently took place, the result of which was that the first defendant paid to the lessors the rent then claimed by them and undertook to do the necessary repairs after the monsoon of 1894.

[442] On the 16th October, 1894, by a partition deed executed between the lessors the said premises subject to the said lease became vested in the plaintiff.

The plaintiff filed this suit on the 10th June, 1895. He alleged that the repairs had not been effected and that the first defendant had committed a further breach of covenant in not having paid the rent as provided by the lease. He claimed Rs. 1,050 as due for rent. He also alleged that the first defendant had failed to insure the premises, and he claimed Rs. 37-8 as the sum paid by himself for insurance.

The following paragraph of the plaint sets forth the plaintiff's case as against the second defendant:—

"The plaintiff is informed and believes that the said second defendant has been in possession and receipt of the rents and profits of the said premises since the date of the alleged mortgage to him as aforesaid, and the plaintiff says that the second defendant is liable to pay damages, as hereinafter prayed, for the non-repair of the said premises and the sum hereinafter claimed for the insurance thereof. The plaintiff will also contend that the said alleged mortgage to the second defendant is void and of no effect as against the plaintiff."

The plaint prayed for a declaration that the lease had been forfeited and that the mortgage to the second defendant was void and inoperative as against the plaintiff; that the defendants should give up possession, and that they or either of them should pay Rs. 1,050 due as rent on the 1st April, 1895 and such further sums as might accrue due up to the date of re-entry. It also prayed for damages for non-repair and for Rs. 37-8 paid for insurance charges, &c.

The following issues were raised at the hearing:—

(1) Whether as against the first defendant there has been a forfeiture of the lease?

(2) Whether the plaintiff has not waived such forfeiture, if any?

(3) Whether the first defendant is not entitled equitably to be relieved from the effect of such forfeiture, if any, and, if so, on what terms?

(4) Whether the plaintiff is entitled to recover from the second defendant the sum of Rs. 1,050, or any further sum, as prayed in clause (*d*) of prayer?

(5) Whether the plaintiff is entitled to recover from the second defendant the sum of Rs. 37-8 mentioned in cl. (*e*) of prayer?

(6) Whether the second defendant is under any obligation to the plaintiff to repair the premises?

[443] (7) Whether the plaintiff is entitled to recover damages from the second defendant for non-repair as claimed in cls. (*f*) and (*g*) of prayer?

(8) Whether the plaintiff is entitled to recover any and what amount of damages from the first defendant?

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Russell (with *Macpherson*, Acting Advocate General), for plaintiff:—He cited *Spencer's Case* (1); *Williams* v. *Bosanquet* (2); Woodfall's Landlord and Tenant (5th Ed.), pp. 275-76; *Perry* v. *Walker* (3); Cruise's Digest, Vol. IV, s. 18; *Beardmore* v. *Wilson* (4); *Williams* v *Heales* (5); Roscoe's Nisi Prius, 693. As to the second defendant's liability, Shepherd's Touchstone, p. 175, note 2; *Aspden* v. *Seddon*(6); *Pomfret* v. *Ricroft* (7); *Burnett* v. *Lynch* (8). As to the duty of thesecond defendant to see that the covenants of the lease were performed, *Moule* v. *Garrett* (9); *Pollock* v. *Stacey* (10). As to damages, *Joyner* v. *Weeks* (11); *Lepla* v. *Rogers* (12); Mayne's Damages, (Ed.) p. 261.

Robertson (with *Rivett-Carnac*), for first defendant:—The second defendant is primarily liable. The mortgage to him is in effect an assignment. As to the first defendant, there has been a waiver of forfeiture. In any case the Court will relieve against forfeiture. The plaintiff had notice of the mortgage to the second defendant before the 20th April, 1894. Subsequently to that he received Rs. 3,000 as rent from the first defendant. That is a waiver of forfeiture—Woodfall's Landlord and Tenant, p. 337; see also pp. 343 and 344. The second defendant in his written statement alleges that the mortgage to him was with the consent of the plaintiff. A mortgagee in possession is bound by the covenants of a lease—*Perry* v. *Walker* (3). Even if he was not in possession he would be bound—*Westerdell* v. *Dale* (13); *Lucas* v. *Comerford* (14); *Stone* v. *Evans* (15). Counsel referred to the Transfer of Property Act (IV of 1882), s. 76, and Woodfall's Landlord and Tenant, (Ed.) p. 620.

[444] *Inverarity* and *Lowndes*, for defendant No. 2:—The plaintiff did not assent in writing to the mortgagee—*In the matter of the Bombay Insurance Company*; *Ex parte Gilbert* (16). The second defendant is not assignee. The plaintiff took rent from the first defendant—*Pollock* v. *Stacey* (10); *Beardmore* v. *Wilson*(4). The second defendant is not liable for the damages claimed. He is only liable to keep the premises in the state of repair in which he had got them—*Doe dem. Dalton* v. *Jones* (17); *Gutteridge* v. *Munyard*(18); *Burdett* v. *Withers*(19); *Stanley* v. *Towgood*(20); *Mantz* v. *Goring* (21); *Mills* v. *East London Union* (22); *Williams* v. *Williams* (23); *Henderson* v. *Thorn* (24); *Baring* v. *Abingdon*(25); *Joyner* v. *Weeks* (11); *Elliott* v. *Johnson* (26).

JUDGMENT.

STARLING, J.—The plaintiff and his brothers were, in 1891, the owners of a piece of land with four chawls thereon at DeLisle Road, which on the 16th February, 1891, was demised for a term of ninety-nine years to one Hariram Deoji. The lease contained covenants against assignment without the written consent of the lessor, for payment of rent, for repairs

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(1) 1 Smith's Leading Cases, p. 252. (2) 1 Bro. and Bing. 238.
(3) 1 Jur (N.S.). 746. (4) L. R. 4 C. P. 57. (5) L. R. 9 C. P. 177.
(6) 1 Ex. D. 496. (7) 1 Wms. Saund., 565. (8) 5 B. and C. 569.
(9) L.R. 5 Ex. 132. On app. L.R. 7 Ex. 101. (10) 9 Q. B. 1033.
(11) (1891) 2 Q. B. 31. (12) (1093) 1 Q. B. 31. (13) 7 T. R. 312.
(14) 1 Ves. (Jun.), 235. (15) Peake's Add. Cas. 94. (16) 16 B. 398 (402).
(17) 4 B and Ad. 126. (18) 7 C. and P. 129. (19) 7 A. and E. 136.
(20) 3 Bing. N. C. 4. (21) 4 Bing N. C. 451. (22) L. R. 8 C. P. 79 (87).
(23) L. R. 9 C. P. 359 (666).
(24) (1893) 2 Q. B. 164. (25) (1892) 2 Ch. 374. (26) L. R. 2 Q. B. 120.

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and for insurance; and it was provided that on breach of any of these covenants the lessors should be at liberty to re-enter. By divers valid assignments the lease was from time to time assigned, and in 1893 the remainder of the term became vested in one Shetiba Enkati.

On the 28th September, 1893, Shetiba Enkati mortgaged the demised property to the second defendant; and on the 2nd February, 1894, transferred his equity of redemption therein to the first defendant, both transactions being without the consent in writing, or in any other way, of the lessors. These two transactions ought, if done regularly, to have been carried out by an underlease to the second defendant, and an assignment of the term, subject to the underlease, to the first defendant. This has **[445]** not been the case. Hence it is necessary to determine what is the real effect of the transactions which took place.

The mortgage recites that Shetiba under an assignment of leasehold property of the same date as the mortgage was absolutely entitled to the premises in dispute, and it grants, releases, conveys and assures the same unto the second defendant, his heirs, executors, administrators and assigns as if they were what is called fazendari land, subject to redemption. It makes no provision for payment of a rent to the so-called fazendar; all that it does is to provide that the mortgagee is at liberty to credit the mortgagor with the rents of the property after payment of fazendari dues, rates and taxes and proper outgoings. At the time of the execution of this deed the original lease and the mesne assignments were handed to the second defendant.

What, then, is the effect of this transaction? In Cruise's Digest, Vol. IV, s. 18, p. 88, it is stated that no particular words are necessary for an assignment of a term, and "that give, grant, &c.," are as good and effectual as "assign, &c.," which are the ordinary terms. In *Beardmore* v. *Wilson* (1), it was held that an underlease for the whole remaining portion of the term operates as an assignment of the term; and from the cases cited and acted on therein it appears that an underlease for a term exceeding that of the original lease has the same effect. Seeing, then, that when this mortgage was executed the lease and assignments were handed over to the second defendant, and that there is no evidence to show that there was anything to lead him to believe that Shetiba had any further interest in the premises mortgaged, I consider I am justified, on these authorities, in holding that the mortgage-deed operated as an assignment of the lease.

The deed to the first defendant of the 2nd February, 1894, commences as if it were a conveyance of freehold property, and it grants and conveys the property to the first defendant, his heirs, executors, administrators and assigns, but only to have and to hold the right, title and interest of Shetiba therein, subject to the mortgage of the second defendant. I can see no substantial **[446]** difference between these two deeds, and I must hold that this also operates as an assignment of the lease.

The execution of these deeds, or either of them, without the consent of the lessors operated as a breach of the covenant not to assign without a license in writing, and gave the lessors the right at any time thereafter to re-enter upon the demised premises. On the 21st March, 1894, when the lessors first gave notice to Shetiba with respect to other breaches of covenant, they seem to have been unaware of the latter of these two above-mentioned breaches, but they knew of the former, as they sent a letter to

(1) L.R. 4 C. P. 57.

the second defendant enclosing a copy of their notice to Shetiba, but apparently only as a warning of what might happen, as they expressly write that they do not recognize the second defendant as having any interest in the property, as the mortgage was made without their written consent. The case in the Privy Council hereinafter cited shows that this protest on the part of the lessors need not be taken into account. Shetiba on the 25th April 1894, disclaimed all liability on the ground that he had assigned to the first defendant If on that day the lessors had brought a suit against the first and second defendants for ejectment, and nothing else, there would have been no defence to it, and a suit would have lain against Shetiba for rent and damage for not insuring and non-repair, which he could not have defended, as he was still the assignee of the lease, his two deeds, being made without the written consent of the lessors, not operating in his favour as an assignment so as to relieve him in any way of liability to perform the covenants of the lease.

On the 27th April, however, the first defendant sent to the lessors the amount of rent and fire-insurance premium claimed by them, which they accepted, and thereafter accepted an agreement from him as to the repair of the premises within a certain time, taking from him a deposit of Rs. 500 for the due fulfilment of the conditions. By this act, in my opinion, the lessors waived the forfeiture caused by any and all causes of forfeiture, which they then knew. See *Doe* v. *Pritchard* (1); *Croft* v. *Lumley* (2); *Davenport* v. *Reg* (3). Consequently, the two defendants [447] being entitled to the demised property by assignments were thereafter in the position of assignees of the lease with the consent of the lessors.

On the 16th October, 1894, the plaintiff became the sole owner of the reversion. In June, 1895, rent was again in arrears, and repairs had not been done properly; and on the 6th June the plaintiffs' solicitor wrote to the second defendant telling him that while they did not in any way recognize him as having any interest in the property, they would proceed to eject him and get such further relief as the plaintiff might be entitled to, unless he paid up the rent then due together with the fire insurance, and undertook to put the premises in repair. The second defendant of course did not comply with the plaintiff's request, as he would thereby have effectually estopped himself in the future from denying that he was assignee of the term—*Williams* v. *Heales* (4). His cautiousness cannot, however, avail him in this case.

On the 9th June the plaintiff filed this suit against both the defendants. After setting out the various breaches of covenants he prays against both the defendants' possession, and that one or both of them may be ordered to pay rent due and damages for non-performance of covenants to insure and repair. The first defendant practically confesses his liability, and asks for the forfeiture of the lease to be set aside on such terms as the Court may think fit, and I may, therefore, proceed for the present as if the first defendant were out of consideration altogether.

The plaintiff in the 7th paragraph of his plaint alleges the mortgage to the second defendant, but says it was made without his knowledge or consent. In para. 17 the plaintiff charges that the second defendant has been in possession of the property and is liable to pay rent and damages for non-insurance and non-repair.

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(1) 5 B. and Ad. 765.
(2) 5 E. and B. 648; 6 H. L. Ca. 672.
(3) 3 Ap. Ca. 115.
(4) L. R. 9 C. P, 177.

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The second defendant in his written statement alleges that the mortgage to him was executed with the knowledge and acquiescence of the plaintiff, apparently thereby claiming to possess [448] a valid assignment of the premises, but submits his rights to the Court.

Now all the prayers seem to me to be proper in the present case. Mr. Russell unnecessarily tried to support the prayer for damages as against the second defendant as a mortgagee in possession. A mortgagee in possession of a term ought to pay the landlord's rent and keep the premises insured and repaired, but for non-performance of these duties he is liable to his mortgagor and to no one else, and the plaintiff is not his mortgagor. Consequently this prayer cannot be supported on that ground; but as I hold the second defendant is an assignee of the lease, he is liable to be ejected for breach of the covenants contained therein, and he is also liable in damages for his breach of them.

Supposing, however, that I am wrong as to the effect of the payment of rent by the first defendant, I am of opinion that the effect of the charge in the 17th paragraph and the double set of prayers which are inconsistent unless the second defendant is an assignee of the lease, the plaintiff not indicating which set he is going to press against the second defendant, but up to the end trying to press both, is to cause a waiver of forfeiture by pleading, and that estops him from relying on the breach of covenant—*Evans* v. *Davis* (1), so that he could not eject the second defendant, but must be content with a decree for damages. This view would, however, result in a rather complicated decree, and in my opinion is not so correct as the former one.

I, therefore, hold that by reason of non-payment of rent since the payment by the first defendant in June, 1894, and by reason of the premises being allowed to continue in a state of non-repair and from their not having been insured, the plaintiff is now entitled to re-enter, and that both the defendants are liable for the rent, the amount of fire insurance already paid by the plaintiff, and for damages for non-repair.

The next question to be determined is, what is the amount of those damages. Under the lease of 16th February, 1891, a piece of land with four chawls on it was demised to Hariram Deoji, and he was within two months thoroughly to repair the three [449] chawls mentioned therein to the entire satisfaction of the lessors. That was never done; but defendants are not liable for that breach of covenant. There was a further covenant to well and sufficiently maintain and keep all the demised premises and fixtures and additions thereto in good and substantial repairs. This covenant has been broken by the defendants.

It was alleged by the defendants, and admitted by the plaintiff, that Hariram Deoji erected a new chawl after the demise to him; but, so far as I can judge, that can only be true if there were only three chawls on the demised land; whereas the lease shows there were four, and I cannot see on the plan attached thereto where there was room for another. If there was another erected, I am of opinion that the covenants in the lease do not apply to this newly-erected chawl. There is nothing said in the lease about separate buildings which might be erected on the demised land, it only provides for additions to present buildings; and under the Transfer of Property Act (IV of 1882) I think the lessee would be entitled

(1) 10 Ch. D. 747.

to remove any buildings in respect of which there was no covenant in the lease requiring them to be delivered up at the expiry thereof. Consequently, the lessee would not under the lease be bound, in the meantime, to keep such buildings in repair. The defendants, however, are liable to pay damages for the breach of the covenant to repair in respect of all the buildings on the land at the time of the demise, and the amount to which they are liable is thus laid down by the Court of Appeal in *Joyner* v. *Weeks* (1): "When there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to be left." The Court was there dealing with a case in which the term had expired by efflux of time. Here the term has ceased by reason of forfeiture; but I see no reason to draw any distinction between the effect of the cesser of the term for these two reasons. The case would be different if this had been a suit to recover damages for breach of a covenant to repair while the term was still in existence. The case must be referred to the **[450]** Commissioner to ascertain the amount which it will take to put these premises into a state of good and substantial repair, having regard to the original character of the buildings and the purposes for which they are used.

There will be decree for the plaintiff against the defendants for the amount of rent Rs. 1.050, the cost of fire-insurance premium Rs. 37-8-0, and the amount found to be due for the damages. The amount of rent and fire insurance will be payable forthwith, but execution for the amount of damages for non-repair will be suspended for three months.

If the rent and fire insurance be paid forthwith and within three months, the premises be put into a state of good and substantial repair, and in the meantime all covenants in the lease other than that relating to repairs be observed, then I relieve from the forfeiture of the lease; otherwise the lease to stand forfeited and the defendants must give up possession of the demised property to the plaintiff and pay the damages hereinbefore given against them.

Defendants to pay plaintiff's costs of this suit.

Attorneys for the plaintiff:—Messrs. *Little and Co.*

Attorneys for the defendants:—Messrs. *Chalk, Walker and Smetham*, and Messrs. *Bhaishankar and Kanga*.

(1) (1891) 2 Q. B. 43.

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Before Chief Justice Farran and Mr. Justice B. Tyabji.

ANANDRAO VINAYAK (*Plaintiff*) *v.* THE ADMINISTRATOR-GENERAL OF BOMBAY AND OTHERS (*Defendants*).*

[27th September and 4th October, 1895.]

Hindu will—Construction—Indian Succession Act (X of 1865), *ss.* 101, 102, 159—*Power of dispossession of moveable property, effect of—Subsequent void gift does not cut down—Gift of balance of rents of immoveable property in hands of trustees—Evidence of intention to limit duration of enjoyment of bequest—Gift by implication, what is necessary to consitiute—Estates according to Hindu law in ancestral property, Court will not presume intention to create by will—Assent to provision of will by son of Hindu testator, effect of, where there is doubt whether property ancestral or self-acquired.*

[451] Where it is doubtful whether the property with which the will of a deceased Hindu purports to deal is ancestral or self-acquired, the assent of his only son to the provisions of the will, some of which are favourable and some unfavourable to his interest and that of his sons, will bind the latter as well as himself.

A direction in the will of a Hindu to the following effect " my remaining moveable property shall be dealt with by my son G. according as he may think proper ; and when the sons of my son G. shall attain the age of twenty-one years, the same shall be divided and duly received by G. and his sons in equal shares " confers an absolute gift on G. If the gift over to G's sons, on their attaining the age of twenty-one years, were valid, the absolute estate of G. would be liable to be divested on a son or sons of G. attaining the age of twenty-one years, and asking for a division ; but that gift being clearly void under ss. 101 and 102 of the Indian Succession Act (X of 1865) its insertion has no effect on the words of absolute gift preceding it.

A direction in the will of a Hindu that immoveable property should be retained in the hands of trustees appointed by the will and that the balance of the rents, profits, &c., after the payment of expenses should be used and enjoyed by the testator's son G. in such manner as he might think fit, with a provision empowering the sons of such son to call him to account for the management of the property on attaining the age of twenty-one and with a direct, though void, gift over to the grandsons of such son, confers only a life-estate on the son G.,—the vesting the property in trustees, the right of G.'s sons to ask for an account, and the gift over to G.'s grandsons all showing an intention on the testator's part that the enjoyment of the bequest should be of limited duration within the meaning of s. 159 of the Indian Succession Act (X of 1865.)

To constitute a gift by implication in a will there must be a reasonable degree of certainty as to the persons intended to take and the nature of the estates which they are intended to take. A direction that until the son or sons of the tenant for life of immoveable property should attain a certain age, no person on behalf of such son or sons should ask the tenant for life for an account or raise any objection, does not sufficiently define the persons to take or the estates in which they are to take to constitute a gift by implication.

It would be difficult, if not impossible, for a Hindu to create by express terms the estates which arise by virtue of the doctrine of Hindu law in regard to the rights of male issue in ancestral property, and even where the hypothesis that the testator intended (under a misapprehension of the law) to create such estates affords a key to the will and gives an adequate explanation of the various estates which would have to be implied in order to give full effect to the different directions contained in the will, yet if the estates cannot be implied from the words used in the will, the Court cannot create such estate for the testator by implication, since to do so would be to construct a will for him based upon his supposed intention, not on the words which he has used.

[R., 39 C. 87=14 C.L.J. 20=15 C.W.N. 945=11 Ind. Cas. 67 ; 31 M. 517 (521)=4 M. L.T. 306 ; 12 Bom.L.R. 621 (627)=7 Ind. Cas. 134 ; 13 C.L.J. 85=15 C.W.N. 66=7 Ind. Cas. 921.]

* Suit No. 577 of 1894.

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SUIT for construction of the will of one Parmanandas Jivandas.

Parmanandas Jivandas died on the 17th November, 1890. He left a son Govardhandas Parmanandas and two grandsons [452] (defendants Nos. 3 and 4), the sons of Govardhandas, him surviving. Defendant No. 3 was born in August, 1886, and defendant No. 4 in May, 1888. Subsequently to the testator's death, *viz.*, on the 1st March, 1894, a third son (defendant No. 5) was born to the said Govardhandas.

By his will dated the 16th October, 1890, Parmanandas Jivandas appointed his son Govardhandas and the plaintiff Anandrao Vinayak to be his executors. They duly proved the will on the 6th April, 1891.

The will was in the following terms :—

"1. The 'wills,' 'codicils' or other disposition papers which I may have made prior to this 'will' are all null and void.

"2. After my decease my funeral outlays and the outlays which will have to be made for twelve months agreeably to the custom of (my) caste, my son Bhai Govardhandas shall make out of my estate in such manner as he may think fit.

"3. Out of my estate Rs. 20,000, namely twenty thousand, shall be paid to my daughter Bai Vijkuvarbai as a 'legacy.'

"4. To each of my mehtas and clerks and servants and menials a sum amounting to twelve months' pay of each person respectively shall be paid as a legacy : from among them to the Bhaya Ajodha Prasad besides the said (legacy) Rs. 5 shall be paid every month as pension, and if the said Bhaya Ajodha should go to perform a pilgrimage, then Rs. 400 shall be paid (to him).

"5. There are my immoveable properties in Bombay and in places abroad. If it should be necessary to repair them, the same shall be repaired out of my estate.

"6. As regards my immoveable estate situate in Bombay and in places abroad or to which I am entitled, I appoint my son Bhai Govardhandas and Mr. Anandrao Vinayakrao, in all two persons, 'trustees' of the whole of such 'estate.' They shall administer my aforesaid immoveable property and recover the rents and profits (thereof), and if it should be necessary, or if a good price is realized, (they) shall sell (the same); (with) the money that may be produced by such sale another immoveable property shall be purchased, and the immoveable property which shall be purchased shall form part of my aforesaid 'trust' account, and until another immoveable property can be purchased, Government (loan) notes shall be purchased and kept (intact). With regard to the rents and profits of the aforesaid 'trust' property and interest on moneys which may be produced after the expenses shall have been deducted therefrom, the balance that may remain over is to be used and enjoyed by my said trustee my son Bhai Govardhandas in such manner as he may think fit.

"7. Excluding the same immoveable property as to my remaining moveable property (consisting of) ready money, (Government loan) notes and shares and outstanding debts and ornaments and trinkets and jewellery and silver vessels and copper and brass vessels and house furniture, carriages and horses, &c., which may remain over out of the same after the amounts in respect of the above-mentioned outlays and expenses [453] for repairs and legacies, &c., shall have been deducted, the residue that may remain over shall be dealt with by my son Bhai Govardhandas agreeably to what he may think proper. And when the (male) issues, that is to say,

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sons of my (son) Bhai Govardhandas, shall attain the age of twenty-one years, the same shall be divided and duly received by Bhai Govardhandas and his (male) issues, that is to say, sons in equal shares.

"8. I appoint my son Bhai Govardhandas and Anandrao Vinayakrao 'executors' of this 'will.' Dated this at Bombay the 15th of October in the year 1890.

"*Fresh Clause.*—As long as my son Bhai Govardhandas or any of his son (or sons) are alive so long the immoveable property mentioned in the aforesaid sixth clause cannot be sold, nor shall they make a partition of and take the same between themselves. But after the lifetime of my son Bhai Govardhandas and his (male) issues, that is to say sons, the same immoveable property shall duly be divided and given to Bhai Govardhandas' son's son (or sons) on (his or their) attaining the age of twenty-one years. Until the said Bhai Govardhandas' son (or sons) shall attain the age of twenty-one years, no person on behalf of his son (or sons) shall ask Bhai Govardhandas for an account, nor shall (he) raise any objection."

On the 22nd June, 1891, the plaintiff transferred the management of the moveable property of the testator to Govardhandas, and he managed it until his death.

On the 29th March, 1894, Govardhandas died intestate, leaving his widow (defendant No. 2) and his three sons (defendants Nos. 3, 4 and 5) him surviving.

On the 14th August, 1894, the Administrator-General of Bombay (defendant No. 1) obtained letters of administration to the estate of Govardhandas, and claimed and obtained the possession and custody of the moveable property in the possession of Govardhandas at his death as belonging to his estate. The plaintiff as surviving executor of Parmanandas contended that Govardhandas left no estate of his own, but that everything left by him really belonged to the estate of his father Parmanandas.

The plaintiff as surviving executor of Parmanandas now brought this suit praying as follows :—

"(*a*) That the will of the said Parmanandas Jivandas may be construed by this Honourable Court, and the rights of the said Govardhandas Parmanandas and his widow and sons, second, third, fourth and fifth defendants, may be ascertained and declared, and that the duties of the plaintiff as executor and trustee with regard to the estate of the said Parmanandas Jivandas may be defined and declared.

"(*b*) That it may be declared what portion of the property, immoveable and moveable, aforesaid belongs to the estate of the said Parmanandas Jivandas, and what portion thereof belongs to the estate of the said Govardhandas Parmanandas Jivandas.

[454]" (*c*) That the first defendant may be ordered to hand over to the plaintiff, as executor aforesaid, all the property in his possession belonging to the estate of the said Parmanandas Jivandas."

In his written statement the first defendant as administrator of Govardhandas submitted to the Court whether under the will, Govardhandas was not absolutely entitled to the immoveable and moveable property of Parmanandas.

Defendant No. 2 (the widow of Govardhandas) died pending the suit.

Defendants Nos. 3 and 4 (sons of Govardhandas) contended that they having been in existence at the death of Parmanandas were alone entitled to his estate under his will.

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Defendant No. 5 (son of Govardhandas born after the death of Parmanandas) contended that the property was ancestral in the hands of Parmanandas, and consequently that he had no right to dispose of it by will. The point arose in this way. The grandfather of Parmanandas Jivandas was one Canji Chattur, who had carried on business with his two brothers (Ramji and Premji) whose property at their death came to him. He died in 1859 and by his will he divided his property between his two sons Ranchordas and Jivandas. Under this will they took the property in moieties as tenants-in-common (1). Jivandas died intestate in 1859, leaving his son Parmanandas (the present testator) him surviving. Ranchordas died subsequently without issue, leaving a will in which he stated that by the death of his brother Jivandas he had become the heir to the whole of their father's property, and that regarding his nephew Parmanandas as his son his executors were to hand over the whole of the said property to him when he attained twenty-one years of age.

Defendant No. 5 now contended that, " having regard to the origin and nature of the property which Parmanandas purported to dispose of by his will, " the property was not validly disposed of thereby—at all events so far as regarded the moiety to which Parmanandas had succeeded on the death of his father Jivandas intestate.

[455] Defendant No. 5 further contended that in any event he was entitled to a one-third share of the property purported to be disposed of by the will of Parmanandas or found to belong to the estate of Govardhandas.

In addition to the issues raised by the defendants the plaintiff raised the following :—

1. Whether Parmanandas Jivandas died intestate in respect of any and what part of his property ?

2. Whether defendant No. 5 is entitled to raise the question of Parmanandas' property being ancestral property in the hands of Parmanandas ?

The suit was ordered to be heard before two Judges, and now came on for hearing before Farran, C.J., and B. Tyabji, J.

Macpherson (Acting Advocate-General) and *Inverarity*, for the plaintiff (the executor).—As executor the plaintiff does not take a contentious part. He submits that the property was all self-acquired in the hands of Parmanandas, and that he, therefore, had power to dispose of it. As to the immoveable property, we submit that the effect of the will is to give a life-estate in this property to Govardhandas, and beyond that there is an intestacy. As to the moveable estate, Govardhandas took a life interest in the income of it until his sons attained the age of twenty-one. They referred to the Succession Act (X of 1865), s. 101.

Russell and *Scott*, for defendant No. 1 (the Administrator of Govardhandas).—We say that Govardhandas under the will took an absolute interest in both the moveable and immoveable estate. They cited *Gibbs* v. *Rumsay* (2) ; *Dawson* v. *Clarke* (3) ; *Clarke* v. *Hilton* (4) ; *Williams* v. *Arkle* (5), *Mannox* v. *Greener* (6) ; *Haig* v. *Swiney* (7) : *Armitage* v. *Coates* (8); *Bentinck* v. *Duke of Portland* (9) ; *In re Ridge's Trusts* (10) ; *In re Jobson* (11) ; *In re Featherstone's Trusts* (12) ; *Drakeford* v. *Drakeford* (13) ;

(1) See *Parmanandas* v. *Vinayakrao*, 7 B. 19 (22).
(2) 2 V. and B. 294.
(3) 18 Ves. 247.
(4) L.R. 2 Eq. 810.
(5) L.R. 7 Eng. and Ir. App. 606.
(6) L.R. 14 Eq. 456.
(7) 1 Sim. and S. 487.
(8) 35 Beav. 1.
(9) 7 Ch. D. 693.
(10) L.R. 7 Ch. 665.
(11) 44 Ch. D. 154.
(12) 22 Ch. D. 111.
(13) 33 Beav. 43.

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Pearks v. *Moseley* (1); [456] Succession Act (X of 1865), ss. 82, 90, 102, 107, 155, 310; William on Executors, p. 155; Hawkins on Wills, p. 224.

Kirkpatrick and *Raikes*, for defendants Nos. 3 and 4:—Only these defendants can take, as they were in existence at the death of testator—*Mangaldas Parmanandas* v. *Tribhuvandas Narsidas* (2). The moveables are given jointly to Govardhandas and his sons; the property vesting at once, but made payable when the sons attain twenty-one. Meantime Govardhandas is to manage—Succession Act, s. 106. There is also a joint gift of the immoveable property. They cited Succession Act, ss. 69, 75, 82; *Sherratt* v. *Bentley* (3); *F. York Smith* v. *Tribhovandas Mangaldas* (4); Hawkins on Wills, pp. 178, 179; *Humphreys* v. *Humphreys* (5); *Sreemutty Kristoromoney* v. *Maharajah Narendra Krishna* (6); *Cally Nath* v. *Chunder Nath* (7); *Alangamonjori* v. *Sonamoni* (8); Jarman on Wills, p. 809.

Branson and *Lowndes*, for defendant No. 5:—The property was ancestral, and the will recognizes the fact, and merely expresses the testator's wishes as to how the ancestral property should be enjoyed by his family. The previous wills of the testator's uncle Ranchoddas and his grandfather Canji are of a similar character. The testator's will deals only with the income of the property, leaving the *corpus* to go according to Hindu law *Shookmoy Chunder Dass* v. *Monohari Dassi* (9); *Ballin* v. *Ballin* (10).

JUDGMENT.

FARRAN, C. J.—This suit was filed by the plaintiff, who is the surviving executor of the will of Parmanandas Jivandas, to have the will construed by the Court and to obtain a declaration of the rights which Govardhandas Parmanandas, the son of the testator, took under the will; and of the rights which the widow and sons of Govardhandas, in the events which had happened, took in the estate after the death of Govardhandas. Since the suit was filed, Manghu Vahu, the second defendant, the widow of Govardhandas Parmanandas, has died. The only persons now who can have an [457] interest in the estate of the testator Parmanandas, or in that of his son Govardhandas, or the infant defendants Dwarkadas and Haridas (defendants Nos. 3 and 4), the sons of Govardhandas by his first wife, and the infant defendant Kaku, their half-brother, the son of Govardhandas by his second wife Manghu Vahu.

As the right of the testator Parmanandas to make the will in question has, on behalf of the defendant Kaku, been called in question by reason of the alleged ancestral nature of the property dealt with by the will, it will be desirable to consider that question in the first instance. For this purpose it is necessary briefly to refer to the history of the family and the origin of the property of the testator disclosed by the evidence and exhibits in the cause.

As to Chatur, the remote ancestor of the testator, there is no evidence except that he had three sons—Ramji, Premji and Canji. It may, however, be inferred that he left no family property, from the fact of each of his sons at their respective deaths dealing by will with the whole property which each of them left. Ramji died in 1835 leaving by his will the

(1) 5 App. Cas. 714. (2) 15 B. 652. (3) 2 M. and K. 149.
(4) 19 B. 401. (5) L.R. 4 Eq. 475. (6) 16 I. A. 29 (41).
(7) 8 C. 378 (390). (8) 8 C. 637. (9) 7 C. 269.
(10) 7 C. 218.

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residue of his property to his brothers Premji and Canji whom he appointed his executors. They proved his will. It is dated the 8th June 1835 (Ex. A).

Premji died in 1836, leaving by his will the residue of his property to his brother Canji. The brother proved this will. It is dated the 2nd July, 1836, (Ex. B). Canji survived his brothers by many years and died in 1859. He made his will which is dated the 25th October, 1852 (Ex. C), and a codicil thereto, which is dated the 11th May, 1853 (Ex. D). The terms of his will and codicil show that he considered and dealt with all the property of which he died possessed as his own absolute property. As to the property which he acquired under the respective wills of his brothers, he writes "that every remaining property they gave to me and departed. I am the owner, having the full control thereof. No one has any claim or title thereto."

This property in the 9th clause of his will he includes in his own property, and (subject to legacies) deals with the aggregate as follows. We transcribe the clause:—

"After making the payments agreeable to what was written by my brothers, 2 persons, the remainder of their property having been given to me by my brothers Premji [458] Chatur and Ramji Chatur, 2 persons, they assigned full authority to me and departed. All that property is mine. No one has any claim upon it. All their property is entered in my account books. The same comprises 'estates' and 'notes' and outstanding claims to be recovered, and 'shares.' All that property is mine. Whatever debts there may be are to be paid out of the same, and of the balance which may remain I am the owner. And as to the vouchers and claims which there may be in the name of brother Ramji Chatur, or which there may be in my name, I am the owner of all these. As regards them, in the event of my decease, the funeral outlays after me and the religious and the charitable donations and what is to be transferred to my wife and daughter, and the legacies and what is to be paid outside, are mentioned below. The same being deducted out of my property, my sons Bhai Ranchoddas Canji and Bhai Jivandas Canji, 2 persons, are owners of the balance which may remain. In the event of my decease they have full powers."

Canji died on the 13th February, 1859, and his younger son Jivandas Canji died on the 2nd March following, leaving an only son the testator, Parmanandas Jivandas, then a boy of about eight years of age. Ranchoddas Canji proved his father's will and entered into possession of the property left by the latter.

From the fact of the several wills which we have referred to having been made, and from their terms which are very definite upon this point, and from their having been proved and acted on, we think that the proper inference to draw is that the property left by Canji Chatur was his self-acquired property. His sons Jivandas and Ranchoddas, therefore, took it under his will as their self-acquired property—*Jugmohandas* v. *Sir Mangaldas* (1). Down to this point the case does not, we consider, present any difficulty.

Ranchoddas Canji soon after proving his father's will died on the 14th May 1859 (Ex. D). He left a will dated the 12th of May, 1859 (Ex. E). In it he recites that by reason of his brother Jivandas having died without making a will, he had become the heir to the whole of the moveable and

(1) 10 B. 528.

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immoveable property which their father had left, apparently treating the devise to him and to his brother as a joint devise. He bequeathed several legacies and gave various directions and appointed Bhanabhai Dwarkadas and four other gentlemen as his executors. The residue of the property he dealt with as follows :—

"The right of inheritance of us two brothers to the moveable and immoveable property has been mentioned in the will made by our said father, and it is stated that **[459]** whatever property may be left, after defraying the expenses, shall be enjoyed by both the brothers; and my younger brother the said Jivandas, who is dead, has left a son named Bhai Parmanandas of the age of about eight years, and I have no issue. Therefore Bhai Parmanandas being considered by me as my son, the said Bhai Parmanandas has a right of inheritance to the whole of the moveable and immoveable property; and when he attains the age of twenty-one years, the executors appointed by me and mentioned below shall entrust to Bhai Parmanandas the whole of my property, moveable and immoveable, that may remain after defraying the expenses agreeably to all the conditions stated in this will."

In the event of Bhai Parmanandas dying before attaining the age of twenty-one years, the property was to be divided into moieties and given in charity.

The executors appointed by the will of Ranchoddas (with the exception of two) proved it and took possession of the property and managed it until Parmanandas Jivandas attained the age of eighteen years. On the 23rd January, 1868, Parmanandas Jivandas took out letters of administration to the estate of his late father Jivandas Canji. In his affidavit dated 21st October, 1867, (Ex. K) he had described the property which was likely to come to him under such letters "as an undivided half share of the property left by Jivandas Canji."

On the 4th May, 1870, the executors of Ranchoddas Canji reciting that the shares of Jivandas and Ranchoddas Canji in the estate of Canji Chatur had not been divided, and that they had managed both, and that Parmanandas Jivandas had taken out letters of administration to the estate of his father Jivandas, and was satisfied with their administration, made over the whole property, except some which had been given in trust for charity, to Parmanandas Jivandas on his executing a release in their favour (Ex. F). In this release Parmanandas clearly recognized the will of his uncle Ranchoddas as a valid will; subsequently in his written statement in Suit No. 204 of 1876 (Ex. K 4), in his plaint in Suit No. 566 of 1877 (Ex. K 3), and in his written statement in Suit No. 237 of 1877 (Ex K 2), Parmanandas set up the case that the will of his uncle Ranchoddas was null and void on the ground that the property with which he dealt by his will was ancestral and joint, but his allegations were then made to defeat the legacies under his uncle's will and are not entitled to weight. The Privy Council in the case of *Parmanandas* **[460]** *Jivandas* v. *Vinayak Wasudev* (1) found it unnecessary to determine what estate Ranchoddas had in the property which he purported to devise, but Sir Michael Westropp adopted a view upon that question unfavourable to the contentions of Parmanandas. With that view we agree and hold accordingly that Parmanandas had a self-acquired estate in the moiety of the property which he took under the will of his uncle Ranchoddas.

(1) 9 I. A. 86.

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It will not be necessary for us to come to any decision as to the nature of the estate which he took in the other, in the view which we have taken as to the construction of his will. The will is dated the 16th October, 1890. Govardhandas, the only son of the testator, was then of adult years. He endorsed the will with these words : " This will is agreed to by me."

Dwarkadas, the eldest son of Govardhandas, was born on the 18th August, 1886. Haridas, his second son, was born on the 17th May, 1888. The testator died on the 17th November, 1890. Kaku, the third and youngest son of Govardhandas, was born on the 1st March, 1894, and consequently after the death of the testator.

The executors named in the will, namely, the plaintiff Anandrao Vinayak and Govardhandas, proved it on the 6th April, 1891 (Ex. G). In accordance with an agreement between them (Ex. K2) the moveable property of the testator was made over to Govardhandas, while Anandrao Vinayak and Govardhandas jointly managed the immoveable estate until the death of Govardhandas, which took place on the 19th March, 1894. He died intestate. On the 14th August, 1894, administration of his estate was granted to the Administrator General. As we have already stated, he left three sons, the infant defendants and his widow Mangu Vahu, who has since died. The property in suit is of considerable value.

We now proceed to consider the construction and effect of the will. It opens with directions as to the funeral ceremonies of the testator and with the gift of certain legacies, and then in cls. 5 and 6 deals with his immoveable property. Clause 7 then deals with the residue of his moveable property, and the 8th **[461]** clause appoints executors. A fresh clause more fully explains his wishes as to the immoveable property, and with this the will closes.

It is contended by counsel for the fifth defendant Kaku that the will does not dispose of the *corpus* of the property of the testator, but only recognizes the rights of his descendants in it and gives directions as to its management ; and that the property consequently as ancestral property devolved upon Govardhandas, and after him upon his sons the infant defendants in co-parcenary. He argues that Ranchoddas by his will treated the property similarly, allowing it to descend to Parmanandas, and that it was ancestral property in the hands of the latter, and was considered and treated by him as such. The argument is not without force, but we think that the depositions in the will extend so far beyond mere directions as to management that we are unable to accept it, and that we must hold that Parmanandas by his will intended to direct the succession to, and to confer ownership in, his property after his death, and that his will must be construed on that footing, and according to the canons of construction laid down in the Indian Succession Act.

Though the testator intended to tie up the property for a lengthened period, he ultimately deals with the *corpus* and does make direct gifts in the *interim*. Both these circumstances differentiate the case from *Shookmoy* v. *Monohari* (1). It is very different from the case before us. The testator has divided the property into two distinct classes, moveable and immoveable, according to its nature, and has dealt with each in a different manner. The directions which he has given as to the one do not appear to us to throw light upon or afford assistance in construing the directions which he has given as to the other, except the assistance which may be

(1) 7 C. 269.

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derived from contrasting the one set of directions with the other. The immoveable property he has manifestly regarded in the light of family property, and the directions which he has given in regard to it seem to be intended rather to provide that it should be kept in bulk for the benefit of the family than that any individual of the family, except perhaps Govardhandas, should have any separate beneficial ownership therein. The disposition which he has made of the residue of [462] the moveable property is peculiar. He clearly contemplates, as to it, an absolute beneficial ownership being vested in his grandsons at a not very distant date. The difficulty is to determine how he has dealt with it—what estate (if any) he has conferred in it during the intervening period.

The provision as to the residue of the moveable property is as follows (His Lordship read the clause and continued :—) The "repairs" referred to in that clause have reference, we think, to those mentioned in the fifth clause of the will, and not to such as shall from time to time be necessary for the upkeep of the immoveable property which are otherwise provided for.

The fifth clause contemplates the immoveable property being at once put in repair out of the capital. It runs thus : "There are my immoveable properties in Bombay and in places abroad. If it should be necessary to repair them, the same shall be repaired out of my estate." This direction has to be provided for. The provision is accordingly found in cl. 7 : "out of the same" (the bulk of the moveable property), "after the amounts in respect of the above-mentioned outlays and expenses for repairs and legacies, &c., shall have been deducted, the residue that may remain over shall be dealt with by my son Govardhandas agreeably to what he may think proper."

The expenses for repairs are thus placed between two other capital outlays which have to be made before the residue of the personalty is ascertained, but when the residue is ascertained after the capital outlays have been made, it appears to us that no trust for the upkeep of the immoveable property is imposed upon it.

What, then, is to be done with the residue ? It is all treated alike—horses, cash, pots, jewellery, shares, &c. It is all to be dealt with by Govardhandas as he pleases. It must, we think, have been intended that it should be made over to Govardhandas. How else could he deal with it as he pleased ? It is not, be it observed, the income of the residue which Govardhandas is to deal with, but the residue itself. And it appears to us that when you come to the conclusion that the residue is to be made over to him, and that he is to deal with it as he pleases, you have all the [463] elements of an absolute gift. Such, in our opinion, the words of the testator confer upon him.

This conclusion is not, we think, weakened by the subsequent contingent provision for the sons of Govardhandas on their attaining the age of twenty-one years. The intention seems to be that if Govardhandas' son attain twenty-one, and ask for a division of the moveable property as it shall then exist, Govardhan is to divide it with them. Until that time he is to be the owner, but his absolute estate is then to be divested, as to all but his own share, by his sons. It is unnecessary to imagine what his share in this event would be, as the gift over in favour of the sons is clearly void under ss. 101 and 102 of the Succession Act. See *Bentinck* v. *Duke of Portland* (1) ; *Jobson* v. *Richardson* (2) ; *Drakeford* v. *Drakeford* (3) ; *In Re Featherstone's trust* (4).

(1) 7 Ch. D. 693. (2) 44 Ch. D, 154. (3) 33 Beav. 43. (4) 22 Ch. D. 111.

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This conclusion covers the whole of the moveable property, ancestral or not, as the assent of Govardhandas to the provisions of the will, some of which are favourable and some unfavourable to his interest and that of his sons, was, we think, binding on the latter as well as on himself. It was in the nature of an assent to a family arrangement intended for the welfare of the whole family.

We rule, therefore, that the moveable property in the suit belonged to Govardhandas and on his death devolved upon his sons jointly.

It is contended that Govardhandas similarly took the immoveable property absolutely. As to it the testator has directed that it shall be held in trust and administered by his executors Govardhan and Anandrao, and after giving minute instructions as to changing its investment he concludes the original clause relating to it as follows:—" With regard to the rents and profits of the aforesaid 'trust' property and interest on moneys which may be produced, after the expenses shall have been deducted therefrom, the balance that may remain over is to be used and enjoyed by my sâid trustee my son Bhai Govardbandas in such manner as he may think fit."

[464] It is to be remarked upon that clause that, unlike the clause relating to the residue of the moveable property which the testator contemplates being made over to Govardhan, it provides for the property being retained and kept up by his trustees, and directs only the surplus income to be used and enjoyed by Govardhan. Now, it is true that under s. 159 of the Succession Act, where the interest or produce of a fund is bequeathed to any person, the principal as well as the interest shall belong to the legatee; but that rule only applies where the will affords no indication of an intention that the enjoyment of the bequest shall be of limited duration. It is impossible, we think, to hold that the will before us does not indicate such contrary intention. The very clause itself investing the property in trustees and providing for its being kept up by the trustees and giving the balance of the income only to Govardhan, affords some indication that the testator did not intend Govardhan to take the estate absolutely, but the matter is, we think, placed beyond doubt by the terms of the fresh clause. That contemplates the sons of Govardhan calling him to account for his management when they attain twenty-one, and makes a direct gift over to his grandsons after the death of Govardhan and his sons. That gift over no doubt may be void, but it is none the less indicative, on that account, of the intention of the testator not to confer an absolute estate on Govardhan. That is really the answer to Mr. Scott's argument that the provisions of the fresh clauses are inoperative to cut down the absolute estate previously given by the sixth clause (which he supported by the case of *Shaw* v. *Ford*) (1) *viz.*, that they do not cut down the absolute estate, as no absolute estate is either given or intended to be given by the sixth clause. We think, therefore, that Govardhan took, at the utmost, only a life estate in the immoveable property.

We have now to inquire how the property is dealt with after the death of Govardhan. And as to this we think that the gift in favour of the grandsons is clearly invalid both under the Succession Act and the rule laid down in the *Tagore Case*. It may be altogether disregarded. The question then remains, is there a gift to the sons or issue of Govardhan after his death, and is it **[465]** valid? There is clearly no direct gift

(1) 7 Ch. D. 669.

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Is there a gift by implication? We think not. There is no doubt an inference suggested by the fresh clause that the testator expected that the sons of Govardhan should have some interest in the property, but it is impossible, we think, to imply a gift when there is no certainty as to the persons who are supposed to take under it or as to the estate which they are to take by implication. There must be a reasonable degree of certainty as to those important matters before a gift can be implied. Here all is uncertain. Who are to take? Is it the sons of Govardhan, or such sons and the sons of deceased sons together, or such sons and the sons of such living sons jointly? There is absolutely nothing to show the nature of the estate which is devised to the supposed devisees. It would be mere guess-work to construct a bequest out of the materials which the vague inferences to be drawn from the fresh clause suggest. One possible inference is that he intended Govardhan's sons to take no vested estate until the age of twenty-one years. But if that is so, the gift in their favour would be invalid as offending against the 101st and 102nd sections of the Succession Act. We feel quite unable to imply, from the provisions in the will before us, a gift of the immoveable estate or of its income in favour of any one between the death of Govardhan and the decease of his last surviving son.

We are, however, disposed to think that the most probable explanation of the different clauses of the will, and the best way of understanding and reconciling them, is by the hypothesis that the testator thought that his son Govardhandas would take under the will an ancestral estate in all the property, both moveable and immoveable. Until the decision of the appellate Court in *Jugmohandas* v. *Sir Mangaldas*(1) there was an impression, amongst many in Bombay, that property acquired by a son from his father by virtue of a will would be of the nature of ancestral property. If we suppose the testator to have been under the same impression, the whole of his will becomes intelligible. He would imagine that the property in the hands of Govardhandas although acquired by him under his father's will, would still be ancestral, and, therefore, Govardhandas' sons and grandsons would by virtue **[466]** of their birth take an interest in it. Starting under this impression the testator's object would seem to have been to devise a scheme for the management of the property until partition, but to restrict the partition beyond the period at which the Hindu law would give the sons and descendants of Govardhandas the right to claim it. This hypothesis, we think, affords a key to the will and gives an adequate explanation of the various estates which would have to be implied in order to give full effect to the different directions contained in the will. These are estates, however, which cannot be implied from the words used in the will. They only arise by virtue of the doctrine of the Hindu law in regard to the rights of the male issue in ancestral property. It would be difficult, if not impossible, for a testator to create such estates by express terms. If we were to attempt to do so by implication, we should be constructing a will for the testator based upon his supposed intention, not on the words which he has used in his will.

The result, therefore, is that there has been an intestacy as to beneficial interest in the immoveable property of the testator after the death of Govardhan, and that the trustee now holds it in trust for the heirs of the testator who are the three sons of Govardhan. The conclusions which we have thus arrived at, will enable us to find on the issues.

(1) 10 B. 528.

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We record our findings upon the issues as follows (the following are the findings on the issues material to this report) :—

Issue (1) that Govardhandas Parmanandas took an absolute interest in the moveable property of Parmanandas Jivandas and only a life estate in his immoveable property.

Issue (12) that Parmanandas died intestate in respect of his immoveable property after Govardhandas' death.

Cost of all parties to be taxed as between attorney and client and come out of the estate of Parmanandas.

Decree accordingly.

Attorneys for the plaintiff :—Messrs. *Little & Co.*

Attorneys for the defendants :—Messrs. *Brown and Moir*, Messrs. *Craigie, Lynch and Owen*, and Messrs. *Pestanji, Rustim and Kola.*

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[467] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

RAMCHANDRA KASHIPATKAR AND OTHERS (*Original Plaintiffs*), *Appellants* v. DAMODHAR TRIMBAK PATKAR AND ANOTHER (*Original Defendants*), *Respondents.** [25th March, 1895.]

Hindu law—Joint Hindu family—Possession—Joint possession—Co-parcener's right to sue for joint possession of the whole or any part of the joint estate—Co-parcener not bound to sue for partition.

A co-parcener in a joint Hindu family is entitled to claim joint possession of a portion, and need not sue for a partition.

[R., 23 B. 144 ; 26 B. 141=3 Bom. L.R. 598 ; 8 Bom. L.R. 99 (106) ; 11 Ind. Cas. 687 =7 N.L.R. 82 ; 6 S.L.R. 140.]

SECOND appeal from the decision of Rao Bahadur Kashinath B. Marathe, First Class Subordinate Judge with appellate powers of Ratnagiri, in appeal No. 487 of 1892.

Suit for possession. The plaintiffs sued to recover exclusive possession of certain land, complaining that they had been dispossessed by the defendants under a Mamlatdar's order. In the alternative they prayed to be put into joint possession with the defendant, and they asked for a declaration that they were so entitled, the land being the joint ancestral property of the parties.

The defendants denied (*inter alia*) that the land was joint property, but contended that, even if it were joint, the plaintiffs' proper remedy was a partition suit, and that the claim was time-barred.

The Subordinate Judge dismissed the suit. He held that the property was joint, but that the plaintiffs could not obtain the relief prayed for.

This decision was upheld, on appeal, by the Subordinate Judge, A.P., who held that the plaintiffs' remedy was a suit for partition.

The plaintiffs thereupon preferred a second appeal to the High Court.

Vasudev Gopal Bhandarkar for appellants (plaintiffs).—The land in dispute is joint family property. The plaintiffs, as part owners of the whole and every part of the joint estate, are entitled to be [468] put into

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*Second Appeal, No. 478 of 1893.

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joint possession with the defendants—*Malhar Dhondev* v. *Ramakant* (1); *Kallapa* v. *Venkatesh* (2); *Dugappa* v. *Venkatramnaya* (3). The Court cannot force partition on the parties against their will.

Manekshah Jehangirshah, for respondents.—The parties to this suit are each in exclusive possession of parcels of the family property. In this state of things, one co-sharer cannot claim to be put into joint possession of the other's parcel.

JUDGMENT.

JARDINE, J.—The case has been argued on the assumption that the parties are co-parceners in an undivided Hindu family. It appears that they each hold parcels of the undivided family property in exclusive possession. How that state of things arose, is not found.

The plaintiffs having failed to prove exclusive possession of the parcel in suit, that ground of claim fails. But, in the alternative, they claimed to be put in joint possession with the defendants, and for a declaration to that effect. The lower Court of appeal decided in the negative a preliminary issue, "Whether the plaintiffs' claim for joint possession of the land in dispute can lie without a claim for partition of all common property?" No authority for holding that an undivided co-parcener cannot make such a claim, has been shown. *Prima facie*, such a co-parcener is entitled to a joint benefit in every part of the undivided estate: and it lies on the other co-parceners to plead and prove some reason for withholding that benefit in the parcel. A case may be conceived where two co-parceners A and B agree, as a temporary arrangement, each to hold $\frac{1}{3}$ in exclusive possession and the remaining $\frac{1}{3}$ in joint possession. If B excludes A from the last $\frac{1}{3}$, A has a right to be restored to joint possession thereof. Again, if A sued B for joint possession of the $\frac{1}{3}$ agreed to be given into B's exclusive possession, B might plead the agreement. Where neither party desires to litigate anything except the right to joint or exclusive possession of a parcel, and where they admittedly retained their original status as undivided brethren, and, therefore, joint sharers and not tenants-in-common (see *Appovier's Case* (4)), neither Hindu **[469]** law nor any rule of equity insists on a general partition either of possession or of the property itself. We are unable to deal with the question of limitation of the merits, as the lower Court of appeal only dealt with the preliminary issue of law. We, therefore, reverse its decree and remand the appeal for a rehearing: costs on the respondents.

Decree reversed and case remanded.

(1) P. J. (1889), 20.
(2) 2 B. 676.
(3) 5 B. 493 (495).
(4) 11 M. I. A. 75.

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APPEL-
LATE
CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

LALUCHAND (*Original Defendant*), *Appellant v.* GIRJAPPA (*Original Plaintiff*), *Respondent.** [28th March, 1895.]

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15 D—Suit for account—Such suit no bar to subsequent suit for redemption—Civil Procedure Code (Act XIV of 1882), s. 43.

Under s. 15 D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) as amended by Act XXII of 1882, an agriculturist mortgagor can sue for an account upon a mortgage, without at the same time asking for redemption. Such a suit will not bar a subsequent suit for redemption. The section was expressly intended to remove the bar created by s. 43 of the Code of Civil Procedure (Act XIV of 1882).

APPEAL from an order of remand passed by Rao Bahadur C. N. Bhat, Joint First Class Subordinate Judge A. P. at Satara.

The plaintiff filed a suit (No. 278 of 1884) under s. 15 D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) (1) for an account of the principal and interest remaining unpaid on a certain mortgage.

[470] In this suit the Court passed a decree to the following effect:—

"On the date of the suit, Rs. 103 and Rs. 107-4-0 were due on the mortgage to defendants Nos. 1 and 2 respectively. Defendants should get interest at 9 per cent. per annum from the date of suit, and should account for the profits, which amounted to Rs. 45-8-0 per year."

The plaintiff then filed a fresh suit, No. 127 of 1893, for redemption of the mortgaged property.

The Subordinate Judge dismissed this suit, holding that it was barred by s. 43 of the Code of Civil Procedure (Act XIV of 1882). He was of opinion that s. 15 D of the Dekkhan Agriculturists' Relief Act gave the

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* Appeal No. 1 of 1895 from order.

(1) The following are the sections referred to :—

15 B. (1) The Court may in its discretion in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section three, cl. (*y*) or cl. (*z*), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.

(2) If a sum payable under any such direction is not paid when due, the Court shall, except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or for foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum.

15 D. (1) Any agriculturist whose property is mortgaged may sue for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring that amount.

(2) When any such suit is brought, the amount (if any) remaining unpaid shall be determined under the same rules as would be applicable under this Act if the mortgagee had sued for the recovery of the debt.

(3) At any time before the decree in the suit is signed, the plaintiff may apply to the Court to pass a decree for the redemption of the mortgage, or the mortgagee, if he would then have been entitled to sue for foreclosure or sale, may apply to the Court to pass a decree for foreclosure or sale (as the case may be), instead of a decree merely declaring the amount remaining unpaid, and the Court may, if it thinks fit, grant the application.

(4) The provisions of s. 15 B shall apply to any decree passed under sub-s. (3).

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agriculturist mortgagor the option to convert a suit for an account into one for redemption, and that, if he failed to exercise this option, a second suit for redemption would be barred by s. 43 of the Code of Civil Procedure.

On appeal the Subordinate Judge A P. held that the suit was not barred by s. 43 of the Civil Procedure Code. His reasons were as follows :—

"The lower Court has properly held that s. 15 D of the Dekkhan Agriculturists' Relief Act was passed after the decision of the case at I. L. R., 7 Bom., 378. The section was apparently intended to remove the inability of bringing a suit for an account of the principal and interest due on a mortgage without seeking redemption. If the omission to seek redemption bars a suit for redemption, the application [471] for a redemption decree can scarcely be called optional. The lower Court has failed to notice that the Court is not bound to grant such application. If the Court refuses to grant the application for passing a redemption decree, a new suit for redemption evidently will not be barred, and I see no reason why it should be barred under other circumstances. The lower Court has also failed to notice that by refusing plaintiff's suit for redemption because he did not make the application referred to in para. (3) of s. 15 D, it has practically decreed foreclosure in favour of the defendants, although they did not make the application required by that clause. The s. 15 D is intended to give the parties power to reserve the right of redeeming the property or recovering the mortgage by another suit, or to conclude the matter finally by an application to be made by one party or another as laid down in cl. 3 thereof. The Court has, however, the power of interfering by granting or refusing the application, so that there may be no hardship in any particular case."

V. R. Joglekar, for the appellants:—The suit is barred both under s. 13, expl. 3, and s. 43 of the Code of Civil Procedure—*Bhau Balaji* v. *Hari Nilkanthrav* (1). Section 15 D of Act XVII of 1879 does not permit a fresh suit for redemption. If it did, each time a suit for an account is brought, a fresh suit would lie for redemption, and the mortgagee would be harassed by a multiplicity of suits.

B. A. Bhagvat, for respondent (plaintiff):—The case cited does not apply. It was decided before s. 15 D was introduced by the Amending Act XXII of 1882. Under this section the Court has a discretion to grant or refuse redemption. If it refuses redemption, can it be contended that the mortgagor who has brought a suit for an account loses his right to bring a redemption suit? Section 43 of the Code of Civil Procedure does not, therefore, bar such a suit.

JUDGMENT.

RANADE, J.—The principal point in issue in this appeal turns upon the construction of s. 15 D, cls. 1, 3, of Act XVII of 1879 (as modified by the Amending Act XXII of 1882), and the extent to which his special provision relaxes the strictness of the bar created by s. 43 of the Civil Procedure Code (Act XIV of 1882). The point has not expressly come before this Court on any previous occasion, the decisions in *Shankarapa* v. *Danapa* (2), *Hari* v. *Lakshman* (3) and *Bhau* v. *Hari* (1) being passed in reference to the old law as it stood before the Amending [472] Act of 1882 introduced s. 15D as a part of Act XVII of 1879.

Under the old law, it was no doubt ruled that cl. *(a)* of s. 3 and s. 16 of Act XVII of 1879 did not refer to suits for account in mortgage

(1) 7 B. 377. (2) 5 B. 604. (3) 5 B. 614.

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transactions, and that the mortgagor-agriculturist could only sue for an account in a redemption suit. It was felt that this was a serious hardship, and the Legislature introduced the s. 15D which declares in cl. 1 that an agriculturist may sue for an account of the principal and interest remaining unpaid on a mortgage effected by him, and for a decree declaring that amount. The Court of first instance appears to be under the impression that, if this clause had stood alone, the present suit for redemption brought by the respondent might be maintained, notwithstanding that he had in 1884 brought a suit for a mortgage account, and obtained a decree declaring that amount. That Court, however, was of opinion that cl. 3 of this same section was intended to restrict this freedom of the mortgagor-agriculturist, and that the mortgagor-plaintiff who first brought a suit for account, if he desired redemption of the mortgaged lands, was bound to avail himself of the permission granted by cl. 3, and turn his account suit into a redemption suit, and that if he failed to do so, he could not bring a separate suit for redemption, because of the bar created by s. 43 of the Civil Procedure Code. The lower Court of appeal took a different view of the scope of this Amending Act of 1882, and held that cl. 3 was not meant to restrict the effect of the general permission given to agriculturist-mortgagors to bring account suits with a view to ascertain the balance due in respect of their mortgage dealings.

Clause 3 provides that before a decree in an account suit brought under cl. 1 is signed, the mortgagor-plaintiff may apply to the Court to pass a decree for the redemption of the mortgage, or the mortgagee may apply to the Court to pass a decree for foreclosure, instead of a decree merely declaring the amount remaining unpaid, and the Court may, if it thinks fit, grant the application. The power conferred on the Court to turn an account suit into a suit for redemption, is, in the first place, a power in which the fullest discretion is left to the Court. **[473]** It is, moreover, balanced by an alternative power to turn the account suit into a suit for foreclosure or sale, if the mortgagee applies for such conversion, and the Court sees fit to grant his application. The appellants' pleader admitted that this permission to turn an account suit into a foreclosure suit cannot be construed into a prohibition to the mortgagee to bring a separate suit for foreclosure or sale, if he does not avail himself of cl. 3, or if the Court sees no reason to grant his application. By parity of reasoning, the discretionary power conferred upon the Court to turn an account suit into a redemption suit must be similarly construed. The mortgagor *may* apply for such conversion, and the Court *may* grant his application, or refuse it at its own discretion. Such a power so worded could never have been intended to restrict the general scope of cl. 1 of s. 15 D. It could only have been intended to be an additional facility afforded to the litigant parties to settle their disputes without unnecessary litigation, which is one of the most important objects aimed at in this relief legislation. The law had already provided separately for redemption suits under cl. (*z*) of s. 3, and for account suits under cl. (*a*), s. 3, and s. 16. The decisions of this Court construed ss. 3 and 16 in a way to prevent agriculturist-mortgagors from availing themselves of cl. (*a*), s. 3, and s. 16 without at the same time incurring the risks and responsibilities involved in suing for redemption under cl. (*z*), s. 3. The Legislature expressly intervened to remove the hardship thus caused, and introduced a new section removing all doubts, and permitting agriculturist debtors to bring account suits in respect of mortgage dealings without at the same time seeking for the redemption of their mortgaged lands.

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The amendment appears thus to have been expressly intended to remove the bar created by s. 43 of the Civil Procedure Code, and this seems to us to be the most reasonable construction of the entire section. The present suit was brought for the redemption of the mortgaged lands; and the prayer for this relief was based on the relief already accorded in the previous account suit. Before the amendment, the mortgagor-plaintiff was not entitled, under the general law, to sue for accounts except as ancillary [474] to the relief implied in a redemption proceeding. Since the amendment, he became so entitled, and his first suit thus included the whole of the claim in respect of his separate cause of action for accounts. There was, therefore, no relinquishment or omission on his part in separating the two causes of action, and the terms of s. 43 are thus in every respect satisfied. The decision in the account suit was, in effect, a settlement of accounts and a determination of the debt found due. A private settlement of the accounts between mortgagor and mortgagee would not come in the way of a redemption suit, and the judicial settlement could not alter the nature of the transaction. The decisions on s. 43, moreover, recognize a distinction between causes of action which must be and those which might be joined together, but which the party interested is not bound to join. A suit, for instance, by a mortgagee against his mortgagors does not bar a subsequent suit to enforce the mortgage lien against purchasers or mortgagors and subsequent mortgagees—*In the matter of Huree Mohun Paramanick* (1); *Raja Ram Tewary* v. *Luchmun* (2); *Hira Lal* v. *Prosunno* (3); *Hafiz Mahomed Khan* v. *Abdul Gunny* (4).

We feel accordingly satisfied that the lower appellate Court acted properly in remanding the case back to the Court of first instance for disposal on the merits.

We reject the appeal and confirm the order. Appellants to pay the costs of this appeal.

JARDINE, J.—I concur. The present suit of 1892 for redemption is governed by the Dekkhan Agriculturists' Relief Act (XVII of 1879) as amended by Act XXII of 1882, s. 15 D. So was the same plaintiff's suit for account of 1884. The Amending Act was passed in consequence of the decisions of this Court. The older law is clearly interpreted in *Hari* v. *Lakshman* (5). The general rule was laid down as follows:—"Ordinarily a suit for an account upon a mortgage cannot be maintained by a mortgagor unless he asks also for redemption. The 42nd and 43rd sections of the Civil Procedure Code are opposed to the maintenance of such an action, inasmuch as it would not afford ground [475] for a final decision, and would not include the whole of the plaintiff's claim in respect of the cause of action." The Court then went on to hold that the Act XVII of 1879 had not created a special rule or privilege for agriculturist mortgagors. The Amending Act by s. 15 D (1) does create the exception by allowing suit for account. The power given in cl. 3 to either the plaintiff-mortgagor or the defendant-mortgagee to apply to the Court to deal with redemption or foreclosure is comparable to an application to amend the plaint or otherwise enlarge the scope of the suit. I think the power to apply to, and the discretion conferred on, the Court may have been given to advance the remedy and at the same time check the annoyance to the mortgagee pointed out at p. 620. It is evident, however, that s. 15 D (2) was passed to avoid the

(1) 15 W.R. 486.
(2) 8 W.R. 15.
(3) 12 C.L.R. 556.
(4) 7 C.L.R. 257.
(5) 5 B. 614.

operation of ss. 42 and 43 of the Code, which would have barred a later suit for redemption if, at the time of filing an earlier suit for account, the redemption suit might have been brought then. We ought, therefore, to interpret s. 15 D (3) as giving a separate cause of action, *i.e.*, one concerned with account only, and, therefore, distinct from the right to demand redemption. In this view, s. 43 creates no bar, for "the correct test is whether the claim in a new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit"—*Moonshee Buzloor* v. *Shumsoonnissa*(1) followed in *Rajah of Pittaapur* v. *Sri Rajah Venkata* (2).

Remand order confirmed.

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Before Mr. Justice Jardine and Mr. Justice Ranade.

RAMCHANDRA BHASKAR NANAL (*Original Plaintiff*), *Appellant v.* RAGHUNATH BACHASHET SONAR (*Original Defendant*), *Respondent.**

[28th March, 1895.]

Land Revenue Code (Bombay Act V of 1879), *s.* 103—*Khoti Act* (*Bombay Act I of* 1880), *s.* 17—*Evidence Act* (*I of* 1872), *s.* 40—Res judicata—Dhara *land*—Khoti *land.*

An entry of a record prepared under s. 108 of the Land Revenue Code, Bombay Act V of 1879, by the survey officer, describing certain lands as *khoti* **[476]** is by force of s. 17 of the Khoti Act, Bombay Act I of 1880, conclusive and final evidence of the liability thereby established, and shuts out the evidence of a prior decision otherwise relevant under s. 40 of the Evidence Act as proof of *res judicata* whereby a civil Court adjudged the land to be *dhara*.

Gopal v. *Sakhojirao* (3) referred to and followed.

[R., 21 B. 235 (242) ; D., 21 B. 480 (488).]

THE plaintiff sued as managing khot for the years 1888—90 to recover Rs. 30-8-7 with interest as *thal* (share of the value of the crops) of certain land in the village of Mandki.

The defendant pleaded that the land was *dhara* land and not *khoti*, and that he had always held it as such. He relied on the decision in a former suit that the land was *dhara*.

The Subordinate Judge held the land to be *khoti* land, and passed a decree for the plaintiff.

He relied upon an entry (Ex. 35) produced by the plaintiff contained in records (botkhat) prepared under s. 108 of the Land Revenue Code (Bombay Act V of 1879) by the survey officer which described the lands as *khoti*.

On appeal the District Judge of Ratnagiri reversed the decree, holding the land to be *dhara* land. His judgment on the point was as follows :—

"The lower Court has decided that the plaint land is not *dhara* land and that it is *khoti* land on the strength of an entry in the botkhat (see extract Ex. 35) where, in a column for entries whether the survey number or sub-division is *inam*, *khoti* or *dhara*, neither the words *inam*, *khoti* or *dhara* are entered, but a certain person is described as *khatedar kul*, which appears to be a phrase compounded by a translator as a rendering of

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* Second Appeal, No. 525 of 1893.

(1) 11 M.I.A. 551. (2) 12 I.A. 116. (3) 18 B. 133 = P.J. (1893) p. 42.

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occupancy tenant (whether privileged or not does not appear), rather than a colloquial term: for the designation 'occupancy tenant' is itself a product of comparatively modern evolution. 'Occupancy tenant' is described in the Khoti Act (Bombay Act I of 1880), s. 3, cl. 8, to mean a holder of *khoti* land who has a right of occupancy in such land.

"In former litigation about the very Chambar Pal Thikan in suit instituted by the managing khot this thikan has been decided to be *dhara* land and not *khoti* (see Ex. 8 in appeal No. 58 of 1884). It is obvious that, if any question had been raised to the knowledge of the appellant before the above entry was made in the botkhat, or any opportunity had been afforded to him to have any such question decided by the survey officer or the special settlement officer appointed under s. 18 of the Land Revenue Code (Bombay Act V of 1879), the appellant would not have consented to the land in question being described as other than *dhara* land.

"Under ss. 20, 21, 22 of the Khoti Act the civil Court would not have been **[477]** open to the unsuccessful party dissatisfied with such decision, as such a decision is not made final by the Act.

"There is nothing to show that the entry in the botkhat above quoted embodies any decision of any survey officer or special settlement officer under s. 16 of the Khoti Act or s. 103 of the Land Revenue Code (Bombay Act V of 1879), or that the defendants ever had any opportunity of getting such a decision passed, or that they were ever informed, even if they did ever hear of the entry '*Khatedar kul*,' that this was intended to be a decision or entry that the plot in question is *khoti* and not *dhara* land.

"Under s. 16 of the Khoti Act 'if a survey number is held by one or more privileged occupants, the said register shall further specify the tenure on which such number is held.'

"If there had been an entry in the botkhat that the plaint land is *khoti* land, and if it had been shown that such entry was duly made under s. 108 of the Land Revenue Code and s. 16 of the Khoti Act, then it might have been contended that such entry is conclusive and final evidence under s. 17 of the Khoti Act 'of the liability thereby established.'

"Neither of these circumstances are shown in this case.

"On the other hand, looking to the evidence of enjoyment it is manifest that the khots have never received *thal* for the plaint land, and that the occupant has never paid more than the Government assessment thereon and local-fund cess.

"In the receipt-books relied upon by the respondent, *thal* is debited, but is not credited.

"Under these circumstances I hold that the lower Court was wrong in deciding the plaint land to be *khoti* land. The defendants proved in the affirmative that the plaintiff is not entitled to recover more in respect of the plaint land than the Government assessment and local-fund cess; and if the entry in the botkhat, on which the plaintiff relied to prove the contrary, is capable of the construction which the plaintiff (respondent) seeks to put upon it, though it does not describe the plaint land as khoti, s. 22 of the Khoti Act (Bombay Act I of 1880) already indicates the procedure which the appellant should follow in order to get the revenue record amended by the Collector and the land in question which has been twice judicially decided to be *dhara* land entered as such in the revenue record."

The plaintiff appealed to the High Court.

Ganesh Krishna Deshmukh, for the appellant (plaintiff).—The entry is conclusive under s. 16 of the Khoti Act.

"*Khatedar kul*" has been translated by the Government Translator as "*occupancy tenant.*" Every occupancy tenant is a privileged occupant.

Ghanasham Nilkanth Nadkarni, for the respondent (defendant).—Under s. 13 of the Civil Procedure Code (Act XIV of 1882) **[478]** the question as to whether the land is *dhara* or *khoti* is *res judicata*. The entry in the botkhat as *khatedar kul* is not conclusive in the face of the prior decision that the land was *dhara*.

JUDGMENT.

JARDINE, J.—If the original of Ex. 55 is one of the records prepared under s. 108 of the Land Revenue Code, Bombay Act V of 1879, by the survey officer "in accordance with such orders as may from time to time be made on this behalf" by Government, then by force of s. 17 of Bombay Act I of 1880 any entry duly made as to "the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of s. 33 of this Act" * * "shall be conclusive and final evidence of the liability thereby established." The Courts cannot look behind the entry—*Gopal* v. *Sakhojirav*(1). The words last quoted "have the effect of shutting out any other evidence on the subject which might be adduced before the civil Court." This authoritative judgment had not been given when the District Judge decided the present cause in appeal. No objection has been taken to the proof by certified copy of the contents of the record; the copy comes from the taluka kacheri.

Assuming for the moment that the conclusiveness of the entry extends to the tenure, *viz.*, that a duly made entry that the occupant is a dharekari or an occupancy tenant is conclusive, we must see how the District Judge impeaches the entry. He evidently thinks that there is an *onus* on the plaintiff khot to justify the entry by proving that the survey officer passed a decision under s. 16 of the Khoti Act or s. 103 of the Land Revenue Code, or by proving that the defendants were informed of the entry made or came to know of it. This is another form of the error which the above decision corrects; and, moreover, the presumption is that the survey officer's acts were regularly performed—Taylor on Evidence, s. 1429.

Next, says the Judge, s. 17 would apply to give finality if the record had described the land as *khoti*. No requirement of statute or statutable rule to that effect has been shown us. Whether the defendants are dharekaris or occupancy tenants **[479]** as they and the plaintiff respectively contend, they are privileged occupants within the definition. Section 16, cl. 2, requires the register to specify the tenure; this is done by entry of the words *khatedar kul*—the Marathi translation of the words occupancy tenant—which by the definition means a holder of *khoti* land who has a right of occupancy in such land. The term is used as a sample in the Government form; and being one so fully and clearly defined by the Act, no better way of complying with the requirement about entry of tenure can be conceived. The record appears to us to be, on its face, such as the law and rules require; and the District Judge ought not to have treated it as invalid. The evidence of a decision otherwise relevant under s. 40 of the Evidence Act as proof of *res judicata* earlier than the date of the survey entry, whereby a civil Court adjudged the land to be *dhara*, and the evidence that the khots have never received *thal*, are

(1) 13 B. 133=P. J. (1893), p. 42.

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inadmissible under the decision above quoted. They were matters which the defendants might have shown to the survey officer before he arrived at the decision of which the record is the entry.

It has not been argued that the entry of the tenure made in the record is outside the finality given by s. 17. It is obvious that the items in s. 33 to which the finality is given, depend on a previous decision of the class of the privileged occupant as s. 33 clearly shows. Anyhow the nature and amount of the rent have been entered, and the decision applies to them, and the suit is conformable to the entries thereof.

The Court reverses the decree of the District Judge and restores the original decree; costs of both appeals on the respondent.

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20 B. 480 (F.B.).

[480] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Jardine, Mr. Justice Parsons and Mr. Justice Farran.

KHOJA SHIVJI SOMJI (*Applicant*) *v.* HASHAM GULAM HUSSEN TEJPAR (*Opponent*).* [28th March, 1895].

Zanzibar—Jurisdiction of High Court over Consular Court of Zanzibar—High Court at Bombay—Power of revision—Appeal—Jurisdiction—Civil Procedure Code (Act XIV of 1882), *s.* 622—*Zanzibar Order in Council*, 1884, *arts.* 7, 8, 9, 21, 27, 30.†

The High Court at Bombay has no power of revision over civil cases tried by the Consular Court at Zanzibar, though it is authorized to hear appeals from the decisions of that Court as a District Court by the Zanzibar Order in Council of 1884.

A power of revision is not an incident of appellate powers, but on the contrary can only be exercised where there is no appeal, and had it been intended to give such powers to the High Court at Bombay, it would necessarily have been expressly provided for.

Per JARDINE, J. (dissenting):—Under any circumstances the Consular Court at Zanzibar is bound to obey a writ issued by the High Court for certifying the papers of a civil case. Under ss. 9 and 10 of the Bombay Civil Courts' Act (XIV of 1869, taken with art. 21 of the Zanzibar Order in Council of 1884 and s. 622 of the Civil Procedure Code (Act XIV of 1882), the High Court is competent to exercise revisionary jurisdiction in civil matters tried by the Consular Court at Zanzibar.

[R., 36 B. 105=13 Bom. L.R. 1017=12 Ind. Cas. 687; Expl. & D., 27 B. 575 (584).]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against an order passed by H. W. de Sauzmarez, Her Majesty's Consul-General at Zanzibar.

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* Application No. 234 of 1894 under the extraordinary jurisdiction.

† See the *Bombay Government Gazette*, 30th April 1885, Part I, p. 537.

(1) Section 21.—Subject to the other provisions of this Order, 'the Code of Civil Procedure,' 'the Bombay Civil Courts Act, 1869,' 'the Indian Succession Act' and the other enactments relating to the administration of civil justice and bankruptcy for the time being applicable to Zanzibar, shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay. The Consul General shall be deemed to be the District Judge of the district and his Court the District Court or Principal Civil Court of Original Jurisdiction in the district. The High Court of Bombay shall be deemed to be the highest Civil Court of Appeal for the district and the Court authorised to hear appeals from the decisions of the District Court; and the powers both of the Governor General in Council and the Local Government under those enactments shall be exerciseable by the Secretary of State or with his previous or subsequent assent by the Governor-General of India in Council.

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[481] One Fatmabai died in the year 1872-73, leaving a will disposing of her property and appointing executors. The will was duly proved by the executors and the estate administered, and a release was passed by the petitioner to the executors.

The petitioner was the nephew of Fatmabai's deceased husband. Alleging that he had ascertained that much more property had come into the hands of the executors than had been disposed of by the will he applied to the Consular Court at Zanzibar for an order directing the executors to file an inventory of the estate and an account of their administration. The Judge of the Consular Court issued a rule *nisi* calling on the executors to show cause why they should not file an inventory or an account. The executors having appeared and showed cause, the Judge discharged the rule and made the following order:—"No order. This application should never have been made at this late date. I do not think in view of the release this man has any right, but he is, in view of all the circumstances, out of all reasonable time."

On 21st December, 1894, the applicant obtained a rule from the High Court of Bombay in its extraordinary jurisdiction to set aside the order of the Judge.

The Judge on receipt of the notices containing the rule *nisi* served them on the executors, and certified the service to the High Court, but declined to send up the record of the case on the ground that, under art. 21 of the Zanzibar Order in Council of 1884, the High Court of Bombay had only an appellate and not a revisional jurisdiction over the Consular Court at Zanzibar.

Manekshah J. Taleyarkhan appeared for the applicant in support of the rule *nisi*.—Article 8, sub-clause (*b*), of the Zanzibar Order in Council makes the Civil Procedure Code applicable to Zanzibar, which is put on the same footing as a district in the Bombay Presidency.

[SARGENT, C.J.—So far as civil matters are concerned, the expression used in art. 21 of the Zanzibar Order is that the High Court of Bombay shall be deemed to be "the highest Civil Court of appeal," but with respect to criminal matters the expression used in art. 9 is that the High Court of Bombay shall be" deemed to be the High Court." The difference in the [482] language seems to show that in civil matters the High Court is not invested with revisional jurisdiction.]

The High Court is not given any power of interference under the Mamlatdars' Act (Bombay Act III of 1876), and yet the High Court has been interfering under its revisional jurisdiction with orders passed under that Act. By analogy the High Court can, under its extraordinary jurisdiction, review the order passed by the Consular Court at Zanzibar.

JUDGMENT.

SARGENT, C. J.—We are of opinion that this Court has no power of revision over cases tried by the Consular Court at Zanzibar. This High Court derives its jurisdiction over the administration of civil justice in the Courts of Zanzibar created by the Order in Council of 29th November 1884, by art. 21 of that order (1). That section provides "that the Code of Civil Procedure shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay. The Consul General shall be deemed to be the District Judge of the district, and his Court the District Court or Principal Civil Court of Original Jurisdiction in the district. The High

(1) See note (1), 20 B. 480.

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Court of Bombay shall be deemed to be the highest Civil Court of Appeal for the district and the Court authorised to hear appeals from the decisions of the District Court." This Court is, therefore, by the above provision, created an appellate Court to hear appeals. But no such power of revision is given to it as belongs to the High Court over the Courts of the Presidency, and which, it is to be remarked, this Court possesses as a High Court by the express terms of s. 622 of Civil Procedure Code, and not by virtue of its being a Court of appeal. A power of revision is not an incident of appellate powers, but on the contrary can only be exercised where there is no appeal, and had it been intended to give such power to this Court it would necessarily have been expressly provided for. This view derives confirmation from the difference of language used in art. 9 relating to criminal matters, where it is provided that the High Court of Bombay shall be deemed to be the "High Court" and not merely an appellate Court for the purpose of applying the Code of Criminal Procedure and also from **[483]** the provision of arts. 27 to 30 with regard to making up the record to be sent to this Court which is confined to the case in which a memo. of appeal has been presented.

It was contended in argument that by sub-clause (*b*) of art. 8 of the Order of Council the Civil Procedure Code of 1882 is made applicable to Zanzibar, and that all its provisions can be called in aid by the persons to whom by art. 6 the Order is made applicable, but art. 8 deals with the jurisdiction and procedure of the Courts in Zanzibar, and for such purposes no doubt the appropriate provisions of the Civil Procedure Code are to be applied, and can thus as constituting "provisions of the Order in Council" be properly invoked as provided for by art 7. For these reasons we think that the rule should be discharged.

BAYLEY and PARSONS, JJ., concurred.

JARDINE, J.—Although I have the misfortune to differ from the rest of the Bench, and, therefore, have doubts, I am not prepared to hold that the learned Judge who issued the writ acted without jurisdiction; and under any circumstances I think it was the duty of the Consular Judge to obey the writ as s. 10 of Act XIV of 1869 expressly requires. The omission doubtless occurred from his overlooking that enactment.

The Foreign Jurisdiction Acts 6 and 7 Vict., c. 94, 41 and 42 Vict., c. 97, and 53 and 54 Vict., c. 37, are intended for the government of persons; and to this end Courts and procedure are provided. The Zanzibar Order in Council of 1884, made under one of the earlier Acts, expressly applies to British subjects in Zanzibar, among others by art, 6. By art. 8, cl. (*b*), certain laws, including the Indian Penal Code (XLV of 1860), are made applicable to Zanzibar; and thus, in my opinion, impose duties and confer rights on the persons to whom the Order in Council applies. This introduction of a system of personal law is more direct than that introduction of law by effect of charters creating Courts which has been considered by some authorities as the means whereby English law was introduced into British India—*Naoroji* v. *Rogers* (1). Among **[484]** these laws is the Bombay Civil Courts Act, 1869 (some parts being excepted), s. 10 of which taken with art. 21 of the Order in Council requires the Judge at Zanzibar to obey all writs, orders or processes issued to him by the High Court, and to furnish such reports and returns and copies as may be called for by this Court. This and the requirement of s. 9, that the Judge shall refer matters here where a rule ought to be made, go a certain way

(1) 4 B.H.C.R. 1.

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in conferring superintendence on this Court even without our jurisdiction of appeal. See *Pirbhai* v. *B. B. & C. I. Railway Co.* (1) and *In the matter of John Thomson* (2). Among other laws the Code of Civil Procedure (Act XIV of 1882) has been extended in its entirety, subject, however, to the other provisions of the Order and to treaties. Among other provisions of the Order are the directing and modifying powers retained by the Secretary of State, *e.g.*, art. 8, cl. (*d*). A later Order in Council, dated the 16th May, 1893, makes substitutions and amendments of the Code of Civil Procedure effectuated by the Governor General of India in Council in a legislative capacity take effect without special order of the Secretary of State.

It results, then, that s. 622 of the Code of Civil Procedure is in force under the Order in Council, and neither the Code nor the Bombay Civil Courts Act, 1869, indicated any other tribunal but the High Court of Judicature at Bombay as competent to exercise the revisionary jurisdiction which s. 622 contemplates. The words of s. 622 imply that the Court subject to revision is one from which appeals lie. Under art. 8, cl. (*d*), ii, the Secretary of State has power to appoint a revisional tribunal. It is plain that he has not done so specifically. The argument of Mr. Manekshah was that the introduction of the Code in its entirety, *plus* the language of art. 21 of the Order, should lead this Court to hold that the person under Her Majesty's jurisdiction at Zanzibar has the same right to apply for revision as the subject in any district of this Presidency, and by necessary implication that the Secretary of State has recognized the revisionary jurisdiction of this Court. I **[486]** would point out that when the Secretary of State makes an exception of part of a Code applied as law to the settlement, his practice appears to be to use specific language as in art. 8 (*b*) dealing with the Bombay Civil Courts Act, 1869, art. 32 (*b*) excluding this Court's jurisdiction where Zanzibar subjects are concerned, and the Order in Council, dated the 17th July, 1893, excluding Chap. 33 of the Criminal Procedure Code from the law applied by art. 8 of the Order in Council of 1884.

I admit the force of the considerations that in art. 9 dealing with the Code of Criminal Procedure the expression is that this Court "shall be deemed to be the High Court," whereas in art. 21 dealing with Civil matters, it is that this Court "shall be deemed to be the highest Civil Court of appeal for the district," but I think the last expression must be considered with art. 7, cl. 3. I do not think art. 7, cl. 3, intends to exclude the Privy Council. I admit also the force of the argument that if the Secretary of State had meant to confer on this Court power of revision in Civil matters he might easily have used specific language. But I think that having introduced a personal law, to take effect as if Zanzibar were a district under Bombay, and making the local Court into a District Court by art. 21, he may have considered that the subject or other person to whom the Order in Council applies by art. 6 would by force of the Code and the Order have a right to come to this Court for the relief contemplated by art. 21. The extension of certain substantive laws and laws of procedure to a class of persons by the Foreign Jurisdiction Acts of the Indian Legislature is noted in the judgment of Sargent, C.J., in *Queen Empress* v. *W. D. Edwards* (3); and the Secretary of State is of course aware of the high controlling powers this Court possesses noticed in that case by Scott, J. I do not think the

(1) 8 B.H.C.R.O.C.J. 59. (2) 6 B.L.R. 180. (3) 9 B. 333 (340).

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Order in Council of 1884 shows an intention merely to confer a right under s. 622, and then render that right futile by refraining to appoint a tribunal where the relief can be obtained. Thus the argument against clutching a jurisdiction used by the counsel in *In re the Judges of the Supreme Court of Bombay* (1) does [486] not apply in the absence of any other tribunal to which the person aggrieved can go for redress. I think, then, that the maxim "*est boni judicis ampliare jurisdictionem*" is applicable in this matter.

FARRAN, J.—In my opinion the High Court has no jurisdiction in the matter. By s. 1 of Statutes 29 and 30 Vict., c. 87, repealed by and re-enacted in Statutes 53 and 54 Vict., c. 37, Her Majesty by Order in Council is empowered to confer on any Court in any of her possessions (out of the United Kingdom) any jurisdiction, civil or criminal, original or appellate, which Her Majesty in Council might lawfully by any such order confer on any Court in any country or place out of her dominions within which Her Majesty has power or jurisdiction, subject to such provisions and regulations as to Her Majesty may seem fit. This section enables Her Majesty to confer upon the High Court of Bombay such jurisdiction over Zanzibar Courts as Her Majesty may think expedient. Over her subjects aud others in Zanzibar, Her Majesty has jurisdiction by reason of other powers and authorities comprised in or conferred by various treaties and statutes to which it is unnecessary to refer. They are all recognized and legalised by Statutes 29 and 30 Vict., c. 87.

The question which we have to determine is not, I think, what law or procedure Her Majesty has by Her Order in Council of the 29th November, 1884, introduced into Zanzibar, but what jurisdiction, by virtue of the above quoted section, she has conferred on the High Court. Part II of the Order defines the persons in Zanzibar to whom it applies, and Part III points out the general laws and principles which Her Majesty's Courts in Zanzibar are to apply in cases, civil or criminal, coming before them, and determines the practice and procedure by which they are to govern themselves. Part IV deals with criminal matters. Part V deals with "civil matters," and in it art. 21 provides that, subject to the other provisions of the Order, "'the Code of Civil Procedure,' 'the Bombay Civil Courts' Act, 1869,' 'the Indian Succession Act' and the other enactments relating to the administration of Civil Justice * * * for the time being [487] applicable to Zanzibar shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay, the Consul General shall be deemed to be the District Judge of the District and his Court the District Court or Principal Civil Court of Original Jurisdiction in the District. The High Court of Bombay shall be deemed to be the Highest Civil Court of appeal for the District and the Court authorized to hear appeals from the decision of the District Court." Pausing there, it cannot, I think, be doubted that the High Court of Bombay while it is directly authorized to hear appeals from Zanzibar Courts is not directly authorized to act as a Court of Revision over such Courts. The latter authority, if it is conferred upon the High Court, can only be impliedly conferred on it by reason of the provision that the Code of Civil Procedure and the other enactments relating to the administration of Civil Justice shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay.

The question, therefore, narrows itself to this:—Does this provision constitute the Civil Courts in Zanzibar Civil Courts of the Presidency of

(1) 1 Knapp. 1.

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Bombay within the meaning of cl. 15 of the Letters Patent of the High Court, or does it merely for jurisdictional purposes assimilate the Zanzibar area to the area of a Bombay district in order that the application of the Procedure Acts to it may be exactly defined. In the former view the effect of the provision would, I apprehend, be to confer upon the High Court the power contained in s. 622 of the Civil Procedure Code, inasmuch as it is by the combined effect of the Letters Patent, cl. 15, and the Civil Procedure Code that this power is conferred upon the High Court over the Civil Courts in the Bombay Presidency. The latter view is, however, in my opinion, the correct one. The language employed appears to be apt to express it, while it is combrous and inapt language to employ to effect the former purpose. If it were intended to place the Zanzibar Courts in the same relation to the Bombay High Court as are the Courts in the Bombay Presidency, I think that it would have been done directly and not by such circuitous language as is contained in the 21st article. I am, therefore, of opinion that the High Court is not by implication made a Court of Revision over the Courts of Zanzibar.

[488] I am fortified in this conclusion by finding that there are elaborate provisions contained in the Order for preparing and sending an appeal record to the High Court (arts. 27 to 30) and none for sending up papers under s. 622. The intention is that original papers are not to be transmitted to Bombay except in exceptional cases. I am further fortified in it by a comparison of the language of art. 9 relating to criminal jurisdiction with that of art. 21, and I think that if it had been intended to make the High Court a Court of Revision over the Zanzibar Courts, it would have been done by direct language and not left to be gathered by doubtful implication. Lastly, the jurisdiction of the High Court over the class of suits referred to in art. 32 is necessarily restricted by express words, as otherwise it would have under art. 21 an appellate jurisdiction in respect of such suits, while it is not necessary to except the application of the provisions of s. 622 of the Code from the Order as they relate to powers of the High Court which are not exerciseable in Zanzibar unless extended to it.

Rule discharged.

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20 B. 488.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Parsons.

KRISHNASHET BIN GANSHET SHETYE (*Original Defendant No.* 2), *Appellant v.* HARI VALJIBHATYE TRADING IN THE NAME OF KHEMJI LADHABHAI BHATYE (*Original Plaintiff*), *Respondent.**

[1st April, 1895.]

Negotiable Instruments Act (*XXVI of* 1881), *ss.* 30, 93 *and* 106 *—Hundi—Local usage—Hundi drawn by a manager of Hindu family—Liability—Notice of dishonour to the drawer necessary.*

The Negotiable Instruments Act (XXVI of 1881), in the absence of local usage to the contrary, applies to *hundis*.

A member of a Hindu family whom it is sought to make liable by a suit on a *hundi* drawn by the manager of the family is entitled to urge that no notice of

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* Second Appeal No. 504 of 1893.

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dishonour had been given to the manager (drawer) so as to make the latter liable under s. 30 of the Negotiable Instruments Act (XXVI of 1881).

[R., 30 C. 977; 23 M. 597 (604) (F.B.) ; 1 S.L.R. 57 (58).]

SECOND appeal from the decision of Rao Bahadur Kashinath B. Marathe, First Class Subordinate Judge of Ratnagiri with [489] appellate powers, varying the decree of Rao Saheb V. K. Sovani, Joint Subordinate Judge of Chiplun.

The plaintiff sued to recover from the defendants the sum of Rs. 637-12, including interest and protesting charges, due on account of a *hundi* dated the 25th March, 1892, and drawn by defendant No. 1. The defendants were brothers and members of a joint Hindu family. Defendant No. 1 had a shop of which he was the sole manager.

Defendant No. 1 admitted the claim.

Defendant No. 2 pleaded that he lived separate from his brother, defendant No. 1, and that he was not liable to the claim.

The Subordinate Judge found that defendant No. 2 was not liable to the claim, because the *hundi* was not drawn with his consent and also because no notice of dishonour was served upon him under s. 93 of the Negotiable Instruments Act (XXVI of 1881). He, therefore, allowed the claim against defendant No. 1 alone.

On appeal by the plaintiff the Judge found that s. 93 of the Negotiable Instruments Act was not applicable to defendant No. 2, whose liability to the plaintiff's claim arose under the Hindu law, the defendants being members of an undivided family of which defendant No. 1 was the manager. He, therefore, varied the decree by holding the share of defendant No. 2 liable to the claim along with the person and property of defendant No. 1.

Defendant No. 2 preferred a second appeal.

Ganesh K. Deshamukh, for the appellant (defendant No. 2).—The point of Hindu law and union was raised for the first time by the appellate Court without there being any allegation to that effect in the plaint or without there being an issue on the point in either of the lower Courts.

We submit that s. 93 of the Negotiable Instruments Act is applicable. No notice contemplated by that section was ever given. The finding of the first Court is quite distinct on that point.

Gangaram B. Rele (with *Shamrav M. Rele*, for the respondent (plaintiff).—Defendant No. 2 is not held liable under the Negotiable [490] Instruments Act. Defendant No. 1 was the manager of the family, and, therefore, defendant No. 2 was held liable. The person primarily liable is defendant No. 1 and he has admitted the claim without raising any plea of notice contemplated by s. 93 of the Act. Defendant No. 2 is, therefore, estopped from raising the plea.

JUDGMENT.

SARGENT, C. J.—The Negotiable Instruments Act, in the absence of local usage to the contrary, applies to *hundis*. See *Moti Lal* v. *Moti Lal* (1). No usage has been alleged, although the question as to notice was argued in both Courts. Notice being necessary in the case, the Lower Appeal Court was wrong in holding that the defendant No. 2 cannot avail himself of the provisions of s. 93 of the Negotiable Instruments Act. As a member of the Hindu family whom it is sought to make liable by this suit on the *hundi* drawn by the manager (the defendant No. 1) in the course of the family business, he would be entitled

(1) 6 A. 78.

to urge that no notice of dishonour had been given to the defendant No. 1 so as to make the latter liable on the bill under s. 30. We must, therefore, send back the case for a finding on the following issue :—

1. Whether notice of the *hundi* having been dishonoured was given to defendant No. 1 within reasonable time, having regard to s. 106 of the Negotiable Instruments Act?

Parties to be allowed to give fresh evidence. Finding to be returned within three months.

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Issue sent down.

20 B. 491.

[491] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Parsons.

VINAYAK VISHVANATH BHOPLE (*Original Plaintiff*), *Applicant* v. BALU BIN BHIKU AND ANOTHER (*Original Defendants*) *Opponents.**

[2nd April, 1895.]

Mamlatdars' Act (Bom. Act III of 1876)—*Delivery of possession in execution of a decree of a Civil Court—Subsequent lease to the judgment-debtor—Refusal of the Mamlatdar to restore possession after the expiration of the lease.*

Vinayak obtained possession of land from Balu in execution of a decree of a Civil Court. After obtaining possession, Vinayak leased the land to Balu. On Balu's refusal to vacate the land on the expiration of the lease, Vinayak brought a possessory suit in the Mamlatdar's Court. The Mamlatdar rejected the plaint, holding that he ought not to order restoration of possession of the land again and again.

Held, that a fresh cause of action accrued to Vinayak on the refusal of Balu to give possession on the expiry of the lease, and that the Mamlatdar was wrong in declining to accept the plaint.

THIS was an application under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Rao Saheb Ramchandra Vishnu Bakre, Mamlatdar of Mahad in the Thana District, rejecting a plaint in a possessory suit.

The applicant had obtained a decree in suit No. 824 of 1892 of the file of the Subordinate Judge's Court at Mahan for possession of the land in dispute against the opponents. On the 20th October, 1893, he, in execution of the decree, got possession of the land together with the standing crop thereon. Subsequently he let out the land to the opponents under a kabulayat dated the 27th October, 1893, which was to expire on the 6th May, 1894. The opponents having failed to restore possession to the applicant on the appointed day, he, on the 10th October, 1894, presented a plaint in the Mamlatdar's Court praying for delivery of possession. The Mamlatdar rejected the plaint on the 16th October on the ground that he did not think it proper to restore possession of the land to the applicant in a summary suit, as he (applicant) let out the land to the opponents, who were his judgment-debtors in the civil suit, at his own risk. The Mamlatdar referred the applicant to the civil suit.

[492] The applicant applied under the extraordinary jurisdiction urging (*inter alia*) that the Mamlatdar failed to exercise the jurisdiction vested in him by law. A rule *nisi* was issued calling on the opponents to show cause why the order of the Mamlatdar should not be set aside.

* Application No. 232 of 1894 under the extraordinary jurisdiction.

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Dhondu P. Kirloskar appeared for the applicant in support of the rule:—Under the Mamlatdars' Act (Bom. Act III of 1876) the only point to be considered is whether the tenancy had expired and whether the suit was instituted within six months from the determination of the tenancy.

There was no appearance for the opponents.

ORDER.

PARSONS, J.—The fact that the opponent obtained possession on the 20th October, 1893, cannot affect the question as to the right of the opponent to be put in possession of the land leased to the opponent on the 27th October, 1893.

A fresh cause of action accrued to the applicant on the refusal of the opponent to give up possession on the expiry of that lease, and the Mamlatdar was wrong in declining to accept the plaint. We make the rule absolute and return the plaint to the Mamlatdar, for him to dispose of it according to law. Costs to abide the result.

Rule made absolute.

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20 B. 492.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Parsons.

KALAPPA BIN GIRIAPPA AND OTHERS, MINORS, BY THEIR GUARDIAN MOTHER TUNGAVA (*Original Defendants*), *Appellants v.* SHIVAYA BIN SHIVLINGAYA (*Original Plaintiff*), *Respondent.**

[4th April, 1895.]

Mortgage—Mortgage with possession—Mortgagee to pay Government revenue—Sale for arrears of revenue—Purchase by mortgagee at sale—Subsequent suit by mortgagor for redemption—Government sale caused by default of mortgagee.

Where mortgaged property was sold at a Government sale for arrears of revenue,

Held, that if the sale took place owing to the mortgagee's default, it would not affect the mortgagor's right to redeem.

[493] The general rule, that a Government sale for arrears of revenue gives a title against all the world, is subject to the exception that if it is caused by the default of a mortgagee, it does not take away the mortgagor's right to redeem the mortgage and to recover the land.

SECOND appeal from the decision of J. L. Johnston, District Judge of Dharwar, reversing the decree of Rao Saheb M. R. Soman, Subordinate Judge of Gadag.

Suit by mortgagor for redemption. The plaintiff alleged that in April, 1877, he mortgaged the land in question with possession to the defendants, and that by the terms of the mortgage-deed the defendants (mortgagees) were to pay the Government assessment out of the income of the property and to apply the balance in payment of interest on the mortgage. He now sued to redeem, and claimed mesne profits.

The defendants answered that they did not hold possession under the mortgage. They alleged that the mortgaged land produced no income, and that they could not, therefore, pay the Government assessment out of it as

* Second Appeal No. 36 of 1893.

provided in the mortgage-deed. They further stated that on the 5th September, 1878, the land had been sold by auction for arrears of revenue, and that their uncle had purchased it, and that they had ever since been in possession as owners.

The Subordinate Judge found that the defendants were in possession as owners and purchasers and not under the mortgage-deed, and he dismissed the suit. In his judgment he said :—

"It appears further from the mortgage-deed that the mortgagee had not agreed to pay the assessment absolutely, but he had agreed to pay the same out of the profits of the property. I have held above that the mortgagee was not put in possession of the property under the terms of the mortgage. A mortgagee, in the absence of special agreement, is not under obligation to pay the assessment and save the property from paramount title. His obligation depends either on special contract or on his being in possession."

On appeal by the plaintiff the Judge reversed the decree, holding that the defendants were mortgagees in possession and that the plaintiff had a right to redeem.

The following is an extract from his judgment :—

"What appears to have really happened was that the defendant got possession just at the beginning of the famine, and as he got no crop, he let the land be sold for the arrears of assessment, and as he was a kulkarni, his brother Gurappa **[494]** bought it at the auction sale for default. In doing so the mortgagee in possession did not become owner. He was bound to preserve the property from forfeiture or sale—11 Moore's Indian Appeals, 241. He was in the present case the more bound, as it was part of his contract to pay the assessment out of the rent. The mortgagee in possession, cannot buy the property and obtain an irredeemable interest therein—I. L. R., Madras 7, 3 ; *Jayanti* v. *Yerubandi* ; Macpherson on Mortgage, pp. 278, 279. The mortgagee can only claim the amount paid by him, which, whether he intended it or not, has saved the estate for the mortgagor. This amount can be added on to the mortgage amount due before redemption in the accounts now to be taken at execution."

The defendants preferred a second appeal.

Narayan G. Chandavarkar, for the appellants (defendants).—The property yielded no income after it was mortgaged to us and, therefore, we could not pay Government dues. The mortgage-deed stipulated that we should pay the dues from the income of the property, and if the property yielded no income, and was sold, the sale cannot be attributed to our default in paying the assessment. The Judge has not taken this circumstance into consideration—*Sambhu bin Anaji* v. *Babaji bin Ravlu* (1); *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan* (2).

Balaji A. Bhagvat, for the respondent (plaintiff).—The view taken by the Judge is correct. A mortgagee in possession is bound to protect the interest of the mortgagor. There is no allegation in the case that the defendants tried to let out the land and failed.

JUDGMENT.

SARGENT, C.J.—The District Judge says that the mortgagee was bound to preserve the property from forfeiture or sale for arrears of revenue. If this were so, the sale would have been the result of the

(1) P.J., (1869), p. 160.

(2) 10 M.I.A. 540 (559).

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20 B. 492.

mortgagee's default, and the plaintiff would not lose his right to redeem. This was decided in *Sambhu bin Anaji* v. *Babaji bin Ravlu* (1) and is in accordance with the judgment of the Privy Council in *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan* (2) where the right of the mortgagor to redeem is put on the ground that the mortgagee could not take advantage of his own wrong. It is an exception to the general rule that a Government sale for arrears of revenue gives a title against all the world.

[495] The District Judge, however, has apparently assumed that the mortgagee was in default, and has not considered the language of the mortgage-deed, which provides for the mortgagee paying the assessment out of the money derived from cultivating or letting the land, when taken in connection with the special circumstances as alleged by the defendants to have led to the sale by Government. We must, therefore, send down the following issue for a finding :—

" Was the land sold owing to the default of the mortgagee ?" Finding to be transmitted to this Court within three months.

Issue sent down.

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20 B. 495.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Ranade.

TRIMBAK RAMKRISHNA RANADE (*Original Plaintiff*), *Appellant v.* LAKSHMAN RAMKRISHNA RANADE (*Original Defendant*), *Respondent.**

[8th April, 1895.]

Jurisdiction—Religious endowment—Property in British India of a temple outside British India—Rgiht to officiate in such temple—Right to share of such property—Partition.

The plaintiff was a member of a family which had the management and received the income of certain property situate in British India belonging to a temple situate at Ashta in the Nizam's territory. Part of the income was devoted to religious services and part to the support of the family. The plaintiff sued to recover by partition his share of the income and for an injunction restraining the defendant from interfering with the plaintiff in celebrating religious worship at the temple when his turn came to officiate. The defendant (his brother) resided at Ashta.

Held, that the right to share in the income followed the devolution of the office and that the Court could not grant the relief prayed for, as the Courts in British India could not execute their decree by putting the plaintiff in possession of his office when his turn came to officiate at the temple which was outside British India.

According to Hindu text-writers as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns and of allowing alienation within certain restrictions.

[R., 13 Ind. Cas. 225=5 S L.R. 107 ; 20 C.L.J. 183=19 C.W.N. 208.]

APPEAL from the decree of Rao Bahadur G. A. Mankar, First Class Subordinate Judge at Ahmednagar.

[496] Suit for partition of a share in ancestral lands and villages in the Ahmednagar District and in a *mokas* allowance payable from the Karjat Taluka.

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* Appeal No. 143 of 1893.

(1) P. J. (1889), p. 160.

(2) 10 M.I.A. 540 (559).

In 1769 one Raghunath Bawa, an ancestor of the parties, obtained from the Peishwas a grant of the village lands in question for the maintenance of the religious services of the samadhi (sacred tomb) of Hari Narayan at Ashta. These villages and lands subsequently became British territory and were included in the Ahmednagar District. Ashta was in the territory of the Nizam.

In 1788 A.D., disputes arose among the successors of Raghunath Bawa, and an arrangement was made by which the income of the property was divided into thirteen equal parts, out of which nine were set apart for the expenses of the samadhi (sacred tomb) and four for the use of Raghunath Bawa's family. This arrangement was confirmed by the Inam Commission in A.D. 1858.

Raghunath Bawa, the original acquirer, was succeeded in the management of this property by his son Pandharinath.

Pandharinath had two sons, *viz.*, Hari and Shivram, and in 1838 the right to officiate at the religious services and the income of the property were equally divided between Hari's branch and Shivram's branch of the family. The plaintiff and defendant were the grandsons of Hari, and the plaintiff claimed to share equally with the defendant in the half share that had been allotted to Hari. He, therefore, sued for a fourth share of the property.

This suit was filed in 1892. The plaintiff prayed for a partition of his fourth share in the revenue of the inam villages, lands and allowances and for an order that he should be allowed to perform the worship at the tomb at Ashta. He claimed his share in the property which was situate in British India, reserving his right to sue in the Nizam's Courts for his share in such property as was situate in the Nizam's territory.

The defendant denied that the property was partible, and pleaded that he as representing the elder branch of the family was alone entitled to officiate at the religious services.

[497] The First Class Subordinate Judge at Ahmednagar held hat the property and the right to officiate were alike divisible, but observed as follows :—

"Though the management of the devasthan at Ashta and the allowance appertaining to it are divisible in enjoyment, yet in the present case no order can be passed in favour of the plaintiff's taking part in the management of the devasthan and the income of the property in dispute, which has been set apart for defraying its expenses, as the devasthan is situate at Ashta in the Nizam's Dominions. Though the property, a portion of whose income has been assigned to the devasthan, is situate in British India, yet the members of the family who receive that part of the income in rotation, that is, the defendant and Gangadhar Shridhar, do so in virtue of their managing the devasthan or on its behalf, and not for their personal enjoyment or use. Consequently the plaintiff's claim to manage the devasthan and to receive the income assigned to it along with the defendant and Gangadhar Shridhar in rotation cannot be allowed. But the same cannot be said of his claim to share in the man's share ($\frac{1}{13}$th). The contention of the defendant that this share is also impartible cannot be sustained."

The Judge, therefore, decreed that the plaintiff should receive a $\frac{1}{13}$th part of the income of the property from year to year.

Against this decision plaintiff appealed, in *forma pauperis*, to the High Court.

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Mahadev Bhaskar Chaubal, for the appellant (plaintiff).—He cited *Nanabhai* v. *Shriman Goswami Girdharji* (1); *Shriman Goswami* v. *Goswami Shri Girdharlalji* (2); *Mancharam* v. *Pranshankar* (3); *Ram Coomar Paul* v. *Jogender Nath Paul* (4); West and Bühler (3rd Ed.), p. 785.

Daji Abaji Khare, for the respondent (defendant).—The division made in 1838 does not justify a further division in the absence of any proof of a custom of the family. The services of the devasthan cannot be divided: see *The East Indian Railway Company* v. *The Bengal Coal Company* (5).

Chaubal in reply.—As to the property in Nizam's territory, see *The Advocate-General of Bombay* v. *Bai Punjabai* (6).

JUDGMENT.

CANDY, J.—In this case, the appellant brought his suit against his elder brother, the respondent, for a partition of his $\frac{1}{4}$th share in certain ancestral inam villages and lands in the Jamkhed and [498] Karjat talukas of the Ahmednagar District, and in a *mokas* allowance payable from the Karjat taluka.

The original ancestor of the parties who acquired the inams was one Raghunath Bava. His son Pandharinath obtained confirmation of the grants. Pandharinath had two sons, Hari and Shivram. Hari's son, Ramkrishna, was the father of both the appellant and respondent. Deducting the half share which belonged to Shivram's branch, plaintiff claimed to be entitled to share equally with defendant in Hari's half share.

The plaint claimed four reliefs: (1) a partition of his $\frac{1}{4}$th share; (2) authority to recover the proceeds of his share indipendently of the respondent; (3) entry of appellant's name in the official papers; and (4) finally, an injunction prohibiting the respondent from interfering with the appellant in the celebration of the worship and *utsav* of the samadhi of Hari Narayan at Ashta in the Nizam's territory, when the appellant's turn of officiating might arrive under the partition decree. The inam lands and villages were, in fact, acquired by the ancestors of the parties for the purposes of this worship and annual celebrations, and for feeding Brahmins at the place of the samadhi, which was at Ashta outside British India.

The respondent in his written statement contended that, under an arrangement sanctioned by the Peishwa's Government and confirmed by the Inam Commission, $\frac{9}{13}$th of the income of the lands and villages were set apart for the religious services of the samadhi, and only $\frac{4}{13}$th were left for the support of the family, and that these $\frac{9}{13}$th as well as $\frac{4}{13}$th were not partible property. It was further urged that even if partition were allowed, the appellant's share was $\frac{1}{39}$th, and not $\frac{1}{4}$th of the whole, and it was burdened with liability for common debts. Lastly, it was contended, in respect of the appellant's claim for worship, that the respondent, as representing the elder branch of the family, was alone entitled to officiate at the religious services. It is not necessary to notice the other defences here.

The lower Court held that the appellant was only entitled to a $\frac{1}{13}$th share of the income of the property, as $\frac{9}{13}$th share was set [499] apart for devasthan services, and out of $\frac{4}{13}$th set apart for family support, $\frac{2}{13}$th

(1) 12 B. 331. (2) 17 B. 620. (3) 6 B. 298.
(4) 4 C. 56. (5) 1 C. 95. (6) 18 B. 551.

belonged to the other eight annas' branch, and $\frac{2}{13}$th were equally divisible between the parties to this suit. Appellant's claim to share in the $\frac{9}{13}$th of the devasthan income, together with the claim for the injunction sought by him, were disallowed, and appellant was directed to recover his $\frac{1}{13}$th share of the income; subject to a liability to pay a similar proportion of the ancestral debts which might be proved in execution proceedings. The claim for partition by metes and bounds was disallowed, as also the prayer for the entry of appellant's name in the village papers.

The lower Court held that although the devasthan income in this case and the right of officiating at the samadhi at Ashta were divisible, no order could be made in regard to the same, as Ashta was outside British India, and the income was received by the respondent, not for his personal enjoyment, but on account of the services rendered at the samadhi.

In the appeal before us, Mr. Chaubal took exception to the rejection of the claim in respect of the devasthan services and the property assigned for itsuse, and the principal point for inquiry is, whether the $\frac{9}{13}$th share of the income set apart for devasthan services, together with the right to officiate by turns at the samadhi, could properly be included in the property in which the appellant had a right to share equally with the respondent in this case.

The appellant rests his case mainly on the finding of the lower Court that the devasthan property and the right of officiating at the samadhi by rotation, were divisible, and that, as a matter of fact, both these had been divided between the representatives of the two eight-annas' sharers. It was urged that the fact of the devasthan at Ashta being in foreign territory made no difference, because the property sought to be divided was admittedly within the jurisdiction, and the following authorities were cited in support of this contention:—*Nanabhai* v. *Shriman Gosawmi Girdharji* (1); *Shriman Goswami* v. *Goswami Shri Girdharlalji* (2); *The Advocate-General of Bombay* v. *Bai Punjabai* (3). None of [500] these cases appear to us, however, to be in point. It is plain that the Courts in British India cannot execute their decree in respect of placing the appellant in possession of his year of office at Ashta when the turn came for him to officiate at the samadhi. The respondent himself lives out of British India at Ashta, and the personal remedy also would not prove effective. If the relief in respect of the permanent injunction asked for could not be granted for the reasons stated above, it is clear that the right to recover the income of the devasthan share for his year of office, which was only ancillary to the principal right, could not be also enforced. The case of *Shriman Goswami* v. *Goswami Shri Girdharlalji* (2) can be distinguished by the fact that the house, in respect of which relief was sought there, was within the jurisdiction, and the Court was thus only called upon to confirm the old Goswami Maharaj in possession, and it held that it was not bound to recognize the act of deposition ordered by a foreign state. The decision in *Nanabhai* v. *Shriman Goswami Girdharlalji* (1) is also not in point, as it simply decided that the act of a foreign ruler could not deprive a party in possession of property in British India of his rights, unless they were adjudicated upon by competent authority here. The effect of these decisions is thus to negative rather than help the claim set up for appellant that the Courts in British India can make valid orders about the right to officiate in a temple outside British India. The cases of *Ram*

(1) 12 B. 331. (2) 17 B. 620. (3) 18 B. 551.

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Coomar Paul v. *Jogender Nath Paul* (1) and *Mancharam* v. *Pranshankar* (2) are more akin to the present case, but they can be distinguished in that the temples and idols, the rights in regard to which were in dispute, were within the jurisdiction of the Courts which decided those cases. The same remark holds good in respect of the decision in *Sonatun Bysack* v. *Juggut Soondree Dossee* (3).

The larger question of the partibility or otherwise of such property, when expressly set apart for religious worship, need not, therefore, be considered in this case. We may, however, note that in *Rupa Jagshet* v. *Krishnaji Govind* (4), Sargent, C. J., held **[501]** that the Hindu law was in this respect different from English law, which distinguished private from public endowments, and that the sale in execution of such property was void, and might be set aside by the judgment-debtor himself. This position was also upheld in *Narayan* v. *Chintaman* (5). Melvill, J., in deciding *Mancharam* v. *Pranshankar* (2) held that these offices were in general inalienable, and that according to the Hindu text-writers, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns, and of allowing alienation within certain restrictions. The rulings in *Ram Coomar Paul* v. *Jogendar Nath Paul* (1) and *Radha Mohun Mundul* v. *Jadoomonee Dassee* (6) and the remarks made by Mayne in paras. 307, 308 must be understood in regard to this growth of customary law regulating private endowments. In the present case, however, the endowment is a public endowment, being a gift made by the former rulers of the country, and confirmed by the British Government. Both the Peishwa's grant and the confirmation expressly set forth the charitable and religious purposes for which the endowment was made in 1769 and 1788, and confirmed in 1858.

All doubts about the public character of the endowment, which might arise from the ambiguous language of the first grant of 1769, were removed by the subsequent decision of 1788, when a clear line was drawn between the devasthan share and the share set apart for the family. The person, who raised the dispute in 1788, was not recognized to have any rights to manage the devasthan, and in fact down to 1838, when the representative of the eight annas' share obtained a division of the office, as well as of the income, there was no division of the office. The circumstances attending that division are set forth in Exs. Nos. 23 and 24, but they furnish no grounds for recognizing that the family arrangement made in 1838 changed the nature of the grant. See also *Appasami* v. *Nagappa* (7). It is clear that if the present claim of the appellant were recognized, each of the **[502]** sons of the parties—and they have many—might claim a share, not only in the family share, but in the devasthan share and office also, and this process might go on with each generation, frittering away the income, and making the service wholly ineffective. The lower Court appears to have assumed, without any such evidence as is suggested in *Mohunt Rumun Dass* v. *Mohunt Ashbul Dass* (8), that the office is partible with the income. The practice of many generations of the parties must be considered in settling the questions of impartibility, and that practice is in this case against partition with the one single exception of what took place in 1838. It is, however, not necessary to discuss this question further in this place. The relief by way of injunction was plainly one

(1) 4 C. 56. (2) 6 B. 298. (3) 8 M.I.A. 66. (4) 9 B. 169.
(5) 5 B. 393. (6) 23 W.R. 369. (7) 7 M. 499. (8) 1 W.R. 160.

which the lower Court was not in a position to grant effectively, and the right to share in the devasthan income naturally follows the devolution of the office.

We accordingly confirm the decree of the lower Court, and reject the appeal, with costs on appellant.

The appellant should pay the Court-fees which he would have had to pay if he had not been permitted to appeal as a pauper.

Decree confirmed.

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20 B. 502.

CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Ranade.

IN RE P. A. RODRIGUES.* [8th April, 1895.]

Criminal Procedure Code (Act X of 1882), *s.* 555—*Disqualification of a Judge—Pecuniary interest.*

The accused was a compounder in the employ of Treacher & Co. He was tried and convicted by the Presidency Magistrate of criminal breach of trust as a servant in respect of certain goods belonging to the company. It appeared that the Magistrate was a shareholder in the company which prosecuted the accused.

Held, that the Magistrate was disqualified from trying the case. As a shareholder of the company he had a pecuniary interest, however small, in the result of the accusation, and was, therefore, "personally interested" in the case within the meaning of s. 555 of the Code of Criminal Procedure (Act X of 1882).

[503] The words "personally interested" in the section are not intended to exclude pecuniary as distinguished from a personal interest.

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was a compounder in the service of Messrs. Treacher & Co.

He was charged with having sold certain goods belonging to the company of the value of Rs. 20, and dishonestly appropriated the money to his own use.

The accused was convicted by Mr. Hamilton, Presidency Magistrate, of criminal breach of trust as a servant, and sentenced to one month's rigorous imprisonment under s. 408 of the Indian Penal Code (Act XLV of 1860).

The accused thereupon moved the High Court under its revisional jurisdiction to set aside the conviction and sentence, chiefly on the ground that the Magistrate, being a large shareholder in Treacher & Co., had a substantial interest in the prosecution, and was, therefore, disqualified from trying the case.

The High Court sent for the record and proceedings of the case.

The accused appeared in person.

Inverarity, for the complainant.

JUDGMENT.

CANDY, J.—P. A. Rodrigues, a compounder in the employ of Messrs. Treacher & Co. at Bombay, was on 2nd March, 1895, convicted by Mr. Hamilton, Presidency Magistrate, of theft, or criminal breach

* Criminal Application for Revision No. 50 of 1895.

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of trust as a servant in respect of Rs. 19-12 and sentenced to suffer one month's rigorous imprisonment. Rodrigues applied to this Court in its revisional jurisdiction, alleging among several grounds that the Magistrate, being a large share-holder in Treacher & Co., was disqualified from sitting in judgment in the case. The record and proceedings were called for, and the accused was released on his personal recognizance in the sum of Rs. 100 and one surety in a like amount. We understand that the learned Judges, who called for the records and proceedings, did so simply on the ground above stated, no notice being then taken of the other allegations made in the petition. We **[504]** have, therefore, confined ourselves for the present to the point above noted. Mr. Inverarity has argued the question on behalf of the complainant in the case, *i.e.*, H. R. Hoyles, an assistant of Messrs. Treacher & Co. No one has appeared for the accused person.

The Magistrate has informed the Court that he was a share-holder in Treacher & Co. when he passed sentence on Rodrigues. Section 555 of the Criminal Procedure Code provides that "no Magistrate shall * * * try any case to or in which he is a party or personally interested." This is simply an enactment of the rule of common law, that no one can be a judge in a case in which he has a pecuniary or personal interest. The words in the section "personally interested" are not intended to exclude a pecuniary as distinguished from a personal interest. For it is evident that a pecuniary must be a personal interest, though there may be a personal interest which is not pecuniary. And the distinction in common law between these interests is well settled. To quote the language of Mr. Justice Stephen in the *Queen* v. *Farrant* (1): "It is a leading principle of English Law that no one is allowed to be a judge in his own case; that means that the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge * * * . But the law does not stop there, for there may be an interest which has substantially the same effect as a pecuniary interest, though it is not of the same nature." This distinction was dwelt upon by the Court of Appeal in the recent case of *Allinson* v. *General Council of Medical Education and Registration* (2), which explained and followed the decision of the same Court in *Leeson* v. *General Council of Medical Education and Registration* (3). In Allinson's case the Master of the Rolls (Lord Esher) said, p. 758: "Where a person who has taken part in the judicial proceedings or, you might say, has sat in judgment on the case has any pecuniary interest in the result, however small, the Court will not inquire whether he was really biased or likely to be biased. The Court will say at once, it is **[505]** against public policy that a person who has any monetary interest, however small, in the result of judicial proceedings should take part in them as a judge. The Court will inquire no further, but will say at once that he is disqualified. But *Leeson's Case* also decides that there are other relations to the matter of a person who is to be one of the judges which may incapacitate him from acting as a judge, and the crucial question is whether in substance and in fact one of the judges has also been an accuser. The question is not whether in fact he was or was not biased. The Court cannot inquire into that. But he must bear such a relation to the matter that he cannot reasonably be suspected of being biased." So, too, Lopes, L. J., p. 762: "A person who has a pecuniary interest in the result of an accusation

(1) 20 Q.B.D. 58 (60). (2) (1894), 1 Q.B. 751. (3) 43 Ch.D. 366.

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cannot adjudicate on it. The inference at once arises that he is interested. But when no pecuniary interest exists, or is even suggested, it is a question of substance and fact whether one of the judges has in truth also been an accuser. * * * In such cases the proper question to be asked is this: Whether there is any reasonable—any real or substantial—ground for suspecting bias."

Now it is clear from these authorities that if in the present case the Presidency Magistrate, Mr. Hamilton, had a pecuniary interest, however small, in the result of the accusation, then he was at once disqualified from adjudicating on the case, and it would be unnecessary for us to inquire whether there was any real or substantial ground for suspecting bias. In our opinion Mr. Hamilton had a pecuniary interest. For he was and is a shareholder in Treacher & Co., Limited. The complainant before him was one of the assistants of that company. The accused before him was a compounder in the employment of that company. The accusation was that the compounder had stolen or committed criminal breach of trust in respect of about Rs. 20, the property of the said company. If the position had been reversed, if the complainant had been the accused, charged with having embezzled about twenty thousand rupees of the company's money, it could hardly have been contended that a shareholder in Treacher & Co. would not have been pecuniarily interested in the result of the accusation. But the Court cannot **[506]** measure the pecuniary interest. As was said by Mr. Justice A. L. Smith in the *Queen* v. *Gaisford* (1), "the fact that a man has even the slightest pecuniary interest operates to disqualify him from adjudicating upon a case." To the remark that in this case the accused was in a certain sense an employe of the Magistrate, and the money alleged to have been stolen may be said to have been partly the property of the Magistrate, Mr. Inverarity objected and mentioned a recent case in which it was held that individual members of a company are not the corporation. He was no doubt referring to the case of *George Newman & Co., Limited* (2), in which Lindley, L. J., in delivering the judgment of the Court of Appeal remarked that "an incorporated company's assets are its property and not the property of the shareholders for the time being." But that remark must be taken in connection with its context: George Newman & Co. was a private company consisting of George Newman and a few relatives and subordinates. The directors were George Newman and his brothers and one Wright, and they gave to George Newman out of the Company's assets two sums of £3,000 and £3,500 with the consent of the other shareholders, who were of age. On the winding up of the company, the liquidator sought to recover these sums from George Newman. To the argument that the whole body of shareholders really assented to what the directors had done, the Lord Justice replied by showing that the corporate capacity of the company could not be ignored, and that, even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held, and so the liquidator, as representing the company in its corporate capacity, was entitled to insist upon and to have the benefit of the fact that, even if a general meeting could have sanctioned what was done, such sanction was never obtained. The Lord Justice could never have meant to say that the shareholders of an incorporated company are not directly interested in the assets of the company, but what he held was that when a company is registered, then the right to deal with the assets

(1) (1892) 1 Q.B. 381 (384).

(2) Times L.R. 15th March 1895.

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of the company is regulated by statute. "A registered company cannot do anything which all its members [507] think expedient, and which, apart from the law relating to Incorporated Companies, they might lawfully do. An Incorporated Company's assets are its property, and not the property of the shareholders for the time being"—that is, the assets can only be dealt with according to the rules regulating incorporated companies. "Individual assent given separately may preclude those who give them from complaining of what they have sanctioned, but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting." It is unnecessary to pursue this line of argument further. The leading case of *Dimes* v. *Proprietors of Grand Junction Canal*(1) shows that a Judge may be disqualified simply by having shares in the incorporated company which is a party in the case before him. Here it is possible that the pecuniary interest which Mr. Hamilton has in the subject of the inquiry is very small, though it may be pointed out that every shareholder in Treacher & Co. has a direct interest in stopping alleged petty defalcations or embezzlements among the members of the establishment. But, as said before, the Court will not measure the interest (see, in addition to the recent authorities quoted above, the dicta of Mr. Justice Blackburn in the *Queen* v. *Rand* (2) reiterated in the *Reg.* v. *Meyer* (3), and the remarks of Mr. Justice Lush in *Sergeant* v. *Dale* (4).

For these reasons we must set aside all the proceedings held in this case before Mr. Hamilton, including the conviction and sentence, and direct that the complaint be disposed of by a duly qualified Magistrate.

Proceedings set aside.

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20 B. 508.

[508] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Parsons.

KESHAV RAMCHANDRA DESHPANDE (*Original Plaintiff*), *Appellant v.* KRISHNARAO VENKATESH, INAMDAR (*Original Defendant*), *Respondent.** [9th April, 1895.]

Pauper—Application for leave to sue as pauper—Rejection of application—Extension of time granted for payment of Court-fees—Payment of fees after period of limitation for suit has expired—Limitation Act (XV of 1877), s. 4—Practice—Civil Procedure Code (Act XIV of 1882), ss. 409 and 413.

On the 2nd February, 1890, the plaintiffs applied for leave to sue in *forma pauperis*. After investigation the Court on the 15th July, 1890, refused leave, but on the plaintiff's application granted him time to pay the Court-fees. He paid the fees on the 12th August, 1890. At this date the suit was barred, and the defendant pleaded limitation. The plaintiff contended that the suit should be taken as instituted at the date of his application for leave to sue as a pauper. The lower Court held the suit barred, and dismissed it.

Held, confirming the decree, that the plaintiff's application to sue as a pauper having been disposed of under s. 409 of the Civil Procedure Code (Act XIV of 1882) there was no proceeding pending which could be continued and kept alive by the payment of Court-fees. On the rejection of an application for leave to

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* Second Appeal No. 681 of 1893.

(1) 3 H.L. Ca. 759.
(2) L.R. 1 Q.B. 230, (233).
(3) 1 Q.B.D. 173, (177).
(4) 2 Q.B.D. 558, (567).

sue as a pauper the only course open to the applicant is that declared in s. 413, *viz.*, to institute a suit, and the date of the institution of that suit for the purposes of limitation is the actual date thereof. The plaintiff could not then be regarded as a pauper, and s. 4 of the Limitation Act (XV of 1877) would have no application.

[N.F., 84 P.R. 1904; F., 24 C. 889; 9 Bom. L.R. 204; Appr., 1 S.L.R. 71 (72); R., 22 B. 849 (852); D., 21 B. 576 (578).]

SECOND appeal from the decision of C. G. W. Macpherson, District Judge of Belgaum, reversing the decree of Rao Saheb R. G. Bhadbhade, Subordinate Judge of Chikodi.

Suit to recover possession of lands.

On the 2nd January, 1890, being the day on which the Court re-opened after the Christmas vacation, the plaintiffs applied for leave to bring a suit in *forma pauperis* against the defendant to recover land of which the defendant had been in possession since the 27th December, 1877.

After inquiry the Court found that the plaintiffs were not paupers, and on the 15th July, 1890, refused their application. The plaintiffs there and then applied to have further time allowed [509] them to pay the Court-fees. The Court granted them further time, and they paid the Court-fees on the 12th August, 1890.

The defendant pleaded (*inter alia*) that the suit was barred by limitation, not having been filed until the 12th August, 1890 (*i.e.*, the day on which the fees were paid), which was after the expiration of twelve years from the date of the defendant's getting possession of the land sued for. He contended that the date of the application to sue as a pauper could not be taken as the date of suit under s. 4 of the Limitation Act (XV of 1877), as that application had been refused.

The Subordinate Judge overruled the defendant's contention, and held that the suit should be regarded as filed on the 2nd January, 1890. He heard the suit and allowed the claim.

On appeal by the defendant the Judge held the claim to be time-barred, and reversed the decree.

Keshavrao Ramchandra Deshpande, one of the plaintiffs, preferred a second appeal.

Mahadeo B. Chaubal, for the appellant (plaintiff):—The point is whether for the purpose of limitation the time is to be calculated up to the date on which the application to sue in *forma pauperis* was made in cases in which the application is refused.

We made the application for time immediately after the Subordinate Judge refused to give us permission to sue in *forma pauperis*. The Privy Council has ruled in *Skinner* v. *Orde* (1) that the provisions of the Civil Procedure Code relating to pauperism should not be very strictly enforced. The Code lays down that the application for permission to sue as a pauper should be numbered and registered as a suit after it is granted, but in the Privy Council case the application was not numbered and registered as a suit.

[SARGENT, C. J.—In that case the application was not dismissed.]

There is nothing in the present case to show that our application was rejected under s. 409 of the Civil Procedure Code (Act XIV of 1882).

[510] *Dhondu P. Kirloskar*, for the respondent (defendant) was not called upon.

(1) 2 A. 241.

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JUDGMENT.

PARSONS, J.—The case of *Skinner* v. *Orde* (1), which is so much relied on by the appellant, is an authority only for the proposition that if during the hearing of an application to be allowed to sue as a pauper the full amount of Court-fees is paid, the application should be considered as a plaint, and the time of institution of the suit taken for purposes of limitation to be the time when the application was made. It has no bearing upon the present case, where it was after his application to be allowed to sue as a pauper had been rejected, and the Court had refused to allow him to sue as a pauper, that the applicant asked for time within which to pay the full amount of Court fees, and contended that he was entitled on such payment to count the date of his application for leave to sue as a pauper as the date of the institution of his suit. We think that he could not do this. His application to sue as a pauper had been disposed of under s. 409 of the Civil Procedure Code (Act XIV of 1882), and there was no proceeding pending which could be continued and kept alive by the payment of Court-fees. On the rejection of the application, the only course open to the applicant is that declared in (s. 413, *viz.*, to institute a suit, and the date of the institution of that suit for purposes of limitation would be the actual date thereof. The plaintiff could not then be regarded as a pauper, and the provisions of s. 4 of the Limitation Act (XV of 1877) relating to paupers would have no application. We agree in this with the decision of the Calcutta Court—*Chunder Mohun Roy* v. *Bhubon Mohini Dabea* (2). We confirm the decree with costs.

Decree confirmed.

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20 B. 511.

[511] ORIGINAL CIVIL.

Before Mr. Justice Candy.

COWASJI NOWROJI POCHKHANAWALLA (*Plaintiff*) *v.* RUSTOMJI DOSSABHOY SETNA AND ANOTHER (*Defendants*).*

[12th November, 1895.]

Trust-deed—Invalid trusts—Recovery of property settled—When right to sue accrues—Limitation Act (XV of 1877), sch. II, arts. 96 and 120—Rule against perpetuities—Indian Succession Act (X of 1865), s. 101—Transfer of Property Act (IV of 1882), s. 14—Whether applies to moveable property—Suit to follow trust property—Limitation Act (XV of 1877), s. 10—Whether applies to suit to invalidate the trust.

The rule against perpetuities (Indian Succession Act, X of 1865), s. 101, and (Transfer of Property Act, IV of 1882, s. 14) applies to moveable as well as immoveable property.

Under art. 120, sch. II of the Limitation Act (XV of 1877) the right to recover property settled on invalid trusts accrues directly the property is conveyed to the trustees.

Section 10 of the Limitation Act (XV of 1877) does not save a suit brought to set aside the trusts specified in a trust-deed and enforce resulting trusts not so specified.

[R. 31 B. 222 (232)=8 Bom L.R. 328; 33 B. 122 (146, 160)=10 Bom. L.R. 417=1 Ind. Cas. 834; 14 Bom.L.R. 987=17 Ind. Cas. 689; 132 P.R. 1907; D., 1 Bom.L.R. 721 (723).]

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* Suit No. 468 of 1895.

(1) 2 A. 241.

(2) 2 C. 389.

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BY a deed of trust dated the 24th January, 1888, made between the plaintiff of the one part and himself and two other persons, *viz.*, the defendant Rustomji Dessabhoy Setna and one Nusserwanji Dinsha Dubash, of the other part, it was recited that the plaintiff being desirous of providing for certain ceremonies set forth in the said deed had absolutely given and transferred to himself and the said two persons certain Government promissory notes of the nominal value of Rs. 10,000, and that it was his intent and wish to divest himself for ever of the said notes, that the property therein should be absolutely vested in himself and the said two persons, "and that the said notes shall no longer in any way belong to him or form part of his estate or ever revert thereto, any rule of law or equity to the contrary notwithstanding," and that he had immediately before the execution of the said deed transferred the said notes into the joint name of himself and the said two persons "to the intent that they and the survivors and the survivor of them and the executors or administrators of such survivor shall stand possessed thereof upon the [512] trusts and to the uses and with and subject to the powers and provisions hereinafter declared and expressed," and it was witnessed as follows :—

"Now this indenture witnesseth that, in consideration of the wish and desire of the said Cowasji Nowroji Pochkhanawalla to make certain provision which he believes to be for the benefit of the souls of his deceased near relations hereinafter referred to and also for the benefit of the Parsi community, and for divers other good causes and considerations, the said Cowasji Nowroji Pochkhanawalla doth hereby direct and declare that the said Cowasji Nowroji Pochkhanawalla, Rustomji Dossabhoy Setna and Nusserwanji Dinsha Dubash and the survivors and survivor of them, and the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents (hereinafter called the said trustees or trustee) shall deposit the said Government loan notes for safe custody in the Bank of Bombay with a power to the said Bank to draw on their behalf the half-yearly interest upon such notes, and shall pay such interest to the said Cowasji Nowroji Pochkhanawalla during his natural life to the use and to the intent that the said Cowasji Nowroji Pochkhanawalla shall out of the said interest expend the sum of Rs. 10 on the anniversary day of each of his father Nowroji Pallonji, his mother Mithibai and his sisters Jerbai and Cursetbai and his two brothers Manokji and Rustomji and his wife Jerbai, who are all dead, and also of his present wife Jaiji after her death accompanied with a suit of clothing called 'Sheeao' according to the Zoroastrian religion, and to the further use that out of the remainder of the said interest the said Cowasji Nowroji Pochkhanawalla shall apply the sum of Rs. 180 in each and every year to the performance from day to day of 'Daroon' ceremonies, called 'Chalco Daroon,' and to the further use that the said Cowasji Nowroji Pochkhanawalla shall apply the remainder of the said interest to the performance every year of the 'Mookhtad' ceremonies, and on the death of the said Cowasji Nowroji Pochkanawalla the said trustees or trustee shall stand possessed of the said interest upon trust to pay the same to the said Jaiji if she should survive her husband to the same uses and for the same purposes as are hereinbefore declared concerning the interest to accrue during the life-time of the said Cowasji Nowroji Pochkhanawalla, with the addition that a sum of Rs. 10 out of the said interest shall be expended on the anniversary day of the said Cowasji Nowroji Pochkhanawalla, and after the deaths of the said Cowasji Nowroji Pochkhanawalla and of the said Jaiji the

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said trustees or trustee shall stand possessed of the said interest upon trust to pay the same to Hormasji Cowasji Pochkhanawalla, the son of the said Cowasji Nowroji Pochkhanawalla, to the same uses as are hereinbefore declared concerning the interest to accrue during the life-time of the said Cowasji Nowroji Pochkhanawalla and his wife the said Jaiji if the said trustee or trustees shall be satisfied that the said interest shall be applied by the said Hormasji Cowasji Pochkhanawalla as above directed; and in case the said trustees or trustee shall not in their absolute discretion be so satisfied upon trust to pay the said interest to any one of the surviving daughters of the said Manokji and Rustomji, the two predeceased brothers of the said Cowasji Nowroji Pochkhanawalla, to the same uses, intents and purposes as are hereinbefore declared and expressed concerning the interest to accrue during the lifetime of the said Cowasji Nowroji Pochkhanawalla and his wife the said Jaiji: Provided and it is hereby agreed and declared that the [513] said trustees or trustee shall be at absolute liberty to entrust the carrying out of the above ceremonies, intents and purposes to any one of the said surviving daughters of the said Manokji and Rustomji in preference to the said Hormasji Cowasji Pochkhanawalla, provided and it is hereby agreed and declared that if the abovenamed relations of the said Cowasji Nowroji Pochkhanawalla should decline to accept the performance and carrying out of the above trusts the said trustees or trustee shall stand possessed of the said interest upon trust to pay the same to a 'Mobed' or Parsi priest of their or his own selection to the uses and for the purposes as aforesaid so long as he shall act faithfully, or in case a proper priest shall not be found in that behalf and at any time during the continuance of these presents the said trustees or trustee shall transfer the said Government promissory notes to the names of and shall hand the same to the trustees for the time being of the Parsi Panchayat to the intent that out of the interest of the said notes the aforesaid uses and purposes shall be carried out under their direction."

The deed provided for the appointment of new trustees.

The said Nusserwanji Dinsha Dubash died on the 3rd December, 1888, and no other trustee was appointed in his place.

The plaintiff now sued to recover the said trust property, having been advised that the trusts for which he had given it were invalid. The defendants to the suit were the surviving co-trusteeand the plaintiff himself as surviving trustees of the above trust-deed. This suit was filed on the 3rd October, 1895.

The plaint stated that the said Government promissory notes were sold by the plaintiff in 1895 and the proceeds were invested by him in the purchase of two shares in the Bombay and Burmah Trading Corporation, Limited, which were at the date of the suit of the value of Rs. 11,000. The said shares although purchased by the plaintiff had always remained in the possession and custody of the defendant Rustomji Dossabhai Setna.

The concluding paragraph and the prayer of the plaint were as follows:—

"4. The plaintiff and the first defendant are advised that all the trusts by the said deed created are by law invalid, and that the plaintiff is entitled to the said shares in his own right.

"The plaintiff, therefore, prays:—

"(*a*) That it may be declared that the trusts created or purported to be created by the deed in the first paragraph hereof referred to are void and that the said deed is inoperative and of no effect.

"(*b*) That it may be declared that the plaintiff is entitled to receive the two shares in the Bombay and Burmah Trading Corporation, Limited, in the third **[514]** paragraph hereof referred to, and to hold the same in his own right freed from the said trusts.

"(*c*) That the first defendant may be authorised to deliver the said shares to the plaintiff.

"(*d*) That the plaintiff may have such further and other relief as the nature of the case may require."

The defendant filed a written statement stating that he had been advised that it was questionable whether the plaintiff's right to have the trust property handed back to him was not barred by limitation, and submitting to the judgment of the Court whether the trustees could and ought to retain the same and apply it in accordance with the trusts declared in the deed.

Lowndes, for plaintiff.—No property can be tied up in this way—Succession Act (X of 1865), s. 101. As to limitation, s. 10 of the Limitation Act (XV of 1877) applies.

Scott, for the defendant.—He referred to Tudor on Charitable Trusts (3rd Ed.), p. 372; *Churcher* v. *Martin* (1). As to limitation, he cited Lewin on Trusts (9th Ed.), p. 155; *Kherodemoney* v. *Doorgamoney* (2).

JUDGMENT.

CANDY, J.—This is at first sight a simple case, but it involves the consideration of an important question.

By an indenture, dated 24th January, 1888, Cowasji Nowroji Pochkhanawalla gave and transferred to himself and to Rustomji Dosabhoy Setna and to another (since deceased) two Government promissory notes of the nominal value of Rs. 10,000 in order that the property in the said notes should be absolutely vested in the said transferees and should no longer in any way belong to the transferor or form part of his estate or ever revert thereto, any rule of law or equity to the contrary notwithstanding, but that the notes should be held in trust by the transferees, who should pay the interest thereof to the transferor during his natural life, to be spent by him in the following way, *viz.*, Rs. 10, on anniversary days of his deceased relatives, and of his present wife when deceased "accompanied with a suit of clothing called Sheeao, according to the Zoroastrian religion," and Rs. 180 every year for the "Chaloo Daroon" ceremonies, and the remainder **[515]** for the annual "Mookhtad" ceremonies, and after the transferor's death the trustees were to pay the interest to his widow for the same uses and for the same purposes, and on her death to pay the interest to other persons named for the same uses and purposes, due arrangement being made for the continuation of the trust in perpetuity.

The transferor, Cowasji Nowroji Pochkhanawalla, brought this suit on 3rd October, 1895, against his surviving trustee R. D. Setna, reciting the indenture above described and stating that the Government notes had been sold by him (the plaintiff) and the proceeds invested in two shares of the Bombay and Burmah Trading Corporation, Limited, now of the nominal value of about Rs. 11,000, the shares being in the name of the plaintiff, but remaining in the custody of the defendant.

The plaintiff states in his plaint that he and his co-trustee (defendant) are advised that all the trusts created by the said deed are by law invalid.

(1) 42 Ch. D. 312.

(2) 4 C. 455 (465).

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and that the plaintiff is entitled to the said shares in his own right. He, therefore, prays that it may be declared that the trusts created by the deed are void, and that the deed is inoperative and of no effect, and that it may be declared that the plaintiff is entitled to receive the shares and to hold the same in his own right freed from the trusts; and the plaintiff prays for the possession of the said shares.

The defendant submits himself to the judgment of the Court, but his counsel suggested first that the trusts are valid, the property being cash and not landed property; secondly, that in any event plaintiff's present claim is barred by limitation.

The first question can be easily disposed of. There is no authority for holding that the property which cannot be tied up for a period exceeding the limit allowed by the rule against perpetuities, is real property, and that the rule cannot be applied to a fund which is not of the nature of a real property. Thus to take the oft quoted case of *Hoare* v. *Osborne*(1), the property in question was 3 per cent. consolidated annuities. Sir R. T. Kindersley, V. C., began his judgment thus:—"The cases which have been cited clearly determine that a gift of a sum of money is void, **[516]** not being a charity." So, too, the illustrations to s. 101 of the Succession Act all relate to "a fund"; s. 14 of the Transfer of Property Act (IV of 1882) relates simply to "property," which may be moveable or immoveable. There is no rule of law more absolute than that all property, whatever be its nature, must be alienable within a life in being and 21 years after (see per Malins, V. C., in *Cooper* v. *Laroche* (2)). There can be no doubt that the objects of this settlement admittedly not being "charity" so as to avoid the rule against perpetuities, the settlement is void.

But it is suggested that the plaintiff's present suit to recover the *corpus* of the fund is barred by limitation, and the point having been brought to the notice of the Court, I cannot avoid considering it.

In discussing the question of limitation, the learned counsel took it for granted that, if limitation applied at all, then the article of the Limitation Act (XV of 1877) applicable to this case would be art. 120. The time from which the perod of limitation under that article begins to run is "when the right to sue accrues." It was contended that here the plaintiff's right to sue accrued when he demanded the money. But this is clearly not so. When the Legislature intends demand and refusal to be the starting point of limitation, this is clearly indicated in the last column of the second schedule of the Act. In the present case the plaintiff's right to the *corpus* of the fund accrued directly he had transferred it to the trustees. There was at once a resulting trust in his favour. If art. 120 of the Limitation Act applies, then the suit became barred six years after the date of the deed.

It may be remarked that no mention is made in the plaint as to any mistake, and the suit cannot be regarded as one for relief on the ground of mistake. The plaintiff simply says that he is advised that the trusts which he purported to create are wholly void. No doubt art. 96 of Act XV of 1877 applies to both mistakes in fact and in law; and as Lord Chelmsford said in *Earl Beauchamp* v. *Winn*(3), "there are many cases found in which equity, upon a mere mistake of the law, without the **[517]** admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake." But that principle

(1) L.R. 1 Eq. 585. (2) 17 Ch. D. 368 (372). (3) L.R. 6 H.L. 223 (234).

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would hardly apply to the present case, in which the conveyance creating the illegal trusts was executed in January, 1888—apparently drawn by a solicitor of this Court—while in February, 1887, there had been a decision of this Court (*Limji Nowroji Banaji* v. *Bapuji Ruttonji* (1)) that the objects of such a trust were not valid charities. This is very different from the case above quoted in which Lord Chelmsford went on to say: "Therefore, although when a certain construction has been put by a Court of law upon a certain deed, it must be taken that the legal construction was clear. Yet the ignorance, before the decision, of what was the true construction, cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed." The case, therefore, must be considered on the assumption that art. 120 applies, and that the right to sue accrued when the plaintiff had the right to demand back from the defendant the *corpus* of the fund in 1888.

But it was contended that no limitation would apply as provided by s. 10 of the Limitation Act (XV of 1877), which says that "no suit against a person in whom property has become vested in trust for any specific purpose.....for the purpose of following in his or their hands such property, shall be barred by any length of time." Here no doubt the property has become vested in defendant in trust for the specific purpose of paying over the interest thereof for certain religious uses and purposes. But defendant has never committed any breach of that trust. Plaintiff seeks to follow the property for purposes directly contrary to the trusts under which it was vested in defendant. It is evident that such a case is not within the terms of s. 10. In *Kherodemoney Dossee* v. *Doorgamoney* (2), Garth, C. J., said (p. 465): "I could have wished, in an equitable point of view, that the scope of that section had been considerably extended. But we are of course tied down to the words of the section, and are bound to see what their true meaning is.

[518] "I think, after much consideration, that what they mean is this; that where a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust (.....), the person or persons who for the time being may be beneficially interested in that trust may bring a suit against such trustee to enforce that trust at any distance of time without being barred by the law of limitation.

"That being the construction which I put upon s. 10, I consider that this case does not come within its scope. The specific purpose for which the defendant became a trustee * * * * was to carry out and protect the disposition of the property in favour of the testator's sister's sons." (That disposition was held to be illegal under Hindu law, and, therefore, there was a resulting trust in favour of testator's widow, who was his sole heir). "But the plaintiff's object is the very opposite of this. She is suing for the purpose of invalidating the disposition, in furtherance of which the trust was created. Her object is to defeat that trust, not to enforce it."

Markby, J., came to the same conclusion. He said (p. 470): "The trust which it is now sought to enforce had not been specified by the testator, and I, therefore, think that s. 10 does not apply to this case, and that the ordinary rules of limitation must apply."

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(1) 11 B. 441.

(2) 4 C. 455.

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The remarks of the Privy Council at p. 96 of *Balwant Rao* v. *Puran Mal* (1) show that the expression used by the Legislature "for the purpose of following in his hands such property" means for the purpose of recovering the property for the trusts in question, *i.e.*, for the purpose for which the property was specifically vested in the trustee. Whether in the case of a resulting trust, the trust is "express" or not, the purpose for which the property is sought to be recovered is certainly not "specific," within the meaning of s. 10, whether the purpose is directly contrary to the terms of the settlement which purported to create the trust. And this is the important distinction which distinguishes a case such as *Lister* v. *Pickford* (2) from the present case. In *Lister* v. *Pickford* (2) the trustees in 1850 entered into possession *bona fide*, **[519]** believing that they did so on behalf of Miss Lister. As a fact, according to the true construction of the will creating the trust, the real *cestui que trust* was M. H. Lister. The Master of the Rolls said: "A trustee who is in possession of land is so on behalf of his *cestui que trust*, and his making a mistake as to the persons who are really his *cestui que trustent* cannot affect the question."

Next it is said: in the present case the plaintiff, the settlor, is one of the trustees, and from the date of the settlement he has been receiving the interest of the fund; how can his co-trustee set up a plea of limitation? The answer to this question may be gathered from the case of *Churcher* v. *Martin* (3). In that case real estate was by deed expressed to be conveyed to trustees upon charitable trusts. The deed was not enrolled, and the grantor died within a year after the execution of the deed. It was held that the deed was not voidable only, but was absolutely void under 9 Geo. II, c. 36, s. 3. The trustees, however, on the death of the grantor in November, 1868, had entered into possession and applied the rents and profits according to the trusts of the deed. Emmanuel Churcher was one of the trustees, and he was also general devisee and legatee of the grantor. He died in 1887, and the executors under his will sued the trustees for a declaration that the charitable trusts were void, and they claimed a conveyance and assignment of the property. The trustees pleaded that the property had been continuously held by them, or some of them, for more than twelve years for the purposes of the trusts of the deed of 1868 (which was held void) and pleaded the statutes of limitation.

Counsel for plaintiffs urged (p. 315): "There is no authority for saying that a trustee who has employed land in charity for twelve years has established a charity. The trust here is express—Lewin on Trusts (8th Ed., p. 878"); (this apparently is a mistake for p. 877); "and they can have no title except as trustees. The trustees are the legal owners and have been in possession, and the Court does not inquire in that case under what title they come in and will hold them trustees. Or in another point of view, they have been mere licensees, and have employed the rents with the **[520]** asset of the owner, Emmanuel Churcher, one of them. That cannot give adverse title."

On this Kekewich, J., said (p. 318):—

"It has been proved that shortly after the execution of the deed of the 22nd of January, 1868, the trustees of that deed entered into possession of the property which it purported to convey, and that as regards so much thereof as is claimed by the plaintiffs in this action the trustees for

(1) 11 I.A. 90. (2) 34 Beav. 576. (3) 42 Ch. D. 312.

the time being (not all the same persons throughout) had been in uninterrupted possession for upwards of twelve years before writ issued. It has further been proved that they have thus been in possession on behalf of the charity which the deed purports to constitute, and they say that such charity has been thus established. Into this I need not enquire, because the trustees and the Attorney-General combine in their defence to the action, and no question arises between them ; but the application of the money coming to the trustees' hands is nevertheless of importance as regards Emmanuel Churcher, who was himself one of them. Apart from that accident, why should not this uninterrupted possession confer a prescriptive title as against the plaintiffs, who, without tracing the devolution about which there was no contest, may be treated as being the devisees of him who would now be entitled to the property comprised in the deed of the 22nd of January, 1868, had that deed never been executed. The plaintiffs' answer is that the possession of the trustees is the possession of the *cestui que trust*, and *Lister* v. *Pickford* (1) was cited. The general proposition is true enough, and might be supported by other authorities, but what is the application in the present case (I will assume that those in possession were trustees in the proper and full sense of the term) ? How can the possession of the trustees enure to the benefit of him whose title was intended to be defeated by the deed which created the trust ? How can the grantor (for Emmanuel Churcher may be considered the grantor) be their *cestui que trust* ? Because, it is urged, there is an express trust in his favour, an express trust necessarily resulting from the failure of those declared. It would suffice to reply that such a resulting trust is implied by law, and that whatever else it may be, it is not an express trust ; but as *Salter* v. *Cavanagh* (2) was referred to, I may point out that the trust there spoken of as express was one inferred from the deed, and discoverable on the face of it, and not as here a trust against the deed and due only to the fact that the deed is void. This seems to have been appreciated by the learned author of the text-book which was mentioned."

This last remark evidently refers to a passage on p. 877 of the 8th Ed. of Lewin on Trusts, in the note (*c*) (see 9th Ed., p. 999, note D) to which *Salter* v. *Cavanagh* (2) is quoted. The passage runs :—"It is not necessary to use the word *trust* in order to create an express trust within the meaning of the statute (*Commissioners of Charitable Donations* v. *Wybrants* (3), but any language that would in equity raise or imply a trust will be deemed an express trust. If, therefore, land be devised to a person upon trust to receive the rents and thereout to pay certain annuities, the surplus [521] rents result to the heir-at-law upon the face of the instrument, and this being an express trust, the heir-at-law, in a case falling within the section, will not be barred by any length of possession by the trustee (2)."

That was exactly the case of *Salter* v. *Cavanagh* (2). It was a resulting trust upon the face of the instrument.

Then as to the argument that the trustees may have been mere licensees, Kekewich, J., said (p. 319) :—

"There is still one argument to be noticed, and one deserving more consideration : 'From the date of the deed until his death in 1887 Emmanuel Churcher was one of the trustees,—one of the persons jointly

(1) 34 Beav. 576. (2) 1 D. and Wal. 668. (3) 2 Jon. and Lat. 197.

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in possession—and it is said that he cannot be taken to have assisted others in acquiring a title against himself. The law, it is urged, adjudges the possession to be that of him who has the right; and the proper inference is that Emmanuel Churcher's co-trustees were in possession with his license and not adversely to him.' If Emmanuel Churcher had been the sole trustee the aspect of the case would have been very different, but here he was one of several; receiving rents and performing acts of ownership without the slightest reservation or indication of beneficial claim, and unless I am bound to regard the physical identity of the beneficial owner with one of the trustees as prevailing to the disregard of the facts and substance of the story, I must treat Emmanuel Churcher the beneficial owner as excluded from possession for twelve years and upwards, notwithstanding that Emmanuel Churcher the trustee took an active part in the management of the estate. Am I so bound? Trustees are not a corporate body; there is no aggregate existence independent of the individual members; but, on the other hand, they are joint owners of the trust property, and they cannot act otherwise than jointly, even though frequently and for many purposes one member of the body represents the others. It seems to me consistent with principle to hold that the joint possession excludes that of any one of the joint possessors on his own behalf, and no authority was cited or has occurred to me inconsistent with that view. My conclusion, therefore, is that the accident of Emmanuel Churcher's beneficial interest did not operate to defeat the title of the trustees which he intended to preserve."

If this reasoning is sound (the decision was quoted in the subsequent case of *Pattrick* v. *Simpson* (1) as good law), then it is impossible not to apply it to the present case. Plaintiff has, by the terms of the deed, been one of the trustees of the trust specified in the deed. Also he has been the conduit pipe for the disposal of the interest arising from the trust funds to the religious purposes which are the objects of the trust. How can that possession enure to the benefit of the plaintiff who now says that the trust was *ab initio* void, and that he has always been and is absolutely [522] entitled to the whole *corpus* of the fund? No doubt the result is startling, but the Court has to administer the law as it is, and not according to a result, which possibly may be due to the too narrow terms of a section of a statute. The learned counsel for the plaintiff submitted whether it would not be inconsistent to establish as a perpetual charity that which is really no charity at all. Here the deed is void, not on account of any absence of certain formalities under any statute such as the Mortmain Act, but it is in itself void as creating a perpetual trust which the law does not recognize. The answer to this question is that the deed is neither more nor less void than was the deed in the case of *Churcher* v. *Martin*, in which it was held that the deed was void altogether. Kekewich, J., refused to consider the question whether the effect of his decision would be to establish the charity. I must follow the same course.

Holding the claim to be barred by limitation, I must dismiss the suit. Under the particular circumstances of the case, the costs of both sides as between attorney and client may come out of the estate

Suit dismissed.

Attorneys for the plaintiff :—Messrs. *Pestanji, Rustim and Kola.*
Attorneys for the defendant :—Messrs. *Edgelow and Gulabchand.*

(1) 24 Q.B.D. 128.

20 B. 522=Chitty's S.C.C.R. 460.

SMALL CAUSE COURT REFERENCE.

Before the Honourable Chief Justice Farran and Mr. Justice B. Tyabji.

HAJI ESSA SULLEMAN (*Plaintiff*) *v.* DAYABHAI PARMANANDAS AND OTHERS (*Defendants*).* [6th December, 1895.]

Vendor and purchaser—Concealment of claim against property—Whether such concealment entitles purchaser to rescind—Transfer of Property Act (IV of 1882), s. 55—Meaning of words "material defects."

The expression " material defect " in s. 55 of the Transfer of Property Act (IV of 1882) includes a defect in the title to an estate.

CASE stated for the opinion of the High Court under s. 69 of the Small Cause Court Act (XV of 1882) by R. M. Patel, Second Judge:—

[523] "The defendants are executors to the estate of one Dayabhai Tribhovandas and the plaintiff is a purchaser from them of a piece of land at Memon Mohla at an auction sale held on the 6th March, 1894. The plaintiff agreed to purchase the property at Rs. 2,900, and deposited Rs. 500 by way of earnest-money. He now seeks to rescind the contract of purchase and to recover back the deposit with interest and charges. He claims in all Rs. 584-8-0 and costs. One of the conditions of sale was that the vendors sold as trustees, and would give such title as they had, and the purchaser should not raise any objection to their title, or make any requisition thereon, but should accept such title as they had or could give. The property having been in litigation for years, the plaintiff added a clause to his signature with the consent of the vendors as follows:—'If there be any claims or disputes about the house, the vendors will clear the same.' The case was argued on both sides, treating this clause as one of the conditions of sale.

"2. The plaintiff sought to rescind the contract on three grounds, two of which I decided against him and in favour of the defendants. The third point I decided in favour of the plaintiff, *viz.*, that one Jackaria Moosa had laid a claim to the property as equitable mortgagee to the extent of Rs. 500 and interest thereon, and defendants had taken no steps to clear or dispose of the same; and that the said claim was known to the defendants before the date of the auction-sale, but they had failed to inform the purchaser or to notify it to him, and that the contract of sale was thereby vitiated under s. 55 of the Transfer of Property Act.

"3. The premises were originally mortgaged to the defendants' testator by one Hazrabai under a deed of mortgage dated 4th of January, 1871. Jackaria Moosa alleges that the testator had during his life-time raised a loan from him of Rs. 500 and delivered to him the said mortgage-deed by way of equitable mortgage, and Jackaria still continues in possession of the said deed. In January, 1894, the defendants attempted to sell the premises to one Hasandada, and Jackaria Moosa then gave notice of his claim as equitable mortgagee to the intending purchaser. Correspondence passed between the solicitors to the defendants and Jackaria [524] Moosa, and on the 2nd of February, 1894, the former wrote to Jackaria Moosa's solicitors that their client had made a false claim, and if the deed of mortgage was not returned and given up, "steps might be taken to compel

* Small Cause Court Reference, No. 11648 of 1895.

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20 B. 522 = Chitty's S. C. C. R. 460.

its delivery." The bargain with Hasandada fell off and no step, or legal proceedings, as threatened, having been taken, Jackaria Moosa continued in possession of the deed. Jackaria must be, therefore, presumed to have a subsisting claim as an equitable mortgagee.

"4. It is admitted that at the auction-sale which subsequently took place on the 6th of March, 1894, no notice or information was given by the defendants or their auctioneer of the claim that had been set up by Jackaria Moosa. Nor was plaintiff aware of the claim till some time, in response to a *battaki* beaten as usual, Jackaria Moosa again sent a notice of his claim through his solicitors to the municipal assessor. That claim was brought to the notice of the defendants, but they took no steps whatever, and simply relied on the correspondence that had previously passed.

"5. Under s. 55 of the Transfer of Property Act I was of opinion that the expression 'material defect in the property' included 'material defect in title,' and that under the last clause of the same section the *omission* to disclose any material defect in title was fraudulent. I held that any omission, *i.e.*, concealment or suppression of a material fact affecting the title made from mere inadvertence or even from accident, should be treated as fraudulent under s. 55, as that section did not require any active concealment of a fact as provided for by s. 17 of the Contract Act. I was of opinion that all omissions to disclose a material defect, whether through carelessness or design, were to be considered fraudulent so as to avoid the contract at the option of the purchaser (see Pollock on Fraud, p. 98). The value of the premises being Rs. 2,900, and the alleged claim of Jackaria Moosa having been over Rs. 500, the disclosure of the claim made by him, if made at the time of the auction-sale, might have induced the purchaser to avoid the contract on account of the alleged incumbrance and apprehended litigation; or it might probably have persuaded him to offer a lower value. On the authority of *Pearee Mohun* v. [525] *Abdool Sobhan* (1) I held that the neglect on the part of the defendants to disclose the fact of the claim of Jackaria Moosa was a fraudulent concealment, and vitiated the contract. I may be permitted to say I also relied on *Waddell* v. *Wolfe* (2); *Mostyn* v. *The West Mostyn Coal, &c., Company* (3); *Nottingham Patent Brick and Tile Company* v. *Butler* (4); and on *Gajapathi* v. *Alagia* (5) and *Morgan* v. *The Government of Haidarabad* (6). I gave verdict for plaintiff for Rs. 584-8, &c.

"6. As the defendants' solicitor has proposed questions (iv) and (v), it is necessary to state that during his life-time the testator Dayabhai had filed a suit, No. 170 of 1875, on the said mortgage in the High Court, and under a decree obtained therein the premises in question were sold, and Dayabhai purchased the same with leave of the Court and obtained a certificate of sale dated the 2nd August, 1887. Amongst the documents of title now in the possession of the defendants, the said mortgage-deed of the 4th January, 1871, has been missing, and it is now in the possession of Jackaria Moosa. No evidence whatever was given by the defendants to show that Jackaria Moosa was aware of the existence of the High Court suit, or of the decree, or of the subsequent purchase of the property under the said certificate of sale by the testator Dayabhai. Nor was the point raised by question (v) argued and pressed as therein suggested.

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(1) 7 W.R. 258. (2) L.R. 9 Q.B. 515. (3) 1 C.P.D. 145.
(4) 16 Q.B.D. 778. (5) 9 M. 89. (6) 11 M. 419.

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"7. At the request of the defendants' solicitor, I beg respectfully to submit the following questions for the opinion of their Lordships :—

"(i) Whether under the circumstances of the case the alleged claim of Jackaria Moosa amounts to a 'material defect in the property' in terms of s. 55 of the Transfer of Property Act ?

"(ii) Whether, having regard to the conditions of sale (Ex. D), the defendants were bound to remove the claim put forward by the said Jackaria Moosa ?

"(iii) Whether the defendants were bound to disclose to the plaintiff before the auction-sale the claim made by the said [526] Jackaria Moosa, and whether by the reason of the non-disclosure of the said claim, the plaintiff is entitled to rescind the contract and claim his deposit with interest and costs ?

"(iv) Whether the deed dated 4th January, 1871, which is in the possession of Jackaria Moosa is a document by the deposit of which an equitable mortgage of the property could be created, having regard to the fact that a decree in the High Court suit No. 170 of 1875 was passed upon the said mortgage and a certificate of sale issued to the said Dayabhai on his purchasing the said property under the said decree ?

"(v) Whether, having regard to the said decree and certificate, the said mortgage is extinguished so as to cease to be a document of title to the property by the deposit of which an encumbrance could be created ? "

The following were the conditions of sale under which the property in question was sold :—

"The highest bidder shall be declared to be the purchaser, and if any dispute shall arise between two or more bidders the property shall be immediately put up again at the last preceding bidding and re-sold.

"2. The purchaser shall pay immediately into the hands of the auctioneer a deposit of Rs. 25 per cent. in part payment of the purchase-money and sign an agreement for payment of the remainder to the vendors or their solicitor within one month from the day of the date of the sale. If from any cause whatever the purchase shall not be completed within the aforesaid time, the purchaser shall pay to the vendors interest at the rate of 12 per cent. per annum on the remainder of the purchase-money from the date of sale until the purchase shall be completed. This condition is to be without prejudice to the seventh condition.

"3. The purchaser shall prepare a conveyance of the property purchased by him at his own expense, the same to be approved of by the vendors, and on payment of the remainder of the purchase-money the same when tendered shall be executed by the vendors.

"4. The vendors shall as trustees of the estate of the late Dayabhai Tribhovandas and will give such title only as they have. The purchaser shall not raise any objection to their title or make any requisition thereon, but shall accept such title as they have or can give.

"5. The description of the property as contained in the particulars is believed to be correct, but if any error or mis-statement or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof.

"6. If the purchaser shall neglect or fail to comply with the above conditions or any one of them the deposit money shall be forfeited and the vendors shall be at liberty [527] to re-sell the said property by public auction without previously tendering any conveyance to the purchaser,

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and the deficiency in the amount of the purchase-money, if any, together with all charges attending the re-sale shall be made good by the purchaser at the re-sale and be recoverable by the vendors, and for liquidated damages.

"7. The vendors will give possession of the property to the purchaser on his paying the full purchase-money and tendering a proper conveyance to the vendors for execution.

"8. The vendors as aforesaid are the trustees of the estate of the late Dayabhai Tribhovandas, and they will not enter into any covenant other than usually necessary to be inserted in the conveyance.

"9. The purchaser shall besides the expenses of the preparation and execution of the conveyance bear the stamp fees and expenses of registration and all other costs of and incidental to the completion of the purchase and the transfer of the property to his name in the book of the Fazendar and Municipality of Bombay."

After the sale the plaintiff signed the following document :—

"I, Haji Essa Sulleman of Bombay, hereby acknowledge that on sale by auction this 6th day of March, 1894, of the property mentioned in the foregoing particulars, I was the highest bidder for and was declared the purchaser thereof, subject to the foregoing conditions of sale, at the price of Rs. 2,900 only, and that I have paid the sum of Rs. 500 only deposit and in part payment of the said purchase-money to Mr. Bomanji Dossabhoy, the auctioneer, and I hereby agree to pay the remainder of the said purchase-money and complete the said purchase according to the foregoing conditions.

"(Signed) ABDULLA HAJI
for HAJI ESSA SULLEMAN.

"Witness :
"TULSIDAS JAKISONDAS."

"If there is any claim in connection with this house, then the same is to be cleared by the seller at his own expense.

Lowndes, for defendants.—The questions are (1) Is the plaintiff as purchaser entitled to rescind his contract of purchase, because of concealment of a material defect in the property ? (2) Can he rescind on the ground that the defendants have not declared the property of Jackaria's claim ? We contend he is not entitled to rescind. We say s. 55 of the Transfer of Property Act (IV of 1882) does not apply to this case. The section does not include defects of title. *Dixon* v. *Muckleston* (1); Transfer of Property Act (IV of 1882), s. 108 ; Specific Relief Act, I of 1877, s. 18, cls. (*c*) and (*d*) and s. 22.

Even if it is a defect, it is not a material defect. The mortgage-deed is not a document of title—Transfer of Property Act [528] (IV of 1882), s. 59 ; Dart's Vendors and Purchasers (6th Ed.), p. 1233. The contract will only be rescinded if the defect is material, *i.e.*, when the purchaser does not get the thing he contracted for—*Mostyn* v. *The West Mostyn Coal, &c., Company* (2) ; *Nottingham Patent Brick, &c., Company* v. *Butler* (3) ; *Gajapathi* v. *Alagia* (4) ; *Morgan* v. *The Government of Haidarabad* (5) ; *Waddell* v. *Wolfe* (6).

Scott, for plaintiff.—We contend that this is a material defect in the property within s. 55 of the Transfer of Property Act (IV of 1882)—*Pearee*

(1) L.R. 8 Ch. 155. (2) 1 C.P.D. 145. (3) 16 Q.B.D. 778.
(4) 9 M. 89. (5) 11 M. 419. (6) L.R. 9 Q.B. 515.

Mohun v. *Abdool Sobhan* (1). The plaintiff knew of the claim and did not disclose it—Contract Act (IX of 1872), s. 17. It was a claim which was likely to produce litigation. The deposit of the mortgage-deed would be an equitable mortgage—*Russell* v. *Russell* (2); *Venkatachella* v. *Pan Janadien* (3); *Ex-parte Chippendale* (4); *Ex parte Arkwright* (5); *Roberts* v. *Croft* (6); *Dixon* v. *Muckleston* (7).

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SMALL CAUSE COURT REFERENCE.

20 B. 522 = Chitty's S. C. C. R. 460.

JUDGMENT.

B. TYABJI, J.—This is a reference to the High Court under s 69 of the Small Cause Court Act (XV of 1882) by the learned Second Judge, Mr. Rustomji Merwanji Patel. The first question we have to answer is whether, under the circumstances stated in the case submitted to us, the alleged claim of Jackaria Moosa amounts to a "material defect in the property" within the meaning of s. 55 of the Transfer of Property Act (IV of 1882). This question sub-divides itself into two questions :—

(*a*) Whether the expression "defect in the property" includes defects not in the estate itself, but in the title to such estate, and

(*b*) Whether if so, the alleged defect in this case, namely, the existence of the mortgage-deed dated 4th January, 1871, and its alleged deposit with the said Jackaria Moosa by way of an equitable mortgage for Rs. 500 is "material" within the meaning of the same section.

[529] The learned Second Judge has held that a defect in the property includes a defect in title under s. 55, and although this construction was not pressed upon us by Mr. Scott, who argued the case on behalf of the plaintiff before us, we still think it our duty to consider and decide the question as it has been specifically put to us by the learned Judge.

Although at first sight it seems somewhat straining the meaning of the words "defects in the property" to hold that they include defects in the title to the property, yet, after a careful consideration of the whole of s. 55 and other sections of the Act bearing on the question, we have come to the conclusion that the construction put upon the words by the learned Second Judge is correct.

Mr. Justice Shephard and Mr. Brown in their learned Commentary upon the Transfer of Property Act, p. 145, say: "There may be some doubt whether defects not in the estate itself, but in the title, are intended to come within the clause,— whether the duty, imposed on the vendor, relates to matters other than those of the class referred to in s. 108. It is apprehended, however, that the term is not to be so restricted, and that an omission to disclose flaws in the title or incumbrances, which the purchaser has no apparent means of discovering, might equally be fraudulent under the section. In England, positive fraud is not necessary to entitle a purchaser to relief; it is enough if he proves concealment, on the seller's part, of a material defect in the title. And it is not competent to a vendor failing to disclose such a defect to put forward conditions of sale which are to force bad title upon his purchaser."

We consider that the above statement of the law is borne out by the English authorities.

In Sugden's Law of Vendor and Purchaser, (14th Ed.), p. 5, the doctrine is broadly stated in these terms: "The same rule applies to incumbrances and defects in the title to an estate as to defects in the estate itself. The

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(1) 7 W.R. 258. (2) White and Tudor's Leading Cases (6th Ed.,) Vol. I, p. 773.
(3) 4 M. 213. (4) 2 Montague Ayrton, 299. (5) 3 Mont. D and DeG. 129.
(6) 2 DeG. and J. 1. (7) L.R. 8 Ch. 155.

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vendor is bound to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise, or to acquaint him with the facts if they do not appear on the title deeds. If a seller knows [530] and conceals a fact material to the title, relief cannot be refused to the purchaser."

Again in Dart, p. 105, we find it laid down: "As to incumbrances and defects in title—a vendor, so far as his *prima facie* liability in this respect is not negatived or restricted by the terms of the contract, must produce to the purchaser all such documents of title in his possession or power as are necessary, and must inform him of all material facts not apparent thereon."

In *Mostyn* v. *West Mostyn Coal and Iron Company* (1) Mr. Justice Brett says: "Now although there is a statement that plaintiff knew and defendants did not and could not know of the want of title to part of the demised premises, and that such a want of title was in respect of a part material to the enjoyment of the rest, still there is no allegation of anything amounting to fraud on the part of the plaintiff. The question is whether a Court of Equity would, if a bill had been filed containing a statement of these facts, set aside the lease. If so, then there is a good *prima facie* answer to the action. I think the passage from Sugdon's Vendor and Purchaser, (14th Ed.), p. 246, and the case of *Edwards* v. *McLeay* (2) are authorities to show that equity in such a case as this will set aside the transaction. * *" In *Edwards* v. *McLeay* the Master of the Rolls (Sir William Grant) says: "Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine, but if he knows of and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser.

Again Archibald, J., at p. 153 said: "Where there has been concealment of a material fact, though it may not amount to affirmative fraud and though there has been no eviction, a Court of Equity will set aside the lease."

In *Nottingham Patent Brick and Tile Company* v. *Butler* (3), Lord Esher, M.R., said: "It seems to me an astounding proposition that a vendor can by means of such conditions of sale force upon a purchaser a defective title, even though he (the vendor) know the defect. Now, that Butler did know of the defect seems [531] to have been assumed by Wills, J.; if you treat him as dealing himself with the purchasers he knew of the defect and if the conversation between his solicitor and the plaintiffs' solicitor, at which he was present, amounted to nothing at all, then it comes to this that he, knowing the defect, by his agent put forth the condition of sale. If that is so, the case is absolutely within the authority of *Haywood* v. *Mallalieu* (4) as it seems to me. It is impossible for a vendor, knowing of a defect in his title, either by himself or his agent to put forward conditions of sale which are to force upon a purchaser a bad title of which he knew, but which he did not disclose. A Court of Equity would not be of much use if it could not meet such a case as that, and it seems to me clear that a Court of Equity would never have enforced a contract under such circumstances."

The case of *Gajpathi* v. *Allagia* (5) is an illustration of the same doctrine, as applied by the High Court of Madras in India. There a Hindu

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(1) 1 C.P.D. 151. (2) G. Coo. 308; 2 Sw. 287. (3) 16 Q.B.D. 786.
(4) 25 Ch. D. 357. (5) 9 M. 89.

had executed a sale-deed of a house in the Mofussil. The deed contained no covenant for title. The purchaser having been evicted from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Munsiff decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree. On appeal the District Judge reversed this decree, holding that as the purchaser had not insisted on a covenant of title, he must be held to have accepted all risks. It was, however, held by Hutchins and Parker, JJ., that, if there had been fraudulent concealment as alleged, the purchaser was entitled to damages. At p. 91 the learned Judges say that "it appears to us that if the respondent did conceal from the appellant the existence of the decree for partition, he was guilty of fraudulent concealment and is bound to refund the purchase-money. In the absence of positive law, we are bound in this country to apply the principles of good conscience and equity * * . Even under English law the vendee is bound to make compensation for a fraudulent concealment of a defect in the title or of any incumbrance .....Although a purchaser cannot ordinarily obtain relief against a vendor for any incumbrance or defect in the title to [532] which his covenants do not extend, an exception is made to this rule in the case of a vendor, or his agent suppressing an incumbrance or a defect in the title...Even though the purchase-money has been paid and the conveyance executed by all the parties, yet if the defect do not appear on the face of the title deeds, and the vendor was aware of the defect, and concealed it from the purchaser, he is in every such case guilty of fraud and the purchaser may either bring an action on the case or file his bill in equity for relief."

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Again in *Peeree Mohun Soor* v. *Abdool Sobhan* (1) it was held by Trevor and Glover, JJ., that where a vendor knowing that he had no right or title to property or being cognizant of the existence of incumbrances or of latent defects materially lowering its value, sold it, and neglected to disclose such defects to the purchaser, there was a fraudulent concealment vitiating the contract.

Again under the Specific Relief Act (I of 1877), ss. 17 and 18, a contract of selling or letting is declared not to be enforceable in favour of a vendor or lessor who knowing himself to have no title to the property has contracted to sell or let the same; and in cl. (*d*), s. 18, it is laid down that "where the vendor or lessor sues for specific performance of contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to return of his deposit with interest and costs."

Further, it is to be observed that in s. 108 of the Transfer of Property Act (IV of 1882) the duty of the lessor is confined to disclosing the defects "in the property with reference to its intended use," which latter words are obviously inserted to exclude defects in the title of the lessor being disclosed to the lessee.

Moreover, cl. 5 of s. 55 of the Transfer of Property Act, which deals with the corresponding duty of the buyer, in express words casts upon him the duty of disclosing to the seller "any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware and which materially increases the value of such interest." It is difficult

(1) 7 W.R. 258.

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to believe that the Legislature would have cast upon the buyer the [533] duty of communicating facts relating to the seller's title without casting a similar duty upon the seller himself.

On the whole we believe that cl. 1 (*a*) of s. 55 casts upon the seller the duty of disclosing to the buyer all defects whether in the title or in the estate itself, while cl. 5 (*a*) casts upon the buyer only the duty of communicating facts relating to the nature and extent of the seller's interest, and not relating to the property itself.

For the reasons above given, therefore, we are of opinion that the words "defects in the property" include defects in the title.

The next question is whether the alleged claim of Jackaria Moosa is a "material defect," the non-disclosure of which vitiates the whole contract. We are of opinion that under the circumstances of the case the alleged claim does not constitute a material defect, as, even if well founded, it is a defect which the vendor could readily remove and the conditions of sale bind him to do so, and it bears only a small proportion to the purchase-money, out of which it can be cleared by the purchaser himself.

The second question is whether, having regard to the condition of sale, the defendants were bound to remove the claim put forward by the said Jackaria Moosa. We answer this question in the affirmative. The defendants were bound to remove the claim if requested so to do by the plaintiff, and if they refused, the plaintiff was entitled to rescind.

The third question is whether the defendants were bound to disclose to the plaintiff, before the auction-sale, the claim made by the said Jackaria Moosa, and whether by reason of the non-disclosure of such claim the plaintiff is entitled to rescind the contract and claim his deposit with interest and costs.

We have already answered this question so far as s. 55 of the Transfer of Property Act is concerned. As regards the Indian Contract Act, the answer depends upon the inference to be drawn from the facts. If the non-disclosure amounts to fraud within the meaning of s. 17, Indian Contract Act, the plaintiff would be entitled to rescind the contract under s. 19 of that Act. Under the circumstances of this case, however, we do not [534] think that such fraud can be inferred as a conclusion of law, and we, therefore, answer this question in the negative.

The fourth question is whether the mortgage-deed, dated 4th January, 1871, which is in the possession of Jackaria Moosa, is a document by the deposit of which an equitable mortgage of the property could be created having regard to the fact that a decree in High Court Suit No. 170 of 1875 was passed upon the said mortgage and a certificate of sale issued to the said Dayabhai on his purchasing the said property under the said decree.

The answer to this question depends upon whether or not the alleged deposit was made before the decree. If it was, the deposit would effect, of course, an equitable mortgage; and, even if made after the decree, it would be effectual if the deposit were made without informing the intended equitable mortgagee of the decree.

The fifth question is whether, having regard to the said decree and certificate, the said mortgage is extinguished so as to cease to be a document of title by the deposit of which an incumbrance could be created. Our observations on the fourth question sufficiently answer this question also.

Attorneys for the plaintiff:—Messrs. *Brown and Moir.*

Attorneys for the defendants:—Messrs. *Edgelow and Gulabchand.*

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

VASUDEV MORBHAT KALE (*Original Plaintiff*), *Appellant v.* KRISHNAJI BALLAL GOKHALE AND OTHERS (*Original Defendants*), *Respondents.** [14th February, 1895.]

Minor—Guardian—Act XX of 1864, *s.* 2—*Decree to bind minors—Debts contracted for immoral and improper purposes—Burden of proof not shifted by proof of immoral habits.*

In execution of a decree against the estate of Vishnu Bhikaji his estate was sold and it ultimately came into the hands of the plaintiff as purchaser, who sued for partition. It was contended that two of the defendants, parties to the suit in which the decree was passed, being then minors were not properly represented by their **[535]** mother, Gangabai, also a party defendant to the suit, she not having obtained a certificate of administration under Act XX of 1864, and that the decree did not, therefore, bind them, and also that the decree was in respect of debts contracted by Vishnu Bhikaji for immoral and improper purposes.

Held, that s. 2 of Act XX of 1864 did not apply, as though Gangabai had not obtained a certificate she did not claim charge of the estate.

Vijkor v. *Jijibhai* (1) and *Jadow* v. *Chhagan* (2), followed.

Held, also that an issue having been raised and determined in the suit in which the decree was passed that Gangabai did represent the minors as guardian for the suit, and as the decree expressly named them as sued by Gangabai, their guardian, the minors were expressly made parties and were properly represented by Gangabai.

Hari v. *Narayan* (3) and *Hari Saran* v. *Bhubaneswari* (4), followed.

Held, also, that proof of immoral habits in the debtor did not throw the *onus* on to the plaintiff and oblige him to prove that the debt was not incurred for an immoral or illegal purpose.

Chintamanrav v. *Kashinath* (5), followed.

[R., 4 O.C. 277 (279) **]**

SECOND appeal from the decision of J. FitzMaurice, Acting District Judge of Ratnagiri, in appeals Nos. 332 and 333 of 1889.

On 31st August, 1876, one Vishnu Babaji Joglekar obtained a money decree against the estate of one Vishnu Bhikaji Gokhale, deceased. In that suit the minor sons of the deceased (respondents Nos. 2 and 3) represented by their mother and guardian Gangabai (respondent No. 4) were defendants, but Gangabai had not at the date of the decree obtained a certificate of administration of the minors' estate.

In execution of that decree the estate of the deceased was sold at a Court-sale on 7th September 1877, and it ultimately came into the hands of the plaintiff as purchaser. He now sued for partition.

The defendants contended that they were not bound by the decree in suit No. 105 of 1875, inasmuch as their guardian Gangabai (respondent No. 4) had not then obtained a certificate of administration. They also contended that that decree was passed for debts contracted by their father, Vishnu Bhikaji, for immoral purposes and not for the benefit of the family.

[536] The Subordinate Judge of Rajapur awarded the plaintiff's claim.

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* Second Appeal No. 737 of 1891.

(1) 9 B H.C.R. 310. (2) 5 B. 306. (3) 12 B. 427.
(4) 15 I.A. 195. (5) 14 B. 320.

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APPELLATE CIVIL.

20 B. 534.

On appeal the District Judge reversed the decree of the Court of first instance with costs in both the Courts on plaintiff. From this decision the plaintiff preferred this second appeal to the High Court.

Setlur (with *Narayan Vishnu Gokhale*), for the appellant.

Macpherson (with *Manekshah Jehangirshah*), for the respondents.

JUDGMENT.

JARDINE, J.—The District Judge has held that the defendants Nos. 2 and 3, who were minors at the time decree was passed in suit No. 105 of 1875, are not bound by that decree, because they were not properly represented by their mother Gangabai (now defendant No. 4) who was a defendant in that suit.

She had not obtained a certificate, but as she did not claim charge of the estate, s. 2 of Act XX of 1864 did not apply—*Vijkor* v. *Jijibhai* (1); *Jadow* v. *Chhagan* (2).

It appears also that although Gangabai in her written statement in suit No. 105 of 1875 disclaimed to represent or to be responsible for the minors, an issue was solemnly raised and determined at that trial that she did represent them as guardian for the suit. The decree expressly names them as sued by Gangabai, their guardian. It is thus clear that these minors being expressly made parties, the case is stronger against them than against the minors in cases where they have not been made parties expressly but have been substantially parties represented virtually by guardian. Such are *Hari* v. *Narayan* (3), *Natesayyan* v. *Narasimmayyar* (4) and *Hari Saran* v. *Bhubaneswari* (5). In the last of these cases their Lordships of the Privy Council take notice that the suit in which the decree was obtained " was substantially brought against the minor," and that the trying Court had treated the mother as his guardian. These authorities are sufficient, as argued by Mr. Setlur, to show that the District Judge is wrong in holding that the minors were not represented in suit No. 105 of 1875.

There is no finding that the debt incurred by the deceased father was for an immoral or illegal purpose. The *onus* of proving that [537] was not shifted on to the plaintiff by proof of immoral habits—*Chintamanrav* v. *Kasinath* (6).

For the above reasons the Court reverses the decree of the District Judge and restores that of the Subordinate Judge. In the District Court the respondents to bear their own costs, and the respondents with the exception of Dhakta bin Soma Shinda to bear those of the appellant. The respondents in this Court to bear the whole cost of this appeal.

(1) 9 B.H.C.R. 310. (2) 5 B. 306. (3) 12 B. 427.
(4) 13 M. 480. (5) 15 I.A. 195=16 C. 40. (6) 14 B. 320.

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APPELLATE CIVIL.

APPELLATE CIVIL.

20 B. 537.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Parsons.

BHANU TUKARAM SHET AND ANOTHER (*Original Plaintiffs*), *Appellants v.* KASHINATH PANDSHET AND OTHERS (*Original Defendants Nos.* 1, 2 *and* 3), *Respondents.** [12th June, 1895.]

Civil Procedure Code (Act XIV of 1882), *s.* 32—*Practice—Procedure—Right of action—Suit by plaintiff having no interest in subject-matter—Joinder of a party co-plaintiff having interest.*

If a plaintiff at the time he brings his suit has no interest in the subject-matter thereof, the joinder of a person as co-plaintiff who has an interest cannot alter the plaintiff's position or confer on him any right of suit.

[F., 11 Ind. Cas. 223 ; R , 1 O.C. 10 (12) ; 3 O.C. 347 (349) ; Disappr., 12 C.L J. 537 (542) = 8 Ind. Cas. 87 ; D., 25 B. 433 (463); 7 O.C 193 (195).]

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnagiri, reversing the decree of Rao Bahadur Naro Mahadeo Thosar, First Class Subordinate Judge of Ratnagiri.

This action was originally instituted by plaintiff No. 1 praying for an account. He alleged that a certain shop at Ratnagiri belonged to him and his undivided cousin Dnyanoba, father of defendant No. 8 (Bhiku), till Dnyanoba's death on the 4th March, 1886 ; that defendant No. 1 was the gumasta of the shop and had managed it till Dnyanoba's death ; that defendant No. 2 was joined because he had obtained a certificate of administration of the estate of defendant No. 8 (Bhiku), who was a minor, and that defendant No. 3 had colluded to injure the interest of defendant No. 8 and the plaintiff.

[538] At an early stage of the proceedings, on the application of plaintiff's pleader the names of defendants Nos. 4, 5 and 6 were struck off.

Subsequently defendant No. 8 (Dnyanoba's son) consented to be joined as co-plaintiff on condition that any sum which might be awarded by the Court should be paid to him and not to the plaintiff who he alleged had no right to the shop.

The other defendants denied that plaintiff No. 1 had any right to sue.

The Subordinate Judge found that defendant No. 8 had been rightly made a co-plaintiff and that he and plaintiff No. 1 were undivided, and on taking accounts he held the plaintiffs entitled to Rs. 4,410-4-4 with costs and interest at 9 per cent. per annum, and gave a decree against defendants Nos. 1, 2 and 3.

Defendants Nos. 1 and 3 appealed and plaintiff No. 2 preferred cross objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

The Judge found (1) that the plaintiff No. 1 had not shown that he had a right to sue, (2) that the suit could not be brought in its present form, and (3) that it must be dismissed for multifariousness. He accordingly reversed the decree and dismissed the suit. His reasons are given in the following extracts from his judgment :—

"The present suit was instituted by plaintiff No. 1 alone on the 2nd March, 1889. Plaintiff No. 2 was sued as defendant No. 8, and when he expressly denied that plaintiff No. 1 was a member of the family or had any interest in the shop, it became evident that the suit could not in the first instance go on against the manager of the shop. Defendant No. 8 then

* Second Appeal No. 561 of 1893.

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agreed to be joined as co-plaintiff, and on the 22nd February, 1890, he was added as such, doubtless under s. 32 of the Civil Procedure Code. He still adhered to his plea against plaintiff No. 1 and only consented to join if any decree that might be passed were passed in his favour and no money paid to plaintiff No. 1. I think it unfortunate that this addition was made. If plaintiff had no right to sue in March, 1889, he could not acquire one by adding a co-plaintiff (I. L. R., 6 Cal., 370). If he had a right to sue, that right had to be proved against defendant No. 8, and even now, when a decree has been obtained, it is manifest that satisfaction cannot be had till plaintiffs have settled their differences. The Subordinate Judge has raised an issue between plaintiffs, not at their own request, but at the instance of defendant No. 1, who is interested in denying plaintiff's title to sue.

"There are other objections which I may notice before disposing of the appeal. The plaint shows no distinct cause of action against defendants Nos. 1, 2 and 3, merely [539] alleging general collusion. It appears to have been treated at first as a suit for accounts in the Court below, but afterwards evidence was given to show that defendant No. 3 had committed what amounts to theft or misappropriation or criminal breach of trust with the other defendants in respect of about Rs. 4,000 worth of cloth. It is alleged that defendant No. 3 obtained this cloth from the shop to pay certain creditors with, and the rights and wrongs of this are to be discussed."

The plaintiffs preferred a second appeal.

Manckshah J. Taleyarkhan, for the appellants (plaintiffs).

Invcrarity (with *Ghanasham N. Nadkarni*), for the respondents (defendants Nos. 1, 2 and 3).

JUDGMENT.

PARSONS, J.—We deal at present only with the first point raised, namely, the right of the plaintiff No. 1 to bring this suit. There can, we think, be no doubt that the plaintiff's suit would be good only if at the time he brought it he had some proprietary interest in the shop, the accounts of which he wishes to have taken. If he had any such interest, then the joinder of Bhiku, first as defendant No 8 and then as co-plaintiff, would correct the initial non-joinder and make the case complete as to parties.

If, however, the plaintiff had no such interest, the joinder of a person who had an interest in the shop could have no effect upon the plaintiff and would confer on him no right of suit. See *Subbaiyar* v. *Kristnaiyar* (1); *Chunder Coomar Roy* v. *Gocool Chunder* (2).

The Court of first instance found that the shop belonged not only to the second plaintiff, but also to the first plaintiff as a joint member of an undivided Hindu family. The Assistant Judge raised the point directly in his 3rd issue, and indirectly in his 1st issue, and found on those issues; but he has nowhere discussed the question, and has given no reasons at all for his findings. He seems to think that the mere denial of the second plaintiff was sufficient to show that plaintiff No. 1 had no right to sue. We are unable to accept his findings, and we remand this issue to the lower appellate Court for it to find upon on the evidence on the record—

Had plaintiff, when he brought this suit, any interest in the shop in question?

Two months' time allowed.

Issue sent down.

(1) 1 M. 383.

(2) 6 C. 370.

20. B. 540.

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[540] CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* WARUBAI. WIDOW OF BHAU PANDU GUMRE.*
[12th June, 1895.]

Criminal Procedure Code (Act X of 1882), *s.* 421—*Judgment rejecting an appeal need not be in writing—Practice—Procedure.*

In rejecting an appeal under s. 421 of the Code of Criminal Procedure (Act X of 1882) the appellate Court is not bound to write a judgment.

Ras Behari Das v. *Balgopal* (1), followed.

[F., 25 M. 534=2 Weir 473; 36 A. 496=15 Cr.L.J. 512=24 Ind. Cas. 600; R., 4 Cr. L. J. 284=U.B.R. (1906), 2nd Qr., Cr. P.C., p. 49.]

THIS was an application by the accused for the exercise of the High Court's revisional jurisdiction under s. 439 of the Code of Criminal Procedure (Act X of 1882).

The accused and three other women were convicted by A. H. Plunkett, Magistrate of the First Class in the district of Poona, of possessing opium in excess of the quantity allowed by law, an offence under s. 9 of Act I of 1878 (Opium Act) and the rules made under s. 5 of that Act, and were sentenced to various terms of imprisonment and fine.

All the accused appealed from this decision to the Sessions Judge of Poona, who after sending for the papers rejected the appeals under s. 421 of the Criminal Procedure Code (Act X of 1882). The following was the judgment recorded in the appeal :—

"After reading the judgment on proceedings of the lower Court and hearing Mr. K. P. Gadgil, Barrister-at-law, on behalf of the appellant No. 1, the Court sees no ground for interfering with the conviction and sentence of the lower Court. Appeals rejected under s. 421, Criminal Procedure Code."

The present accused now moved the High Court under its revisional jurisdiction for a reversal of the conviction and sentence, and contended (*inter alia*) that the Judge should have stated his reasons for upholding the conviction and have given his opinions on all questions of fact in the case.

Inverarity (with *Ganpat Sadashiv Rao*), for the accused.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

JUDGMENT.

[541] JARDINE, J.—The Court following *Ras Behari Das* v. *Balgopal* holds that the Sessions Judge, in rejecting the appeal under s. 421 of the Criminal Procedure Code (X of 1882) was not bound to write a judgment; and it dismisses the application made by Warubai, widow of Bhau Pandurang Gumre.

Application dismissed.

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* Criminal Application for Revision No. 102 of 1895.

(1) 21 C. 92.

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APPELLATE CIVIL.

20 B. 541.

20 B. 541.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Parsons.

TUKARAM VALAD NAGURAM (*Original Plaintiff*), *Decree-holder v.* KHANDU VALAD BHAVANI (*Original Defendant*), *Judgment-debtor.**

[13th June, 1895.]

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), ss. 98, 248 and 647—Darkhast for execution of decree—Notice to the judgment-debtor to show cause why decree should not be executed—Failure of both parties to appear on the appointed day—Dismissal of darkhast.

A darkhast for the execution of a decree can be dismissed when on its presentation a notice is issued to the judgment-debtor under s. 248 of the Civil Procedure Code (Act XIV of 1882), and neither party appears on the day on which it is made returnable.

THIS was a reference by Rao Saheb K. S. Risvadkar, Second Class Subordinate Judge of Parner in the Ahmednagar District, under s. 617 of the Civil Precedure Code (Act XIV of 1882).

Plaintiff, Tukaram valad Naguram, having obtained a decree against Khandu valad Bhavani, presented a darkhast for its execution. The Subordinate Judge issued notice to the judgment-debtor, under s. 248 of the Civil Procedure Code (Act XIV of 1882), requiring him to show cause why the decree should not be executed. The notice was made returnable on the 12th March, 1895. On that day neither party having appeared, the Subordinate Judge disposed of the darkhast and made a reference in the following terms :—

" The practice hitherto followed was to dismiss it (darkhast) under ss. 98 and 647 of the Civil Procedure Code, no separate procedure having been laid down in the Code in the matter, on the understanding that the procedure applicable to **[542]** suits was also applicable to darkhasts, which were proceedings in suit as laid down by s. 4 of Act VI of 1892. But it has been held by the High Court that there is nothing in the Code of Civil Procedure (Act XIV of 1882) as amended by Act VI of 1892 which authorizes a Court to apply to execution proceedings any of the procedure enacted in chap. VII of the Code to which the said s. 98 belongs (see *Hojrat Akramnissa Begam* v. *Valiulnissa Begam*, I.L.R., 18 Bom., 429)."

The Subordinate Judge, therefore, being at a loss to know how to deal with the darkhast, and his order not being appealable, referred the following questions :—

" (1) Whether, relying as heretofore on ss. 98 and 647 of the Civil Procedure Code, I can dismiss the accompanying darkhast ?

" (2) If not, how the darkhast should be disposed of, or what procedure should be followed therein ? "

The opinion of the Subordinate Judge was on the first question in the affirmative, and he gave no opinion on the second question, having expressed his inability to do so.

Dhondu P. Kirloskar (*amicus curiæ*) appeared for the judgment-creditor.

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* Civil Reference No. 9 of 1895.

Shivram V. Bhandarkar (*amicus curiæ*) appeared for the judgment-debtor.

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ORDER.

BAYLEY, ACTING C. J.—Upon the facts stated in this reference we are of opinion that the Subordinate Judge can dismiss the darkhast.

Order accordingly.

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20 B. 543.

[543] CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS v. NAGESHAPPA PAI.* [17th June, 1895.]

Criminal Procedure—Salt Act XII of 1882—*Limitation prescribed for charging with offence—Fraud in concealing date of offence—Limitation Act* (*XV of* 1877), *s.*18, *not applicable to criminal proceedings—Revisional jurisdiction of High Court—Power to interfere with interlocutory orders of Subordinate Courts.*

The High Court can interfere with an interlocutory order passed by a Magistrate.

Abdool Kadir Khan v. *The Magistrate of Purneah* (1) and *Chandi Pershad* v. *Abdur Rahman* (2), followed.

The provisions of s. 18 of the Limitation Act of 1877 do not apply to criminal cases, and the peremptory terms of s. 11 (3) of the Indian Salt Act (XII of 1882) are not affected by that section.

[F., 3 Cr.L.J. 23=3 L.B.R. 109 (110); 11 Cr. L.J. 387=6 Ind. Cas. 624=17 P.W.R. 1910 (Cr.); 11 Cr.L.J. 388=6 Ind. Cas. 626=18 P.W.R. 1910 (Cr.); 130 P.L.R. 1901; R., 12 Cr.L.J. 50=8 Ind. Cas. 1161=33 P.R. 1910 (Cr.)=57 P.L.R. 1911; 21 T.L.R. 85 (91).]

ON the 13th December, 1894, the accused was charged by the Customs authorities before the Second Class Magistrate of Khanapur in the Belgaum District with having on the 29th December, 1893, and the 2nd January, 1894, clandestinely removed salt without paying the customs duty.

The accused pleaded that the complaint having been made more than six months after the date of the offence by s. 11 of the General Salt Act XII of 1882 ought not to be admitted.

The Magistrate overruled this plea and held that the complaint was in time observing:—

"I hold that the case is not barred by the provisions of s. 11, if it be proved that there has been a fraud by which the prosecution were kept in ignorance of the occurrence of the alleged offence."

Summonses were directed to be issued and a day appointed for the hearing. The accused applied to the High Court in its revisional jurisdiction to reverse this order of the Magistrate.

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* Criminal Application for Revision No. 91 of 1895.

(1) 20 W.R. Cri. 23. (2) 22 C. 131.

(3) Section 11 of Act XII of 1882.—A charge of an offence under s. 9 or under s. 11 of the Indian Customs Act, 1875, shall not be entertained except on the complaint of an Assistant Commissioner or other Salt-Revenue Officer not inferior in rank to a Sub-Inspector, and no such complaint shall be admitted unless it is preferred within six months after the commission of the offence to which it refers.

All such offences shall be tried by a Magistrate exercising powers not less than those of a Magistrate of the Second Class.

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[544] *Ganpatrao Shivram Mulgaokar*, for the accused.—The order against which this application is made was, no doubt, an interlocutory order, but the High Court may nevertheless interfere in its revisional jurisdiction—*Chandi Pershad* v. *Abdur Rahman* (1).

The charge was made too late—s. 11 of Act XII of 1882. The Magistrate has applied the rules laid down in s. 18 of the Limitation Act (XV of 1877), but those rules are not applicable to a criminal charge: see s. 6 of the Limitation Act and see also *Queen-Empress* v. *Ajudhia Singh* (2).

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.—This case is still pending in the Magistrate's Court, and this Court cannot interfere at this stage of the proceedings. Section 439 of the Criminal Procedure Code (Act X of 1882) is not applicable to interlocutory orders.

The next question is whether the present prosecution is under Act XII of 1882, which, no doubt, provides in s. 11 the period within which a prosecution under the Act should be commenced. The complaint in this case does not allege that the prosecution is under that Act. If this be a case under the Bombay Salt Act II of 1890, the objection on the score of limitation fails. Even if Act XII of 1882 were held applicable to the present case, there being a finding that fraud was used in keeping the prosecution in ignorance of the offence committed, limitation would run only from the time of the discovery of the offence. The rules in the Limitation Act on this point apply to criminal cases: see *Guracharya* v. *The President of the Belgaum Town Municipalities* (3). The English law also recognizes this principle. See *Brutton* v. *Vestry of St. George's Hanover Square* (4).

JUDGMENT.

JARDINE, J.—This being one of the rare instances of interference in revision with an interlocutory order, we confine our decision to the naked point of law argued. We are of opinion that a complaint of a criminal offence is not a suit or application within the meaning of s. 18 of the Limitation Act of 1877; and that the peremptory terms of s. 11 of Act XII of 1882 [545] are not affected by that section. We return the case to the trying Magistrate for disposal according to law.

RANADE, J.—This is an application for revision of an order passed in an interlocutory stage of an enquiry into a complaint made in respect of an offence under the Salt Act. The complaint was made more than six months after the alleged offence was committed, and the accused raised the defence that the prosecution was barred under s. 11 of the General Salt Act XII of 1882, which laid down a period of six months within which all prosecutions under that Act should be instituted. The Magistrate overruled this plea, and held that the complaint was in time, as limitation only commenced to run from the time when the fraud was discovered and became known to the complainant, which was within six months previous to the complaint. The applicant before us contends that the Magistrate was in error in importing the general law of limitation into the consideration of a special law. As the point was one of some importance, we directed that notice should be issued to the District Magistrate with a view that he might instruct the Government Pleader to appear and support the order of the Magistrate. A preliminary objection was

(1) 22 C. 131. (2) 10 A. 350. (3) 8 B. 529. (4) L.R. 13 Eq. 339.

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raised by the Government Pleader that as the proceedings before the Magistrate were still pending, this Court could not interfere with an order passed by the Magistrate in an interlocutory stage. The words used in s. 435, Criminal Procedure Code, are, however, very general, and empower the High Court to send for the record of a case not only when it wishes to satisfy itself about the correctness of any finding, sentence or order, but also as to the regularity of any proceedings in Subordinate Courts. In *Abdool Kadir Khan* v. *The Magistrate of Purneah* (1) the High Court of Calcutta expressly ruled that it had jurisdiction to revise interlocutory orders. This power was again exercised by the same Court in respect of an illegal municipal prosecution—*Chandi Pershad* v. *Abdur Rahman* (2). We follow these decisions and overrule this preliminary objection urged by the Government Pleader. As regards the principal question, how far the general provisions of the Limitation Act (XV of 1877) **[546]** can be imported so as to extend the scope of the provision of a special law like the Salt Act, we feel satisfied that the view taken by the trying Magistrate is not correct. The only authority in our reports relied upon appears to be the decision of this Court in *Guracharya* v. *The President of the Belgaum Town Municipality* (3); but it is not in point, as it related to a civil suit, and not to a criminal prosecution. Section 6 of Act XV of 1877 expressly relates to periods of limitation laid down for suits, appeals, or applications, and this last word has been interpreted in this place, as also in art. 178, as referring only to civil applications—*Vithal Janardhan* v. *Vithojirao Putlajirao* (4); *Kylasa Goundan* v. *Ramasami Ayyar* (5); *In the matter of the petition of Ishan Chunder Roy* (6). The same interpretation must be placed on the word "application" in s. 18 of Act XV of 1877. The decisions which, therefore, relate to civil proceedings can have no application in the present case. In regard to these decisions themselves, it may be noted that they are not altogether in accord, but certain general principles may be gathered from them which have no bearing on criminal prosecutions. It appears, for instance, that under the older Acts XIV of 1859 and IX of 1871, the provisions of these general laws were held not to affect special or local laws—*Puran Chunder Ghose* v. *Mutty Lall* (7); *Syed Mohidin* v. *Hussen Saheb* (8). Since Act XV of 1877 was passed, this restriction is confined only to the particular period fixed by local or special laws; and the general provisions are held to apply to suits, &c., under local laws—*Guracharya* v. *The President of the Belgaum Town Municipality* (3); *Kullayappa* v. *Lakshmipathi* (9); *Nijabutoolla and others* v. *Wazir Ali* (10); *Erajabi* v. *Mayan* (11); *Khetter Mohun* v. *Dinabashy* (12); *Behari Loll Mookerji* v. *Mungolnath Mookerji* (13); *Golap Chand* v. *Krishto Chunder* (14). Moreover, when a statute is complete by itself (such as the Registration Act or Bengal Rent Law) the general law of **[547]** limitation may not be read along with it, or be incorporated with it—*Veeramma* v. *Abbiah* (15); *Nagendro Nath* v. *Mathura Mohun* (16). None of these principles have any relation to criminal proceedings. The principles on which rules of limitation are framed have no natural application to prosecutions which are, in theory at least, instituted by the Crown. The general law of limitation and its schedules are chiefly intended for civil matters. Of course for the greater protection of

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(1) 20 W.R. Crl. 23. (2) 22 C. 131. (3) 8 B. 529. (4) 6 B. 586.
(5) 4 M. 172. (6) 6 C. 707. (7) 4 C. 50. (8) 8 M.H.C. R. 44.
(9) 12 M. 467. (10) 8 C. 910. (11) 9 M. 118. (12) 10 C. 265.
(13) 5 C. 110. (14) 5 C. 314. (15) 18 M. 99. (16) 18 C. 368.

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subjects certain periods are laid down in special laws for prosecutions to be instituted under them; but these special periods are not those which are contemplated by parts 2 and 3 of the general law. The Allahabad High Court has expressly ruled that rules of limitation are foreign to the administration of criminal justice, and that it is only by express statutory provisions that such rules can be made applicable to criminal proceedings —*Queen-Empress* v. *Ajudhia Singh* (1). This ruling was passed in respect of the six months' limitation laid down in s. 195 of the Criminal Procedure Code for sanctions to prosecute. The same reason applies to the provision of the Salt Act with which we are more immediately concerned.

Holding these views, we feel satisfied that the Magistrate was in error in deciding that the prosecution in this case, being admittedly instituted more than six months after the alleged offence, was not barred by s. 11 of Act XII of 1882.

We expressly limit our decision to the particular question of law raised before us. If the complainant can proceed under any other local or general law, this order will not interfere with his liberty of action.

Case returned to the trying Magistrate for disposal according to law.

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20 B. 548.

[548] APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Parsons.

HARISING DEVISINGRAO (*Original Applicant*), *Appellant v.* BHAUSING BIN BALVANTRAO (*Original Opponent*), *Respondent.**

[18th June, 1895.]

Regulation VIII of 1827, *s.* 4—*Certificate of heirship based on adoption—Regular suit to prove adoption—Adoption—Application for certificate of heirship.*

H applied under Reg. VIII of 1827 to a District Judge for a certificate of heirship to a deceased D. under a registered deed of adoption by his widow executed nearly fifty years after D.'s death. The opponent claimed to be the heir, and denied the legality of the adoption. The District Judge referred the applicant to a regular suit to establish the validity of his adoption.

Held, in appeal, that the District Judge was bound to investigate the case, following the procedure laid down in s. 4 of Reg. VIII of 1827, and had no authority to dismiss the application and refer the applicant to a regular suit to establish the validity of the adoption.

APPEAL against the decision of A. H. Unwin, District Judge of Nasik, in the matter of an application for heirship under Reg. VIII of 1827.

On the 2nd September, 1865, Bhausing (the respondent) obtained a certificate of heirship to his uncle Devisingrao), who had died twenty-three years previously, *viz.*, on 26th November, 1842.

On the 5th July, 1889, Krishnabai, the widow of Devisingrao, adopted Harising (appellant), and in the year 1894 Harising applied for a certificate of heirship to Devisingrao, alleging that he was his legal heir. He further prayed that the certificate of heirship granted to Bhausing in the year 1865 might be cancelled.

The opponent Bhausing denied that the applicant had been legally adopted, and alleged that he himself was Devisingrao's heir.

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* Appeal No. 28 of 1895.

(1) 10 A. 350.

The Judge dismissed the application with the following observations :—

" Nearly *half a century* having elapsed upon Davising's death before his widow Krishnabai thought proper to adopt, applicant is referred to a regular suit to establish the validity of the adoption. The question is not one to be settled in a miscellaneous proceeding on a mere 8-anna stamped petition. "

[549] The applicant preferred an appeal.

Manekshah J. Taleyarkhan, for the appellant (applicant) :—Our application should not have been dismissed without any inquiry. A widow is not bound to adopt till she chooses to do so. Under ss. 3 and 4 of Reg. VIII of 1827 the Judge could not dismiss our application without inquiry.

There was no appearance for the opponent.

ORDER OF REMAND.

PARSONS, J.—The District Judge had no authority to dismiss the application with costs and refer the applicant to a regular suit to establish the validity of the adoption. He was bound to investigate the case, following the procedure laid down in s. 4 of Reg. VIII of 1827. We, therefore, reverse his order and remand the case for a legal inquiry. Costs to abide the result.

Order reversed and case remanded.

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20 B. 549.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Parsons.

PADGAYA BIN NAGAYA, *Deceased, by his son and heir*, NAGAYA (*Original Defendant No.* 2), *Appellant v.* BAJI BABAJI MOHOLKAR, *Deceased, by his son and heir*, GOVIND (*Original Plaintiff*), *Respondent.**

[19th June, 1895.]

Mortgage—Sub-mortgage—Redemption—Suit by original mortgagor against mortgagee and sub-mortgagee—Death of mortgagee pending suit—Abatement—Parties—Civil Procedure Code (Act XIV of 1882), *s.* 368—*Practice—Procedure.*

Plaintiff sued to redeem a mortgage passed by his deceased father to defendant No. 1 and joined defendant No. 2 as being the sub-mortgagee of defendant No. 1 and in possession of the property. After suit defendant No. 1 died, and no steps were taken by the plaintiff within time to make his legal representatives parties. The suit was, however, allowed to be continued against defendant No. 2 and a redemption decree was passed in plaintiff's favour.

Held, on second appeal, that defendant No. 2 being the sub-mortgagee and not the assignee of defendant No. 1 on the death of the latter no cause of action survived to the plaintiff against defendant No. 2, and the suit abated under s. 368 of the Civil Procedure Code (Act XIV of 1882).

[R., 35 B. 342=12 Bom. L.R. 1014 (1049)=8 Ind. Cas. 752 ; 10 C.L.J. 470 ; 30 P.R. 1900=(1900) P.L.R. 219 (F.B) ; U.B.R. (1906), Sub-Mortgage 1 ; Expl., 20 M. 35 (39).]

[550] SECOND appeal from the decision of S. Tagore, District Judge of Sholapur, confirming the decree of Rao Saheb R. D. Paranjpe, Subordinate Judge of Sholapur.

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* Second Appeal No. 380 of 1893.

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20 B. 549.

Suit for redemption. The plaintiff's father (Baji Babaji Moholkar) mortgaged certain property to the first defendant on the 21st October, 1828.

On the 21st January, 1856, the first defendant (the mortgagee) sub-mortgaged the property to defendant No. 2 for Rs. 1,600. The mortgage was in the following terms :—

"In all Rs. 1,600 of the Belapur currency are due to you by me. In security for the whole amount due to you the very shop mentioned above in respect of Moholkars, situate at peth Mangalvar, kasba Sholapur, which has been in mortgage with me and which we had formerly mortgaged to you * * is mortgaged to you and now given into your *vahivat* in the very same manner in which it has been in your *vahivat* from former times. The terms in respect thereof are as follows :—Out of the Rs. 1,600 due to you as mentioned above, Rs. 1,300 are to bear no interest and the shop is to pay no rent. As to the remaining Rs. 300 I will continue to pay you interest thereon at the rate of one (1) per cent. per month. The time for the repayment of this (amount) is this :—Within five years from this day I will pay you the said (amount of) Rs. 1,600 and redeem the shop. If the amount remains (unpaid) after that time, then Rs. 800 out of the above-mentioned Rs. 1,600, that is, a moiety of that amount, is to bear no interest and the shop to pay no rent from that time. The interest on Rs. 800 is settled to be equal to the rent of the shop. As to the remaining amount made up of Rs. 800 and the interest on the Rs. 300 accrued due for the above-mentioned five years, I am to pay interest on the whole amount thus formed at the rate of 1 per cent. per month. A further term of five years is the time fixed for the payment thereof. In this manner I will pay off the said amount as agreed within ten years from this day and redeem the shop * * * After the lapse of the said fixed period I will pay you your amount in full when you may demand the same after making an account as agreed. If at the time of making the account it is found that the amount exceeds *damdupat*, even then I will not bring any objection in respect thereof, but will pay off as agreed above the amount including the interest accrued due and the expenses of repairs, &c., without raising any objection, and redeem the shop. Should I fail to pay the amount after the fixed period, I wil pay you the amount by selling the above-mentioned shop. If the proceeds of the sale do not suffice to pay off your amount, you should take the proceeds of the sale of the shop, and as to the balance remaining due I will pay off the same. I will not plead *gahan lahan* until your amount is paid off. Neither I nor anybody else has any right to the shop. You should carry on the *vahivat* thereof in any manner you like with absolute authority by virtue of your right as mortgagee.

* * * * *

"In the same shop Krishnarao Moholkar has a third share and Baji Babaji Moholkar has two shares. Of these Krishnarao Moholkar is represented here by nobody. Baji Babaji Moholkar is here. As to this when the said persons pay the whole of [551] the said amount according to their respective shares on making an account thereof according to the agreement, you should receive the same and give to each his respective share with absolute authority without pleading the excuse of my absence. As to the rest of the agreement written above the same is confirmed."

In 1882 the plaintiff brought this suit to redeem the mortgage of 1828. In his plaint he stated that defendant No. 2 was in possession of the property as sub-mortgagee of defendant No. 1.

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While this suit was pending defendant No. 1 died.

On the 20th June, 1891, the Subordinate Judge passed a decree for the plaintiff for redemption on payment of Rs. 1,448-10-8 to the second defendant within six months.

The seccnd defendant appealed, and in appeal contended that the first defendant having died, and his legal representatives not having been entered on the record in time, the suit had abated.

The Judge overruled the defendant's contention and confirmed the decree. With reference to the question of abatement he said :—

"There is nothing to show when Lakshman Madhav, defendant No. 1, died, and the point was not taken in the Court below. Defendant No. 1 was merely joined as a formal party and did not appear to defend the suit. His mortgage might have been assigned to defendant No. 2, and the suit was allowed to proceed against him alone as the party in possession and solely interested. It is too late now to contend that the suit should be ordered to abate by reason of plaintiff's failure to revive it against the representatives of the deceased Lakshman."

The second defendant preferred a second appeal.

Inverarity (with *Narayan G. Chandavarkar*), for the appellant (defendant No. 2).—The original mortgagee having died, the plaintiff has no cause of action against us. There is no privity between us and the plaintiff. He ought to have made the heirs of the original mortgagee parties to the suit. Not having done so, the suit must abate under s. 368 of the Civil Procedure Code (XIV of 1882).

Machpherson (Acting Advocate-General, with *Gangaram B. Rele*), for the respondent (plaintiff) :—The heirs of the original mortgagees would have been necessary parties if the transaction of the 20th May, 1856, had been a sub-mortgage. We contend that it is not a sub-mortgage. The last clause in the document clearly shows that we are entitled to redeem the property direct from the **[552]** second defendant. The transaction is, therefore, an assignment of mortgage and not a sub-mortgage. The heirs of the original mortgagee are, therefore, not necessary parties to the suit. See Coote on Mortgage, (5th Ed.), pp. 1086, 1161 and 1206.

PARSONS, J.—The respondent (original plaintiff) brought this suit to redeem a mortgage passed by him to the defendant No. 1. He joined the appellant (original defendant No. 2) because he was a sub-mortgagee of the defendant No. 1 and in possession. After suit defendant No. 1 died, and as the respondent took no steps, to join his legal representatives within the time allowed by law, the suit abated as against him; it was, however, allowed to be continued against the appellant notwithstanding his objection that the right to sue did not survive against him. The District Judge says on this point: "Defendant No. 1 was merely joined as a formal party; he did not appear to defend the suit. His mortgage might have been assigned to defendant No. 2, and the suit was allowed to proceed against him alone as the party in possession and solely interested. It is too late now to contend that the suit should be ordered to abate by reason of plaintiff's failure to revive it against the representative of the deceased Lakshman."

The same objection has been taken in this Court, and we are of opinion that it must prevail if the appellant (defendant No. 2) was the sub-mortgagee of the defendant No. 1, for in that case there would be no privity between him and the respondent, and the respondent would have no cause of action against him. On the death of the defendant No. 1 the right to sue the appellant (defendant No. 2) would not survive.

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The learned counsel for the respondent has admitted that this is so, and has sought to support the decree on the ground hinted at by the District Judge, *viz.*, that the appellant was the assignee of the defendant No. 1. We should be glad if we could adopt this view. In the face, however, of the deed itself (Ex. 40) the contention is untenable. It is stated in several places in that deed that it is a mortgage, and that the shop is mortgaged. The amount for which it was passed is Rs. 1,600, the mortgage to the defendant No. 1 having been Rs. 301 only. It provides for payment of interest by the appellant to the defendant No. 1. It gives defendant No. 1 the **[553]** right of redemption and puts the appellant into possession "by virtue of his right as mortgagee." In every essential it is a deed of mortgage and not of assignment, and it is quite clear that by it defendant No. 1 did not make over his whole interest to the appellant.

We must, therefore, hold that the appellant was not the assignee, but the sub-mortgagee of defendant No 1, and this being so on the death of defendant No. 1 no cause of action survived to the respondent as against the appellant, and the suit abated under s. 368 of the Civil Procedure Code (Act XIV of 1882). We reverse the decree of the lower appellate Court, and order that the respondent's suit do abate and that he pay the appellant's costs throughout.

Decree reversed. Suit ordered to abate.

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20 B. 553.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

VANI AND OTHERS (*Original Defendants Nos.* 1—3), *Appellants v.*
BANI AND ANOTHER (*Original Plaintiffs*), *Respondents.**
[20th June, 1895.]

Registration Act (III of 1877), *s.* 17, *cls.* (*b*) *and* (*h*)—*Instrument creating a charge in the nature of a mortgage—Admissibility of documents compulsorily registrable—Evidence.*

A *kararnama* (agreement), dated 11th day of June, 1885, was passed by A. to B. to the following effect :—

"As my father Shivram valad Keshav is dead, it has been arranged that I should succeed to his estate.....Part of this estate at Vagoda, consisting of a house, fields, cattle and a cart, has been given into your possession for use and enjoyment. The reason thereof is that you have undertaken to pay Rs. 450 found due on an adjustment of *khata* from my father to Ganpatdas Khushaldas. I am unable to pay off this debt; and so you have been put into possession of this property. I shall pass to you a sale-deed in respect of this property, and shall transfer the fields to your name from the year 1888-89."

Held, that the *kararnma* required registration. It did not fall within the exception provided for by cl. (*h*) of s. 17 of the Registration Act (III of 1877). It was not a document which merely created a right to demand another document. It created as between the parties to it a charge in the nature of a mortgage. The document of itself declared a right, and the mention of an intention to execute a deed of sale made no difference.

[554] An unregistered mortgage-bond for one hundred rupees and upwards may be admissible in evidence to prove the simple debt or a personal obligation, but it is inadmissible in evidence to prove any right to the property affected by it.

[R., 21 B. 704 (707); U.B.R. (1904), 4th Qr., Registration 1.]

* Second Appeal No. 774 of 1893.

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SECOND appeal from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge, A. P., at Dhulia, in Appeal No. 99 of 1892.

The plaintiffs sued to recover by partition their two-thirds share of certain property belonging to their father Shivram valad Keshav Vagodekar. Defendant No. 3 was the son of defendant No. 2 and the husband of defendant No. 1. They pleaded (*inter alia*) that after Shivram's death the plaintiff No. 1 had assigned by a *kararnama* the property in dispute to defendant No. 2 on his undertaking to pay Shivram's debts; that he had accordingly paid those debts, and taken possession of the property as absolute owner.

The *kararnama* was dated 11th day of June, 1885, and was to the following effect:—

"As my father Shivram valad Keshav is dead, it has been arranged that I should succeed to his estate..... A part of this estate at Vagode, consisting of a house, fields, cattle and a cart, has been given into your possession for use and enjoyment. The reason thereof is that you have undertaken to pay Rs. 450 found due on an adjustment of *khata* from my father to Ganpatdas Khushaldas. I am unable to pay off this debt; and so you have been put in possession of this property. I shall pass to you a sale-deed in respect of this property and shall transfer the fields to your name from the year 1888-89."

The Subordinate Judge held that the *kararnama* not having been registered was inadmissible in evidence, and he passed a decree awarding the plaintiffs' claim.

This decree was varied, in appeal, by inserting a direction that plaintiffs should pay to defendant No. 2 Rs. 228, which he had paid on plaintiffs' behalf on account of their father's debt.

From this decision the defendants preferred a second appeal to the High Court.

The sole question argued at the hearing of this appeal was whether the *kararnama* of the 11th June, 1885, required registration.

Daji Abaji Khare, for appellants:—The first part of the *kararnama* was a mere recital of a fact which had occurred in the **[555]** past. The last portion contemplates a deed of sale to be executed in the future. It does not of itself purport to create or transfer any interest in immoveable property of the value of one hundred rupees and upwards. It only gives a right to obtain another document which when executed will create or transfer such interest. It does not, therefore, require registration—*Burjorji* v. *Muncherji* (1); *Chunilal* v. *Bomanji* (2); *Sakharam* v. *Madan* (3).

Manekshah Jehangirshah, for respondent:—The document does not fall within s. 17, cl. (*h*) of the Registration Act. The document of itself declares a right. It is sought to be used for establishing a right to the immoveable property affected by it. It, therefore, requires registration—*Basawa* v. *Kalkapa* (4); *The Bengal Banking Corporation* v. *Mackertich* (5).

JUDGMENT.

RANADE, J.– The only point that was urged in this appeal relates to the admissibility or otherwise of the *kararnama* which was produced in support of the defence, and which both the lower Courts held to be inadmissible for want of registration. The *kararnama* purports to have

(1) 5 B. 143. (2) 7 B. 310. (3) 5 B. 232. (4) 2 B. 489. (5) 10 C. 315.

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been executed in June, 1885, by respondent (plaintiff No. 1) to the appellant No. 2. In consideration of his (appellant No. 2's) undertaking to pay off the debts due by respondent's father, respondent made over to appellant No. 2 her father's house and lands for use and enjoyment, and she agreed to pass a deed of sale for the same, and transfer the *khata* in 1888-89. It was contended for the appellant that in so far as this last agreement of sale and transfer of the *khata* was concerned, the instrument was one which fell within the exemption provided for by cl. (*h*) of s. 17 of Act III of 1877. That clause excepts from the operation of cls. (*b*) and (*c*) all documents which do not themselves create, declare, assign, &c., any right, title or interest of the value of one hundred rupees and upwards in immoveable property, but *merely* create a right to obtain another document which will, when executed, create such a right. The appellant urges that the first portion of the document only recited a fact, and created or declared no [556] right, and that the last portion about the sale and transfer merely created a right to obtain another document.

After careful consideration of the authorities cited on both sides, we see no reason to differ from the lower Courts in the view they have taken of the scope and legal effect of the document. It is certainly not a document which merely created a right to demand another document. The first portion of the agreement is not a mere recital of a fact. It creates as between the parties to it a charge in the nature of a mortgage. In consideration of appellant No. 2's undertaking to advance a large sum which respondant No. 1 was unable to pay herself, she made over certain property to appellant No. 2 for use and occupation. There is no further consideration to proceed from the appellant to the respondent. She apparently stipulated for three years' time to enable her to raise the money, after which she was to effect the formal and regular transfer of *khata*. This circumstance of the absence of any fresh consideration distinguishes the facts of this case from those of the documents recited in *Burjorji* v. *Muncherji* (1) and *Chunilal* v. *Bomanji* (2). In both those cases, the documents were only bargain papers, which recited the sale agreement for the full consideration, part of which was received as earnest-money, and the remaining sums were to be paid within a certain time, and sale-deeds executed. It was held in those cases that the bargain paper only created a right to obtain the sale-deed, and that, therefore, it fell within cl. (*h*). In *Sakharam* v. *Madan* (3) the document recited the fact of a *passi* partition, and declared no right in immoveable property. Here the transfer of house and lands was contemporaneous with the execution of the document. Defendant No. 2 himself in his written statement rested his claim of ownership on this same document, Ex. A. The facts of the present case closely resemble those reported in *Ramasami* v. *Ramasami* (4). Like the letter in that case, the *kararnama* here of itself declares a right. The mention in both cases of an intention to execute a deed of sale can make no difference, because the documents did not *merely* create a right to demand another document.

[557] Of course documents which require registration, and are unregistered, may be admissible in evidence for some purposes, and not admissible in evidence for other purposes. An unregistered mortgage-bond for more than one hundred rupees may be admissible in evidence to prove the simple debt or a personal obligation, but it is inadmissible in evidence to

(1) 5 B. 143. (2) 7 B. 310. (3) 5 B. 232. (4) 5 M. 115.

prove any right to the property affected by the instrument—*Ulfatünnissa* v. *Hosainkhan*(1); *Tukaram* v. *Khandoji*(2); *Sangappa* v. *Bassappa*(3); *The Bengal Banking Corporation* v. *Mackertich*(4) and *Faki* v. *Khotu* (5). These cases do not help the appellant inasmuch as he seeks to use the *kararnama* for the purpose of claiming the whole property for himself. He seeks no personal remedy. Under these circumstances the appellant's chief contention before us must be disallowed. As the contract was reduced to writing, no secondary evidence about its terms was admissible.

We accordingly confirm the decree of the lower Court with costs.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice and Mr. Justice Parsons.

GANESH MAHADEO BHANDARKAR AND ANOTHER (*Original Plaintiffs*), *Appellants v.* RAMCHANDRA SAMBHAJI MHASKAR AND OTHERS (*Original Defendants*), *Respondents.** [26th June, 1895.]

Limitation Act (XV of 1877), sch. II, art. 137 – Mortgage—Mortgage of joint property —Share of co-owner sold in execution of decree—Subsequent sale of the mortgaged property by all co owners—Redemption of mortgage—Suit for partition and redemption by purchaser at Court sale—Adverse possession.

Three undivided brothers (Babaji, Ramchandra and Atmaram) mortgaged part of their joint property (plot 1) in 1870 and the rest (plot 2) in 1874. In 1875 Babaji's share in both plots was sold in execution of a decree against him and was purchased by the plaintiff. In 1877 Babaji and his two brothers sold plot 1 to the defendants Nos. 3—6, who at once paid off the mortgage of 1870 and took possession. On the [558] 11th February, 1877, the three brothers paid off the mortgage of 1874 of plot 2 and in the same month mortgaged that plot to the defendants with possession. On 26th August, 1890, the plaintiff sued for possession of Babaji's share by partition and redemption if necessary.

Held, that the suit was barred by art. 137 of the Limitation Act (XV of 1877). Babaji became entitled to possession of his share of plot 1 in 1877 when the mortgage of 1870 was paid off by the defendants, and their possession had been since then adverse to the plaintiff. As to plot 2, Babaji had become entitled to possession of his share therein on the 11th February, 1877, when the mortgage of 1874 was redeemed.

Ramchandra v. *Sadashiv* (6) *Bhaudin* v. *Shaik Ismail* (7), *Faki Abas* v. *Faki Nurudin* (8) and *Naro* v. *Ragho* (9) referred to.

[R., 23 B. 137 (142).]

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnagiri.

Suit for partition and for possession of one-third share of two parcels of land purchased by the plaintiff at an execution sale under a decree against one Babaji, a joint owner.

Defendants Nos. 1 and 2 were brothers of Babaji. Defendant No. 3 (it was alleged) was a purchaser of one of the plots and a mortgagee of the other. Defendants Nos. 4, 5 and 6 were brothers of defendant No. 3.

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* Second Appeal, No. 658 of 1893.

(1) 9 C. 520. (2) 6 B H.C.R. O.C.J. 134. (3) 7 B.H.C.R. A.C. J. 1.
(4) 10 C. 315. (5) 4 B. 590 (591). (6) 11 B. 422.
(7) 11 B. 425. (8) 16 B. 191. (9) P. J. (1892), 412.

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The two plots of land had belonged to Babaji and his brothers Ramchandra and Atmaram (defendants Nos. 1 and 2.)

On 30th July, 1870, they mortgaged one plot to Anant Babuji Vaze and on the 23rd January, 1877, they sold their equity of redemption therein to defendants Nos. 3 to 6. On the 4th May, 1877, these defendants paid off Anant's mortgage of 1870 and continued in possession up to the date of suit.

The other parcel of land had been mortgaged by the three brothers on the 6th May, 1874.

On the 9th March, 1875, Babaji's right, title and interest in both parcels of land were sold to the plaintiff in execution of a decree against him.

On the 11th February, 1877, the three brothers (Babaji and defendants Nos 1 and 2) paid off the mortgage of 6th May, 1874, **[559]** and on the 28th February, 1877, they again mortgaged it to defendants Nos. 3 to 6.

The plaintiff now sued for possession of Babaji's share by partition and redemption if necessary. The suit was originally filed on the 2nd January, 1889, and amended by adding the plaintiff's brother as co-plaintiff and by joining the defendants Nos. 4, 5 and 6.

The defendants (*inter alia*) pleaded that the claim was barred by limitation.

The Subordinate Judge held that the suit was barred under art. 137 of sch. II of the Limitation Act (XV of 1877) not having been filed within twelve years of the dates (11th February, 1877, and 4th May, 1877), on which the judgment-debtor Babaji was first entitled to possession.

The Assistant Judge confirmed the decree.

The plaintiff appealed to the High Court.

Inverarity (with *Vasudeo G. Bhandarkar*), for the appellants (plaintiffs) :—We purchased Babaji's rights in 1875 and thereupon we took his place and became owners of his undivided share. It was then liable to the mortgage of July, 1870, and in our hand as purchasers it remained liable. Babaji joined in the sale to defendants Nos. 3 to 6 on the 23rd January, 1877, but as his share was then vested in us it did not pass to them by that sale. On the 4th May, 1877, defendants Nos. 3 to 6 paid off the mortgage of July, 1870. The only effect of that was that the plaintiff when claiming possession of Babaji's share would have to pay one-third of the mortgage-debt to the defendants instead of to the original mortgagees. They became the mortgagees of the share. Their possession as mortgagees was not adverse to Babaji, and could not, therefore, be adverse to the plaintiff who had purchased his rights.

As to the second parcel of land which was mortgaged in 1874, the three brothers redeemed it on the 11th February, 1877, and mortgaged it again to the defendants Nos. 3 to 6 on the 28th February, 1877. But Babaji's share was at that time vested in the plaintiff—nothing passed to the defendant. Babaji by **[560]** redeeming only obtained a right to claim the amount which he paid and he could only give the defendants the same right. Neither Babaji nor the defendants have ever had adverse possession of the share. Article 144 of the Limitation Act (XV of 1877) and not art. 137 is applicable. He cited *Naro Shivaji* v. *Ragho Govind*(1); *Faki Abas* v. *Faki Nurudin* (2) ; *Ramchandra* v. *Sadashiv* (3).

(1) P. J. (1892), 412. (2) 16 B. 191. (3) 11 B. 422.

Manekshah J. Taleyarkhan, for the respondents (defendants Nos. 3 to 6) :—The suit was not properly constituted until amended on 26th August 1890. As to the plot which we bought from the three brothers on the 23rd January, 1877, we became owners of it by the purchase, and as owners on the 4th May, 1877, we paid off the mortgage of July, 1870. Our possession has been adverse ever since.

As to the second parcel mortgaged to us on the 28th February, 1877, Babaji was then in adverse possession, having paid off the previous mortgage, and our possession as his mortgagees has also been adverse. He cited *Ramchandra* v. *Sadashiv* (1) ; *Datto Narasing* v. *Babaji* (2).

JUDGMENT.

PARSONS, J.—The two parcels of land in dispute were originally owned by one Babaji and the defendants Nos. 1 and 2 in equal shares. On the 9th March, 1875, the plaintiff bought at an execution sale the right, title and interest of Babaji therein, and his present suit, brought on the 26th August, 1890, is for possession of that share by partition and redemption if necessary. The following facts are material.

One of the parcels had been mortgaged by Babaji and defendants Nos. 1 and 2 to one Vaze with possession on the 30th July, 1870. Babaji and the defendants Nos. 1 and 2 sold the equity of redemption of it on the 23rd January, 1877, to the defendants Nos. 3 to 6, and they on the 4th May, 1877, paid off Anant Bapuji Vaze, and have since been in possession. They thus claim title to Babaji's share by more than twelve years' adverse possession.

[561] It is, however, argued that the redemption of the mortgage by the defendants Nos. 3 to 6 was really a redemption by two out of three co-sharers, since Babaji's title had vested in the plaintiff, and the defendants Nos. 3 to 6 had acquired the title of the defendants Nos. 1 and 2 only, and that the plaintiff can now come in and claim Babaji's share of the land on payment of his share of the mortgage-money. The decisions in *Ramchandra* v. *Sadashiv* (1), *Bhaudin* v. *Shekh Ismail* (3), *Faki Abas* v. *Faki Nurudin* (4) and *Naro* v. *Ragho* (5) are cited in support of the contention. We do not think, however, that the plaintiff, who is a purchaser at a Court sale in execution, can call in aid such decisions as these, which proceed on the assumption that the co-sharers are in amicable and harmonious relations with each other and would do nothing adverse to the interests of each other. Here the plaintiff as auction-purchaser was at arm's length with Babaji and the defendants Nos. 1 and 2 from the date of the purchase. Their adverse holding is shown by their ignoring the purchase and by continuing to deal with the land as if it were still their own, and the possession of defendants Nos. 3 to 6 was clearly adverse both to Babaji and to the defendants Nos. 1 and 2. As the judgment-debtor was out of possession at the time of the plaintiffs' purchase, he had, under art. 137, twelve years within which to bring his suit for possession, reckoned from the time his judgment-debtor first became entitled to possession. Other conditions remaining the same, this would be when the mortgage to Vaze was redeemed. See *Vajeram* v. *Bhaishankar* (6). As plaintiff's suit for this land is not brought within twelve years of this time, it is, we think, time-barred.

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(1) 11 B. 422.
(2) P. J. (1894), 149.
(3) 11 B. 425.
(4) 16 B. 191.
(5) P.J., (1892), 412.
(6) P.J. (1888), 157.

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The second parcel of land had been mortgaged by Babaji and defendants Nos. 1 and 2 with possession on the 6th May, 1874. They redeemed this mortgage on the 11th February, 1877, and on the 28th February, 1877, they mortgaged the land to the defendants Nos. 3 to 6. It is clear that Babaji became entitled to possession of his share of this land on the 11th February, 1877, and [562] the plaintiff cannot claim a period of limitation and a right to redeem as if he were a party to the mortgage of the 28th February, 1877, or as if the defendants Nos. 1 and 2 were then mortgaging his share as his agents. The possession of Babaji and of the defendants Nos. 3 to 6 as mortgagees would clearly be adverse to the plaintiff as the purchaser of the one-third share of Babaji. See *Datto* v. *Babaji*(1). The suit for this parcel is time-barred also.

We confirm the decree of the lower appellate Court with costs.

Decree confirmed.

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20 B. 562.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

CHAMANBU JAVJE MAHOMEDALI BOHORI (*Original Plaintiff*), *Appellant* v. MULTANCHAND SHIVRAM (*Original Defendant*), *Respondent.**

[26th June, 1895.]

Registration Act (III of 1877), s. 17, cl. (b)—Indian Evidence Act (I of 1872), s. 32, cl. (6)—Will—Statement—Words not purporting or operating to extinguish an interest in the present or in future.

Section 17, cl. (*b*) of the Registration Act (III of 1877) does not render a passage in a will inadmissible in evidence if the words of it do not purport or operate to extinguish an interest in the present or in future, but state only past facts. Such a statement would, if proved, be admissible also under s. 32, cl. (6) of the Indian Evidence Act (I of 1872).

[R., 13 Ind. Cas. 500.]

SECOND appeal from the decision of S. Hammick, District Judge of Ahmednagar, confirming the decree of Rao Bahadur G. A. Mankar, First Class Subordinate Judge.

The plaintiff sued to obtain a declaration that a certain house which she had obtained from her husband as dowry was not liable to attachment by the defendant in execution of a decree against her sons and grandsons.

The defendant contended that the house belonged to his judgment-debtors and not to the plaintiff.

[563] The Subordinate Judge rejected the claim. The following is an extract from his judgment :--

"There is no question about the property in dispute having belonged to the plaintiff's husband. But the plaintiff has not succeeded in proving her allegation that it was granted to her by her husband in lieu of dower. For the purpose of proving her allegation on this point, the plaintiff has caused a document, Ex. A, to be produced, containing a clause relating to the grant of the property in dispute to her in lieu of dower. The document, Ex. A, of which Ex. B is a Marathi translation, is said to be in Gujarati, but is transliterated in Arabic according to witness No. 43, and purports to

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* Second Appeal No. 555 of 1893.

(1) P. J. (1894), 149.

be a will of the plaintiff's husband. But the clause in the document relating to the grant of the property in dispute to the plaintiff by her husband in lieu of dower does not appear to be a testamentary disposition of the said property by him. For 'will' means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death according to s. 3, Act X of 1865, and Act V of 1881. But in the portion of the document, Ex. A, relating to the property in dispute, it is stated that the property in dispute was already given to the plaintiff in lieu of dower, and that the maker of the document had no longer any right to it, and that his heirs and successors should also have none. This cannot be considered to be a testamentary disposition of the property, as it was effected in the lifetime of the plaintiff's husband. Supposing Ex. A to be a will, the portion thereof relating to the property in dispute cannot be said to be a testamentary disposition of the said property. If it is not a part of the will, it requires to be stamped and registered according to the provisions of the Stamp and the Registration Acts, as it is a conveyance of immoveable property of the value of upwards of Rs. 100. But as it is neither stamped nor registered, it is not admissible in evidence. Consequently the plaintiff was not allowed to examine witnesses to prove the document. The plaintiff has not produced any other evidence relating to the alleged grant of the property in dispute to her by her husband in lieu of dower."

The following is the translation of the material portion of Ex. A, referred to in the above extract:—

"(As to) my wife Chamanbu, daughter of Najambhai, I have given her both the immoveable properties (namely) the two stories of the dwelling-house which have fallen to my share and the *kothu* (that is, house built of burnt bricks and stones) as *hiba* (a gift or a bequest with a return or consideration), as gift, and as property purchased (by her) in consideration of her dowry. Chamanbu, the daughter of Najambhai, is the owner and mukhtyar of both these properties. I have no right, claim or interest whatever in both these properties."

On appeal by the plaintiff the Judge confirmed the decree. In his judgment he said:—

"The document A is in the first instance a will, and in that capacity it need not be registered. But the appellant wishes to make use of it for her own purposes as a declaration that certain property therein specified and worth more than Rs. 100 has been assigned to her in lieu of her dower. Regarded from this point of view, the [564] document ceases to be a will and becomes an instrument which purports to declare a right or interest of the value of Rs. 100 in immoveable property. It is included under (6) of s. 17 of the Registration Act, and not having been registered, it cannot be admitted in evidence."

The plaintiff preferred a second appeal.

P. M. Mehta (with *Gangaram B. Rele*), for the appellant (plaintiff).—The Judge held Ex. A to be a will. Being a will it does not require registration. Further, it does not create any interest in or right to immoveable property so as to come within the pale of s. 17 of the Registration Act (III of 1877). It merely contains a statement of fact and does not purport to deal with any property, because the property had already been dealt with before the document came into existence—*Sakharam Krishnaji* v. *Madan Krishnaji* (1); *Shivlingapa* v. *Haribai* (2). The

(1) 5 B. 232.

(2) P. J. (1890), p. 78.

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statement in the document is admissible under cl. (6), s. 32 of the Evidence Act.

Macpherson (Advocate-General, with *Ghanasham N. Nadkarni*), for the respondent (defendant).—The document is relied on as a document of title. It is not produced merely to prove a fact. As a document of title, it is not admissible, being unstamped and unregistered.

JUDGMENT.

JARDINE, J.—The lower Courts held the following passage in the will inadmissible under the Registration Act of 1877:—"I have given her both the immoveable properties, (namely) the two stories of the dwelling-house, which have fallen to my share, and the *kothu* (1) as *hiba* (2), as gift, and as (property) purchased (by her) in consideration of her dowry. Chamanbu, the daughter of Najambhai, is the owner and mukhtyar of both these (properties). I have no right, claim or interest whatever in both these two properties."

We do not think that s. 17, cl. (*b*) of that Act renders this part of the document inadmissible, as the words do not purport or operate to *extinguish* an interest *in the present or in future*, but state only past facts. The statement contained in the passage would, if proved, be admissible also under s. 32, cl. (6), of the Indian Evidence Act. We think, then, **[565]** that the lower Courts were wrong in precluding the plaintiff from giving proof of the statement.

It is admitted by the learned counsel for the parties that the whole case turns on the first issue framed by the Subordinate Judge. We, therefore, refer this issue for trial and finding on the two parts thereof by the District Court after taking evidence. The finding to be certified to this Court within three months.

Issue sent down.

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20 B. 565.

APPELLATE CIVIL.

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice Parsons.

DOSHI FULCHAND (*Original Plaintiff*), *Appellant v.* MALEK DAJIRAJ (*Original Defendant*), *Respondent.**

[11th July, 1895.]

Talukdar—Gujarat Talukdars' Act (Bom. Act VI of 1888), s. 31—Mortgage of talukdari estate—Validity of mortgage before the Act—Decree upon the mortgage for sale of talukdari estate.

A talukdar of the Ahmedabad district mortgaged his *talukdari* property in 1886.

In 1892 the mortgagee sued to enforce his lien by sale of the mortgaged property.

The Court passed a decree against the talukdar personally, holding that it had no power under ss. 31 and 32 of the Gujarat Talukdars' Act (VI of 1868) (3) to direct a sale of the *talukdari* estate.

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* Appeal No. 53 of 1894.

(1) *Kothu* probably means a house built of burnt bricks and stone.
(2) *Hiba* means a gift or a bequest with a return or consideration.
(3) The following are the sections of Act VI of 1888 referred to:—

31. (1) No incumbrance on a talukdar's estate, or on any portion thereof, made by the talukdar after this Act comes into force, shall be valid as to any time beyond

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[566] *Held*, reversing the decree, that the mortgage having been effected prior to the coming into force of the Gujarat Talukdars' Act (1888) was not invalidated by cl. 1 of s. 31 of the Act, and that the Court was bound to pass a decree for sale in default of payment of the mortgage-debt.

Quære—Whether the property could be sold without the sanction of the Governor in Council, regard being had to the provisions of cl. 2 of s. 31 of the Act.

Nagar Pragji v. *Jivabhai* (1) doubted.

[R., 22 B. 884 (887, 888); 11 Bom. L.R. 1372 (1377).]

APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad, in suit No. 26 of 1892.

The property in dispute was a *talukdari* estate belonging to Malek Dajiraj Ajambhai.

The property was mortgaged to one Tribhovan Raichand by a mortgage-bond for Rs. 879 on 21st December, 1886.

Tribhovan Raichand assigned the mortgage to the plaintiff, and in 1892 the plaintiff filed this suit to recover Rs. 2,438, being the amount of principal and interest due on the mortgage by sale of the mortgaged property.

The defendants, who were the heirs of the mortgagor, being minors were represented by the Collector of Ahmedabad as their guardian. They pleaded (*inter alia*) that the property in suit being a *talukdari* estate, the plaintiff was not entitled to a decree for sale of the mortgaged property, and that he could not recover interest exceeding the amount of the principal.

The District Judge held that under the Gujarat Talukdars' Act (Bombay Act VI of 1888) the plaintiff could not obtain a decree against the *talukdari* estate.

The following extract from his judgment gives his reasons :—

"It is quite true that the mortgage lien was created before the passing of the Talukdari Act. But it appears to me that under ss. 31 and 32 (of the Act) Civil Courts are barred from imposing incumbrances on a *talukdari* estate, even though the basis of such incumbrances may be found embodied in contracts entered into by talukdars before the passing of the Act. No doubt a decree passed before the passing of the Talukdari Act would be binding on the estate. In this spirit I [567] read the ruling at p. 94 of the Printed Judgments for 1892." (*Kallian Moti* v. *Pathubhai* (2)).

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such talukdar's natural life, unless such incumbrance is made with the previous written consent of the Talukdari Settlement Officer or of some other officer appointed by the Governor in Council in this behalf.

(2) No alienation of a talukdar's estate or of any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the talukdar.

32. (1) No consent or sanction given under the last preceding section shall be deemed to affect any right of Government under s. 3 of Bombay Act VII of 1863 (*an Act for the Summary Settlement of claims to exemption from the payment of Government land-revenue, and for regulating the terms upon which such exemption shall be recognized in future, in those parts of the Bombay Presidency which are not subject to the operation of Act XI of* 1852 *of the Council of India*).

(2) And nothing in the last preceding section shall apply to the property of any thakur to which s. 28 of the Broach and Kaira Encumbered Estates Act, 1881, is applicable, or be deemed to affect the power of the manager of any thakur's immoveable property under s. 24 of the said Act.

(1) 19 B. 80. (2) 17 B. 289.

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On these grounds the District Judge passed a decree for Rs. 2,438 and costs against the personal estate of the deceased talukdar so far as the same might have come into the possession of his heirs, the defendants on the record. He directed the plaintiff to pay the costs incurred by the defendant Collector.

Against this decision the plaintiff preferred a second appeal to the High Court.

F. R. Viccaji (with him *Ganpat Sadashiv Rao*) for appellant:—The mortgagee is entitled to a decree against the mortgaged property. Our mortgage was executed before Bombay Act VI of 1888 was passed. Sections 31 and 32 of the Act are not retrospective. They apply in the case of any charge or incumbrance made *after* the Act came into force. Our mortgage is, therefore, perfectly valid, and we are entitled to a decree for sale of the mortgaged property—*Nagar Pragji* v. *Jivabhai* (1). We are also entitled to interest, at the stipulated rate, till date of payment.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the respondent :—The object of the Talukdari Act is to preserve *talukdari* estates and prevent their passing into the hands of strangers. With this object ss. 31and 32 of the Talukdari Act appear to have been framed. No alienation of a talukdar's estate is valid except when made with the previous sanction of the local Government. The object of the Act would be defeated if the Civil Courts were to pass decrees for sale of *talukdari* property. A sale by the Court, followed by confirmation of sale and grant of sale certificate, is an "alienation" within the meaning of s. 31, cl. 2, of the Act—*Kallian Moti* v. *Pathubhai* (2). The ruling in *Nagar Pragji* v. *Jivabhai*(1) is not correct.

JUDGMENT.

PARSONS, J.—The mortgage sued on being prior in date to the coming into force of the Gujarat Talukdars' Act, 1888, is not invalidated by cl. 1 of s. 31 of that Act, and is one which the deceased talukdar had power to execute. We think, therefore, that the Court was bound to give the plaintiff, the rights which he acquired under that mortgage and pass a decree for sale in default of payment of the mortgage-debt.

[568] The point taken before us, that the property cannot be sold having regard to the provisions of cl. 2 of the section above mentioned, will only arise if the plaintiff applies for an order absolute for sale (under s. 89 of the Transfer of Property Act) and is then unable to show the sanction of the Governor in Council to the proposed sale. It would, therefore, be premature for us to discuss that point.

As, however, the case of *Nagar Pragji* v. *Jivabhai* (1) has been cited to us, we think it right to record our doubt as to the correctness of that decision, which should, we think, if the case again comes before this Court, be tested by a reference to a Full Bench.

We consider that the decree sufficiently declares the personal liability of the defendants. They will under its execution have to account for the assets of the deceased which have come into their hands, and will, of course, be liable personally in case of failure to account.

The Judge has refused to award interest from date of suit. In this he is wrong. In a suit on a mortgage the plaintiff is entitled to interest down to the date of the decree. We must award the plaintiff Rs. 870 with interest at two per cent. per month from December 21st, 1886, to

(1) 19 B. 80.

(2) 17 B. 289.

September 19th, 1893, and we allow further interest on the 870 rupees at six per cent. from September 20th, 1893, to payment.

The Judge has given the Collector costs as against the plaintiff, but the Collector appeared in the suit only as guardian for the suit of the minor defendants, and the plaintiff is not liable for the costs incurred by him in so appearing which the Collector can charge to the estate of the minors.

We amend the decree by altering the decretal amount as above stated, and by striking out the order directing plaintiff to pay the costs incurred by the defendant Collector and by adding an order to the effect that, in default of the payment of the decretal amount with costs in the lower Court and this Court within six months of this date, the plaintiff may apply for an order absolute for sale of the mortgaged property.

Decree amended.

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[569] APPELLATE CIVIL.

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice Parsons.

PARASHRAM VALAD BAPU (*Original Defendant No.* 3), *Appellant v.* MIRAJI VALAD SUBHANA AND OTHERS (*Original Plaintiffs*), *Respondents.** [15th July, 1895.]

Practice—Possession—Suit for exclusive possession—Joint ownership proved at hearing—Procedure.

Exclusive possession can only be awarded on proof of exclusive title.

If a case not alleged by the plaintiff is disclosed in the evidence, the Court can allow it to be set up, provided a specific issue is raised on it and the defendant is given an opportunity of meeting it.

[R., 20 B. 627 (629); 26 B. 141=3 Bom. L.R. 598; 8 Bom. L.R. 99; 3 Ind. Cas. 24=5 N.L.R. 105 (106).]

SECOND appeal from the decision of Rao Bahadur N. G. Phadke, Joint First Class Subordinate Judge with appellate powers, at Sholapur.

Suit for possession of land. The plaintiffs claimed exclusive possession at the hearing, and gave evidence that the land had been allowed to them on partition. They alleged that it had actually been in their possession previously to 1879, but that on leaving their village in that year they had entrusted the land to defendants Nos. 1 and 2 who were their relations.

Defendants Nos. 1 and 2 admitted the claim.

Defendant No. 3 alleged that the land was his and pleaded limitation.

The Subordinate Judge dismissed the suit, holding that the suit was barred.

On appeal the District Judge reversed the decree and awarded the plaintiff's claim. He found, however, that the alleged partition had not been proved, and that the land was joint; that it belonged to three brothers, *viz.*, Miraji (plaintiff No. 1), Babaji (the father of plaintiff No. 2), and Rayaji (father of defendants Nos. 1 and 2), and that defendant No. 3 (appellant) had purchased it from Rayaji.

Defendant No. 3 appealed to the High Court.

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* Second Appeal No. 784 of 1893.

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[570] *Manekshah J. Taleyarkhan*, for the appellant (defendant No. 3).—The Judge has given the plaintiffs a decree for exclusive possession although he holds the property to be joint. That decree is wrong—*Eshan Chunder Singh* v. *Shama Churn Bhutto* (1); *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer* (2); *Lakshmibai* v. *Hari bin Ravji* (3).

Mahadeo V. Bhat, for the respondents (plaintiffs).—The Judge found that the property was not divided. We are, therefore, entitled to it along with the defendants.

JUDGMENT.

FARRAN, C. J.—The decree in this suit cannot, we think, be supported in its present form. The plaintiffs asked for exclusive possession of the property in suit, alleging in their evidence that it had been allotted to them on a partition. The Judge of the lower appellate Court found that the partition was not proved and that the property was joint. Nevertheless he passed a decree in favour of the plaintiffs, awarding them the exclusive possession claimed. This was illegal. He could only give exclusive possession if he found exclusive title proved.

In point of fact the Judge has not specifically found upon the case set up by the plaintiffs. He has come to the conclusion that the plaintiffs and defendants Nos. 1 and 2, the sons of Rayaji, [from whom the appellant (original defendant No. 3) has purchased] were owners in co-parcenary of the property. This, however, the plaintiffs did not allege, and it was a state of things on which the parties did not go to trial in the Court of first instance. When the Judge found that the evidence tended to show joint ownership, it was open to him, we think, having regard to the cases of *Wahid Alam* v. *Safat Alam* (4), *Babaji* v. *Vasudev* (5) and *Kallapa* v. *Venkatesh* (6) to have allowed the plaintiffs to set up that case; but if he did so, he should have raised a specific issue on the point, and given the defendant Parashram an opportunity of meeting it.

We, therefore, reverse the decree of the lower appellate Court, and remand the case for re-trial on the merits. Should the Judge [571] consider it necessary in the interest of justice to raise the point of joint ownership, he should do so by a distinct issue and allow the parties an opportunity of adducing evidence. The lower appellate Court can deal with all the costs including the costs of this appeal.

Decree reversed and case remanded.

(1) 11 M.I.A. 7.
(2) 11 M.I.A 468.
(3) 9 B.H.C.R. 1.
(4) 12 A. 556.
(5) 1 B. 95.
(6) 2 B. 676.

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Before the Honourable Chief Justice Farran and Mr. Justice Strachey.

KRISHNARAO RAMCHANDRA AND ANOTHER (*Original Defendants* 1-2), *Appellants v.* BENABAI (*Original Plaintiff*), AND OTHERS, *Respondents.** [13th December, 1895.]

Will—Construction—Bequest to children—Meaning of the expression "children"—Unexpected bequests—How Court treats—Gift to a class—Rule in Tagore case—Executors—Right of executors to have sums lent to the estate allowed them in account—Limitation—Legacy—Gift of income as required with trust for accumulation of balance—No right to arrears once accumulated.

Considerations which only show that a testator has made a disposition in his will which the Court is surprised to find there, though they might have determined the sense in which the testator had used an ambiguous expression, cannot of themselves lead the Court to refuse to give effect to the plain language he has employed, *e.g.*, to read a bequest to "children" as a bequest to "sons" only.

A bequest to "the children of R, living at his decease" where some such children are in existence at the date of the will, need not be construed as a gift to a class of which some members might come into existence after the testator's death, when such a construction would manifestly defeat the primary object of the testator.

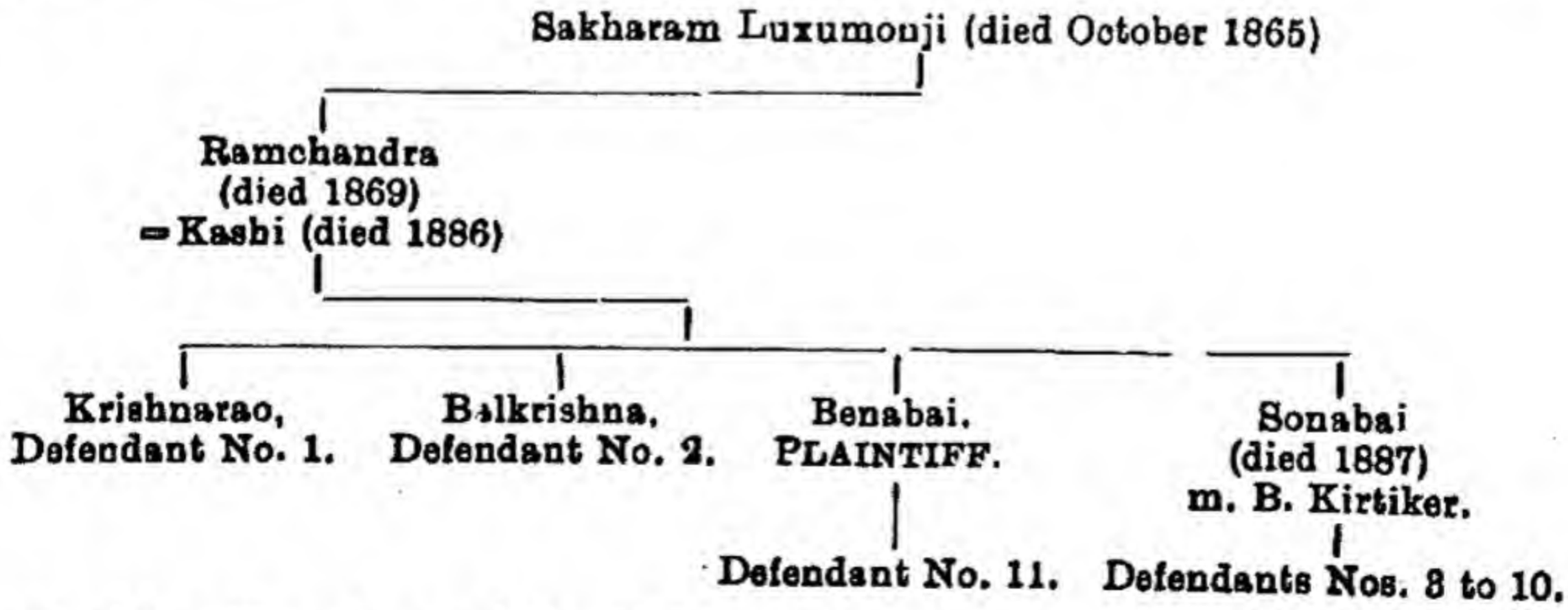
The right of executors, who have used their own monies for the purposes of the estate to be allowed them in their accounts, cannot be affected by limitation before such accounts are taken.

A direction in a will to trustees to pay to a Hindu lady so much of certain dividends as she might from time to time require for her own use and support, &c., and to accumulate the surplus not required by her upon certain trusts specified, entitles the legatee to receive, if she requires it, the whole interest as it falls due, but not to claim afterwards amounts which she did not require as they fell due and which have been accumulated, and this is so whether the trust for which accumulation is directed is valid or invalid.

[R., 22 B. 533 (538); 26 B. 449=3 Bom.L.R. 857; 32 C. 992=1 C.L.J. 482=9 C.W.N. 749; 114 P.R. 1900=1900 P.L.R. 144.]

SUIT for the construction of a will.

The plaintiff was the granddaughter of one Sakharam Luxumonji who died in October, 1865, leaving him surviving a son [572] Ramchandra (who was of weak mind) and grand-children, as shown by the following table :—



By his will and codicils Sakharam Luxumonji bequeathed to his executors and trustees a sum of Rs. 7,000 on trust to invest it, and to pay

* Suit No. 221 of 1893; Appeal No. 874.

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the income thereof to the plaintiff during her life. The will also gave directions as to the disposal of this money after the plaintiff's death.

The testator also directed that the income of the residue of his estate should be applied during the lifetime of his son Ramchandra towards his maintenance, and after his death should be given to his widow for life, and after her death the residuary estate was given in trust for all the children of Ramchandra living at his death in equal shares.

The following are the material portions of the will. Under it the sum left to the plaintiff was Rs. 4,000, but by a codicil the amount was increased to Rs. 7,000. The sum (Rs. 4,000) given to Sonabai by the will was similarly increased to Rs. 8,000.

"I give and bequeath to my son-in-law Bhagwantrao Ramchandraji and one Eshwantrao Wittoji, their executors and administrators, the sum of rupees four thousand upon trust that they and the survivor of them, and executors and administrators of such survivor or other the trustees or trustee for the time being of this my will, do lay out and invest the same in the names or name of the trustees for the time being of this my will in any of the public stocks or funds or Government securities of the United Kingdom or India or upon freehold or leasehold securities in India or in or upon the stocks, funds, shares, debentures, mortgages or securities of any corporation, company or public body, municipal, commercial or otherwise, in Great Britain or India or any other colony or dependency of Great Britain, but not in any other mode of investment, and do from time to time alter, vary or transpose such stocks, funds, shares or securities into or for others of any nature hereby authorized at their or his [573] discretion, and do and shall pay so much and such part of the dividends, interest and income of the same monies or of the stocks, funds and securities in or upon which the same may be invested as she may from time to time require for her own use and support, unto my beloved granddaughter Sonabai, the wife of Balkrishna Vasudeo, during her life for her sole and separate use independently of her husband and of his debts, control or engagements, and so that she shall not have power to dispose or deprive herself of the benefit thereof by anticipation, and the receipts of my said granddaughter shall alone be good and sufficient discharges for the same. And do and shall accumulate the surplus of such dividends, interest and income (if any) which shall not be required by my said granddaughter in the way of compound interest by investing the same and the resulting income thereof in or upon any such stocks, funds, shares or securities as are hereinbefore mentioned for the benefit of the persons or person who under the trust herein contained shall become entitled to the principal fund from which the same shall have proceeded.

"And from and after the death of my said granddaughter do and shall stand possessed of the said sum of four thousand rupees and of the stocks, funds, shares and securities in or upon which the same may be invested and the interest and income thereof and all accumulations thereof (if any) in trust for all or any the children or child of my said granddaughter who shall be living at her death or who shall leave lawful issue living at her death if more than one in equal shares and proportions.

"And I hereby declare that the said trustees or trustee for the time being of this my will shall after the death of my said granddaughter, apply the interest, dividends and income of the share to which any child or more remote issue shall for the time being be entitled under the trust-aforesaid for or towards his or her maintenance or education during his or her

minority, and if there shall be no child or other issue of my said granddaughter who shall be living at her death, then the said trustees or trustee for the time being shall stand possessed of the said sum of four thousand rupees and the stocks, funds, shares and securities in or upon which the same may be invested and the dividends, interest and income thereof respectively upon and for the trusts, intents and purposes which are hereinafter declared of and concerning my residuary real and personal estate.

"Also I give and bequeath to the said Bhagwantrao Ramchandraji and Eshwantrao Wittoji, their executors and administrators the like sum of rupees four thousand upon trust to lay out and invest the same in the names or name aforesaid in or upon any of the stocks, funds, shares or securities hereinbefore authorized for the investment of the like sum of four thousand rupees firstly hereinbefore bequeathed to them and to stand possessed thereof and of the stocks, funds, shares and securities in or upon which the same may from time to time be invested upon the like or similar trusts for or for the benefit of my granddaughter Benabai, the wife of Keshav Vinayak, and her children or other issue and with the like power and provisions in every respect as are hereinbefore contained for or for the benefit of my said granddaughter Sonabai as to and concerning the sum of rupees four thousand firstly hereinbefore bequeathed and with the like remainders over. Also I give and bequeath to the said Bhagwantrao Ramchandraji and Eshwantrao Wittoji, their executors, and administrators the further sum of four thousand rupees upon trust to lay out and invest the same in the names or name aforesaid upon any of the stocks, funds, shares or [574] securities authorized by this my will for the investment of the sum of four thousand rupees firstly hereinbefore bequeathed and to stand possessed of the said sum and the dividends, interest and income thereof upon the same or similar trusts for or for the benefit of my granddaughter Mancubai, the wife of Ramchandra Sakharam, and with the like powers and provisions in every respect as are hereinbefore contained for or for the benefit of my granddaughter Sonabai as to and concerning the sum of four thousand rupees firstly hereinbefore bequeathed by me and with the like remainder over.

"I give and bequeath to the said Bhagwantrao Ramchandraji and Eshwantrao Wittoji, their executors and administrators the sum of nine thousand rupees upon trust that they and the survivor of them and the executors and administrators of such survivor or other the trustees or trustee for the time being of this my will do lay out and invest the same in their or his names or name in any of the stocks, funds, shares or securities hereinbefore authorized for the investment of the sum of four thousand rupees firstly hereinbefore bequeathed to them, and do alter and vary such stocks, funds and securities for others of a like nature as often as they shall think fit, and do and shall pay the dividends, interest and income thereof when and as the same shall become payable unto my granddaughter Angubai, the wife of Bhagwantrao Dwarkanath, during her life for her sole and separate use independently of her husband or his debts, control or engagements and so that she shall not have power to dispose or deprive herself of the benefit thereof by anticipation, and the receipts of my said granddaughter shall alone be good and sufficient discharges for the same. And from and after the death of my said granddaughter Angubai do and shall stand possessed of the said sum of rupees nine thousand and the stocks, funds, shares and securities in or

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upon which the same may be invested and the interest, dividends and income thereof in trust for all or any the child or children of my said granddaughter who shall be living at her death or who shall leave lawful issue living at her death in equal shares and proportions if more than one, and I hereby declare that the said trustees or trustee for the time being of this my will shall, after the death of my said granddaughter, apply the dividends, interest and income of the share to which any child or more remote issue shall for the time being be entitled under the trust aforesaid for or towards his or her maintenance and education during his or her minority, and if there shall be no child or other issue of my said granddaughter who shall be living at her death, then the trustees or trustee for the time being of this my will shall stand possessed of and interested in the said sum of rupees nine thousand and the stocks, funds, shares and securities in or upon which the same may be invested upon and for the several trusts, intents and purposes which are hereinafter expressed and contained of and concerning my residuary personal estate hereinafter bequeathed.

"And as to all the rest, residue and remainder of my real and personal estate wheresoever and whatsoever I give and devise and bequeath the same unto the said Bhagwantrao Ramchandraji and Eshwantrao Wittoji, their heirs, executors, administrators and assigns according to the nature and quality thereof upon trust that they and the survivors and survivor of them and the heirs, executors and administrators of such survivor or other the trustees or trustee for the time being of this my will do and shall in their or his discretion allow the whole or any part or parts of my said residuary real and personal property to remain as long as they shall think fit in its present form of investment or do or shall sell, collect or otherwise convert into money according to the nature of the premises all such parts of the same premises as shall not [575] consist of money in such manner and under such stipulations and upon such terms and conditions in all respects as they, he or she shall in their his or her uncontrolled discretion think fit, and may for the purposes aforesaid execute and do all such assurances as they, he or she shall think fit, and shall invest the monies arising from any such sale, collection or conversion and all other monies arising from or forming part of my said residuary estate in their his or her names or name in or upon any of the stocks, funds, shares and securities hereinbefore authorized for the investment of the aforesaid sum of four thousand rupees firstly hereinbefore bequeathed, and may alter, vary and transpose such stocks, funds, shares and securities for others of a like nature at their, his or her discretion and shall during the lifetime of my son Ramchandra *alias* Fakir apply the dividends, interest and income thereof and the rents of my said residuary real estate until sale for the benefit, maintenance and support of my said son in such manner as the said trustees or trustee for the time being of this my will shall in their or his own absolute discretion think fit, my intent and meaning being that the said trustees or trustee shall have an absolute discretion either to apply the same rents, interests, dividends and income or any part thereof immediately for the purposes aforesaid or to pay the same or any part thereof into the hands of the present wife of my said son to be by her applied for his benefit, maintenance and support.

"And from and after the death of my said son to pay the said rents, dividends, interest, and income to his present wife if she shall survive him until her death.

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"And I hereby declare that from and after the determination of the trusts aforesaid the said trustees or trustee for the time being of this my will shall stand possessed of and interested in the said residuary real and personal estate and the stocks, funds, shares and securities in or upon which the same or any part thereof may be invested, and the rents, dividends and income thereof. In trust for all or any the children or child of my said son who shall be living at the time of his decease or who shall leave lawful issue living at the time of his decease in equal shares and proportions if more than one and if there shall be no such child who shall be living or whose issue shall be living at the time of the decease of the survivors of them my said son and his present wife, then the said trustees or trustee for the time being of this my will shall stand possessed of and interested in the said residuary estate and the stocks, funds, shares and securities in or upon which the same or any part thereof may be invested in trust for the persons or person who would become entitled thereto in case the same had belonged absolutely to my said son, and he had died intestate."

At the date of this suit the first two defendants were the trustees in the place of those originally appointed by the will, and they were in possession of the estate.

The plaintiff complained that the sum of Rs. 7,000 to which she was entitled under the will had never been invested and set apart for her, nor had she been paid the income thereof. She alleged that the first and second defendants, in breach of their duty as trustees, were about to divide between themselves the whole estate of Sakharam Luxumonji. She claimed that her rights under the will should be [576] declared, that fit persons should be appointed trustees instead of the first two defendants, and for a declaration that she was entitled to have the Rs. 7,000 set apart and invested, and also to the interest and income thereof since the death of the testator, and to be paid the income for her life.

Ramchandra died in 1869 and his widow Kashi in 1886.

The first and second defendants contended (1) that the plaintiff was only entitled to so much of the income of the sum of Rs. 7,000 as she might from time to time require for her support; (2) that she was not entitled to any of the arrears of the said income; (3) that, with respect to the said sum of Rs. 7,000, the trusts subsequent to the death of the plaintiff were void; and (4) that the plaintiff was in no event entitled to any share in the residuary estate, that the trusts with reference to it were void, and that, as to it, Sakharam died intestate, and that the same now belonged to them.

The defendants further alleged that a sum of Rs. 16,700, which had come to the hands of the executors of Sakharam, was ancestral property; that the money had been mixed up by the executors with the other property and had been used in defraying necessary expenses, and they submitted that they were entitled to this sum absolutely, and that it should be made good to them out of the estate.

B. Tyabji and *Scott*, for the plaintiff.—They cited Lewin on Trusts (9th Ed.), p. 377; Indian Trusts Act (II of 1882), s. 23; *Mangaldas Parmanandas* v. *Tribhuvandas* (1); *Manjamma* v. *Padmanabhayya* (2); *Tribhuvandas Ruttonji* v. *Gangadas Tricumji* (3); *Soudaminey Dossey* v. *Jogesh Chunder Dutt* (4); *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5);

(1) 15 B. 652. (2) 12 M. 398. (3) 18 B. 7.
(4) 2 C. 262. (5) 4 C. 455.

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Ram Lal Sett v. *Kanai Lal* (1); Jarman on Wills (4th Ed.) pp. 443—5; Theobold on Wills, p. 78; Succession Act (X of 1865), ss. 167—177.

Lang (Advocate-General), *Macpherson* and *Lowndes*, for defendants Nos. 1 and 2.—They cited Mayne on Hindu Law (5th Ed.), para. 387; Succession Act (X of 1865), ss. 104, 167; *Rancliffe* v. *Parkyns* (2); Jarman on Wills (4th Ed.), pp. 445-6; Williams on **[577]** Executors, pp. 1447-8; *Padbury* v. *Clark* (3); *Fitzsimons* v. *Fitzsimons* (4); *Whitley* v. *Whitley* (5); *Miller* v. *Thurgood* (6); *Varley* v. *Winn* (7).

Modi and *Cama*, for defendants Nos. 3 to 10 (children of Sonabai).

Modi, for defendant No. 11 (daughter of plaintiff).

CANDY, J.—In this case the main questions depend upon the construction of the will and codicils of Sakharam Luxumonji, who died in October, 1865, leaving issue as shown by the family tree. The will dated 12th August, 1865, and codicils dated 2nd and 11th October, 1865, provided that the trustees should invest Rs. 8,000, and pay so much and such part of the dividends, interest and income as she might from time to time require for her own use and support, to Sonabai during her life, for her sole and separate use, independently of her husband; and should accumulate the surplus of such dividends, &c., which should not be required by Sonabai, in the way of compound interest, by investing the same and the resulting income thereof for the benefit of the persons who under the trusts contained in the will should become entitled to the principal fund from which the same should have proceeded, and from and after the death of Sonabai should stand possessed of the Rs. 8,000 and interest and income and accumulations thereof, if any, in trust for all or any the children of Sonabai living at her death, or who should have lawful issue living at her death, and if there should be no child or issue of Sonabai then the Rs. 8,000 and the income thereof should form part of the residuary estate.

A like sum of Rs. 7,000 was to be laid out in the same way upon like or similar trusts for Benabai and her children or other issue, with like power and like remainder over. As to the residuary estate of the testator, the trustees were during the lifetime of the testator's son Ramchandra to apply the income for the maintenance of the said son, and after the death of the said son to pay the income to Ramchandra's wife Kashi, till her death, and after her death the trustees were to stand possessed of the residuary estate in trust for all or any the children or child of Ramchandra who should be living at the time of his decease, or who should leave lawful issue living at **[578]** the time of his decease, and if there should be no such child who should be living or whose issue should be living at the time of the decease of the survivor of Ramchandra and Kashi, then the residue was to go to the person or persons who would become entitled thereto in case the same had belonged absolutely to Ramchandra and he had died intestate.

It is admitted that the testator intended the bequest of Rs. 8,000 to Sonabai and Rs. 7,000 to Benabai (present plaintiff) to be on exactly the same terms. It was argued that the testator intended these bequests to be the only benefits which his granddaughters, Sonabai and Benabai, should take under his will, and that they have no interest in the residuary estate. It certainly seems more probable that the testator intended that the grandsons should take the residuary estate, the granddaughters and

(1) 12 C. 663. (2) 6 Dow. 149. (3) 2 Mac. and Gord. 298.
(4) 28 Beav. 417. (5) 31 Beav. 173. (6) 33 Beav. 496.
(7) 2 J. and H. 706.

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their children having the bequests of R. 8,000 and Rs. 7,000 rather than that the grand-daughters should take an equal share in the residuary estate with the grandsons, and should also in addition have the benefit of the bequests of the Rs. 8,000 and Rs. 7,000. But the arguments in favour of this view drawn from the language of the will fail to support it. Thus, in support of this contention, the learned Advocate-General pointed to the fact that by his will the testator appointed the two trustees named in the will to be guardians of his " infant grand-children, Krishnarao and Balkrishna," the sons of Ramchandra. It was suggested that these were the children of Ramchandra who, he intended, should take the residuary estate. But the answer to this contention is that there was no need to appoint guardians to his grand-children, Sonabai and Benabai, who were both married at the time of the execution of the will.

Then the Advocate-General pointed to the provision that the residuary estate was after Kashi's death to go to the children of Ramchandra who should be living at the time of his decease, " or who shall leave lawful issue living at the time of his decease," and he argued that the latter *his* referred to the death of *Ramchandra's son*. But this clearly is not so. It refers to the death of Ramchandra, or, as is explained by the provision a few lines further on, the decease of the survivor Ramchandra or Kashi. There can be no doubt that according to the strict language of the will the testator provided **[579]** that the children (sons and daughters) of Ramchandra should take the residuary estate. In another part of his will he spoke of a certain allowance to his daughter-in-law Rakhmabai, to be made " out of the residue hereinafter devised," and bequeathed in trust for or for the benefit of my said son *and his issue*. Possibly Sakharam thought that "issue" meant sons only. But whatever may have really been his intention, and whatever may have been the opinions of members of the family at various times on this point (as to which something will presently be said), the words of the will are too clear to admit of any doubt. The two sons and the two daughters of Ramchandra were alive at the time of the death of the testator, and they were alive at the time of the death of Kashi in 1886, when the trust came to an end. Each of them, therefore, on the death of Sakharam became possessed of a vested interest in a one-fourth share in the residuary estate. Each became in 1886 absolutely entitled to possession of that one-fourth share. Sonabai died, subsequently in 1887. Her one-fourth share has now become vested in her children, defendants Nos. 3 to 10. Benabai is still alive. Her child, defendant No. 11, has, therefore, no interest at present in her mother's one-fourth share.

A contention was raised on behalf of defendants Nos. 1 and 2 (the sons of Ramchandra) on the authority of *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (1) and *Khcrodemoney Dossee* v. *Doorgamoney Dossee* (2) that the bequest of the residue, after the death of Ramchandra and Kashi, to a class, *viz.*, the children of Ramchandra, was bad, because there might in 1886 have been children of Ramchandra who had not been born at the time of the death of the testator.

But the view taken in the cases just quoted was not followed by another Bench of the Calcutta High Court in *Ram Lal Sett* v. *Kanai Lal Set* (3) and the later view taken by the Calcutta High Court has been adopted by the Madras High Court in *Manjamma* v. *Padmanbhaya* (4)

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and twice by the Bombay High Court, *viz.*, *Mangaldas* v. *Tribhuvandas* (1) and *Tribhuvandas* v. *Gangadas* (2). In the absence, therefore, of any serious argument why I should not follow [580] the view now generally adopted, I am content to accept the later authorities, and hold that the bequest of the residue was good.

I now come back to the bequests of Rs. 8,000 and Rs. 7,000. Sonabai, as before stated, was married to a well-known solicitor, Mr. Balkrishna Kirtiker. Benabai was married to a gentleman with whom she has not for several years been on good terms. She admits that since her grandfather's death she lived mostly with her mother. All her five children who have been born to her, and of whom one only now survives, were (with the exception of the first) born in her mother's house. Her father Ramchandra was admittedly a man of weak intellect; but her mother Kashi was evidently a capable person and managed the family affairs. It may be taken that for many years Benabai lived with her mother and brothers and was supported by them. In 1886 Kashi died. Benabai continued for a short time to live with her brothers. Then they separated, Benabai assisting in the partition of the family cooking pots. She remained on with the younger brother for a time and then went to nurse her sister Sonabai, who was ill. Sonabai died in 1887, and Benabai has continued since then to live with her brother-in-law Mr. Kirtiker, acting as mother to his numerous children. On 30th July, 1892, she made a formal demand through the solicitors, Messrs. Wadia and Gandhi, addressed to her brothers, defendants Nos. 1 and 2, who had by that time become trustees under Sakharam's will, calling on them to pay to her arrears of interest due on the bequests of Rs. 7,000, and also to set apart and invest in Government loan notes the said amount of Rs. 7,000 without any further delay. The letter also recited a claim on behalf of Benabai to be interested in the residuary estate of Sakharam.

No answer was given by defendants Nos. 1 and 2 to that letter. They now admit their liability to set apart the Rs. 7,000 in trust for Benabai, and to pay her the interest as she may require, including of course the interest from the date of the demand in July, 1892. The question as to Benabai being interested in the residuary estate of Sakharam has already been dealt with above. But it has been further pleaded for Benabai that she had made many previous demands on defendants Nos. 1 and 2 for the interest due to her on the Rs. 7,000. This plea is not established. The evidence of Benabai and witness Shewantibai, is, on the face of it, quite insufficient to establish the [581] plea. On the contrary, if any previous demands had been made, it is clear that the facts would have been alluded to in the letter of July, 1892. Mr. Balkrishna Kirtiker was not called, and it is clear, from facts to be alluded to presently, that the members of the family were on perfectly amicable terms, Benabai and Mr. Kirtiker (who may be said to have represented Sonabai) being well aware of what the brothers were doing and not doing as regards their grandfather's estate.

Bhagwantrao and Eshwantrao were the persons named in Sakharam's will as executors, administrators and trustees of his estate. They took out probate of his will in October, 1866. Bhagwantrao died in November, 1868. Eshwantrao then by deed appointed Wasudeo Pandurang to be his co-trustee.

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On 3rd October, 1872, Kashi and her sons Krishnarao and Balkrishna filed suit No. 561 of 1872 against Eshwantrao and Wasudeo, joining Sonabai and Benabai as party-defendants, setting forth the will and codicils of Sakharam, and complaining that the trustees had not set apart or invested many of the legacies or ascertained the residuary estate, and no accounts had been filed till August, 1872, as to the particulars of which and as to the act and omissions of the trustees the plaintiffs complained. They, therefore, prayed that the trustees might be removed and that the estate should be properly administered. It may be remarked that, in the 4th paragraph of this plaint, Krishnarao and Balkrishna and Sonabai and Benabai were recited as entitled to Sakharam's residuary estate after the death of Kashi, but the names of Sonabai and Benabai were subsequently struck out.

On the 17th December, 1872, a consent decree was passed in the said suit No. 561 of 1872. It was ordered that the suit should be withdrawn without liberty to bring a fresh suit for the same matter against Eshwantrao and Wasudeo; that one Sarvotam and Krishnarao, one of the plaintiffs (now first defendant), should be appointed trustees of the will of Sakharam in the place of Eshwantrao and Wasudeo, all charges of misconduct being withdrawn and all costs being paid out of the residuary estate of Sakharam.

It is admitted that in the same year 1872 Sonabai and Benabai received all arrears of interest on their bequests of Rs. 8,000 and Rs. 7,000, respectively.

[582] Allusion was made above to the fourth paragraph of the plaint in suit No. 561 of 1872. It may be remarked that in the same year in the matter Eshwantrao being called to furnish accounts of his administration of the estate of Sakharam, an affidavit was prepared and sworn by Krishnarao, dated 18th June, 1872, in which he spoke of himself and his brother and his sisters Sonabai and Benabai being residuary legatees under his grandfather's will. In another affidavit in the said suit No. 561 of 1872 filed by Krishnarao on the 4th October, 1872, he spoke of himself and his brother as being the residuary legatees.

In the year 1877, on the application of Krishnarao in the said suit No. 561 of 1872, Sarvotam was allowed to withdraw from his trusteeship, and Balkrishna (now defendant No. 2) was appointed in his place to be co-trustee with his brother Krishnarao. Since then the two brothers have managed Sakharam's estate.

As remarked above, the members of the family were apparently then on amicable terms and continued to be so for several years. In 1888 the brothers Krishnarao and Balkrishna by the aid of their brother-in-law Mr. Kirtiker, with whom Benabai was then residing, drew up an agreement of partition of immoveable property, which (*inter alia*) provided for the payment of the legacies of Rs. 8,000 and Rs. 7,000 described above, but evidently did not contemplate Sonabai's children or Benabai being interested otherwise in Sakharam's residuary estate. Subsequently to 1888 some family quarrel must have arisen. Benabai's demand through her solicitors was made in July, 1892, and in April, 1893, the present suit was filed by Benabai against defendants Nos. 1 and 2, her brothers Krishnarao and Balkrishna, the present trustees under Sakharam's will, defendants Nos. 3 to 10, the children of Sonabai, deceased, and defendant No. 11, the child of the plaintiff Benabai, being subsequently joined. It is admitted that of Sonabai's children defendant No. 3 is the only one

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who was born at the time of Sakharam's decease. Benabai's child, defendant No. 11, was admittedly not then born.

The above being the facts proved or admitted, I find that Benabai is entitled to have the Rs. 7,000 invested and to be paid arrears of interest from the date of her demand in July, 1892. **[583]** I find that she is not entitled to arrears of interest prior to July, 1892. Not that I agree with the argument used by the learned counsel for defendants Nos. 1 and 2, that Benabai by the terms of Sakharam's will was not entitled to the interest on the Rs. 7,000 as long as she lived with her mother and brothers. I do not think that the words "for her own uses and support" cut down the bequest or made it less than an absolute gift to be at Benabai's own disposal whenever she demanded it. But I think that it is equally clear that the money was only to be paid to her as *she might from time to time require it*: *i. e.*, as the interest accrued, if Benabai asked for it, it was to be paid to her; if she did not ask for it, it was to be accumulated and eventually added to the principal fund. Benabai not having before July, 1892, demanded the interest, cannot now recover arrears of interest before that date. The fact that in 1872 Benabai and Sonabai recovered the arrears of past years' interest (presumably from 1866) will not prevent the present trustees from taking their stand on the express directions of the will.

Next, according to the will, if the Rs. 7,000 had been properly invested, the interest as it accrued and had not been required by Benabai would from time to time have been invested, and after the death of Benabai the principal fund of Rs. 7,000 and the fund of accumulations would go to the children of Benabai living at her death, or who should leave lawful issue living at her death. Benabai is not dead, but all the parties interested being before the Court, the Court is in a position to give direction as to the ultimate disposal of the Rs. 7,000. The direction must be that as Benabai's child (defendant No. 11) was not born at the death of Sakharam, the bequest of the Rs. 7,000 to Benabai's child or children is void. When, therefore, Benabai dies, the Rs. 7,000 will be distributed as part of the residue, and should Benabai subsequently to this suit not require the interest on the Rs. 7,000 from time to time as it accrues (obviously there is not much chance of this) then the interest not so required being as far as possible itself invested will also be distributed like Rs. 7,000.

The question, then, arises as to the interest which should, according to the provisions of the will, have been accumulated between **[584]** 1873 and 1892. It is admitted that the present defendant cannot be held liable for any accumulations of interests before January, 1873, when the first defendant as trustee came into charge of the estate. But plaintiff through her counsel seeks now to recover the arrears of interest (with compound interest) on the ground that the trustees failed in their duty to invest the Rs. 7,000. This, however, cannot be allowed. The trustees may have been negligent, but they are entitled to take their stand on the provisions of the will, and contend that plaintiff is only entitled now to interest as she did demand it, the interest not so demanded being otherwise disposed of. The fact that the Rs. 7,000 have not been invested according to the provisions of the will would not entitle plaintiff to claim the interest of the same in any way contrary to the will. And, as noticed above, the present trustees are not concluded by what took place in 1872. So far the point is clear enough. The plaintiff is not entitled to present possession of any accumulations of interest

prior to 1892. And, according to Mr. Budrudin's reply for plaintiff, that was the limit of the plaintiff's case. The question as regards the accumulations, he said, can only arise on the death of the plaintiff; the surplus interest is only to be invested on the death of the lady; no point arises as to the directions in the will regarding accumulations, because there are none, and they would fall into the residue. The answer to this is clear. The provision of the will is explicit; the interest not required by Benabai was to be invested from time to time by way of compound interest, and on the death of Benabai the fund formed by these further investments was to go to the person who would take the Rs. 7,000. But, as has just been shown, the Rs. 7,000 fall into the residue. On Benabai's death her representative may claim the one-fourth share of the Rs. 7,000, which will then be distributed among the four residuary legatees or their representatives. It may be argued that the interest in that sum of Rs. 7,000 is vested in interest in Benabai though not in possession, and that with that share of the Rs. 7,000 there will also be the arrears of the interest which was not required, and which should itself, according to the will, have been formed into a fund to be added to the Rs. 7,000.

The learned Advocate-General, for defendants, argued that the direction in the will as to accumlations of interest was wholly **[585]** void, quoting Mayne's Hindu Law (5th Ed.), para. 387. But of the two cases quoted by Mr. Mayne, one (*Kumara Asima* v. *Kumara Krishna*(1)) was a case in which the direction was to accumulate for ninety-nine years, while no direction was given as to the appropriation of the fund at the end of the time. In the other (*Krishnaramani* v. *Ananda* (2) the trust for accumulation was wholly bad as being, in fact, part and parcel of the creation of a perpetuity. I can find no case in which a direction such as the present one was held bad, *viz.*, a gift of Rs. 7,000 to Benabai for life with a gift over of Rs. 7,000, to which was to be added so much of the income of the Rs. 7,000 as had not been required by Benabai. The fact that s. 104 of the Succession Act was not made applicable to Hindus by Act XXI of 1870 seems to show that a direction in a will to accumulate the income arising from any property is not necessarily void.

Then it was argued that as the sum of Rs. 7,000 forms part of the residue, therefore by the will the interest not required by Benabai belonged to Ramchandra and then to Kashi, and thus could never be a vested interest to which Benabai or her representative could lay claims. But this is not so. Supposing that by the terms of the bequest, and not by operation of law, the accumulated interest not required by Benabai was on her death to go with the Rs. 7,000 to the residuary legatees, the trustees would not have been justified either in taking that money for themselves or in paying it over to Ramchandra and Kashi. If the direction to accumulate is good at all, it is good for its disposal with the Rs. 7,000 as part of the residuary estate.

Then it was argued that as the gift over of the Rs. 7,000 to Benabai's child is void, therefore the direction to accumulate for the benefit of Benabai's child is void also. But this is not the case of a bequest being void, and, therefore, any bequest contained in the same will and intended to take effect *after or upon failure of such prior bequest* being also void (*cf.* s. 163 of Succession Act). This is the case of the bequest of Rs. 7,000 plus

(1) 2 B.L.R.O.C. J. 11. (2) 4 B.L.R.O.C.J. 231.

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interest being void, and, therefore, the said bequest falling to the four residuary legatees. Of these defendants Nos. 1 and 2 do not, of course, ask that any accumulated interest between 1873 and 1892 should be calculated [586] in taking the account of the residuary estate. Nor do the children of Sonabai; their counsel expressly disclaimed any such plea. It is only the remaining $\frac{1}{4}$th share on whose behalf such a plea can be said to require consideration. Apart from the fact that plaintiff did not explicitly raise it, but on the contrary asked for the present possession of the said money, I find that it would not be equitable to give such a direction to the Commissioner in taking an account of the residuary estate; for it was with the full knowledge of Benabai that the Rs. 7,000 were not invested, but used for other family purposes. Defendant No. 1, who holds a responsible position under Government, gave his evidence in a straightforward manner, and I accept his statements without hesitation.

I hold, therefore, that interest which should have been accumulated between 1873 and 1892 cannot be given, wholly or in part, to plaintiff now, nor can it be taken into consideration in taking an account of the residuary estate.

I now come to consider the question regarding the sum of Rs. 16,436-5 which Eshwantrao as the surviving executor of Sakharam Luxumon on 30th November, 1870, received from the Master in Equity, as representing a share payable to Sakharam according to a decree of the High Court dated 20th February, 1864. That decree was in a suit to which Sakharam with several other members of his family was a party, and related to certain ancestral estate which the Master was to sell and to give Sakharam $\frac{1}{6}$th share of the proceeds. It is clear, from the accounts which Eshwantrao furnished in August, 1872 (alluded to above) that Eshwantrao received and dealt with the sum of Rs. 16,436-5 as part of the estate of Sakharam covered by Sakharam's will. No one up to the present suit seems to have had any opinion as to this money, but that it formed part of "all the rest residue and remainder of my real and personal estate wheresoever and whatsoever" devised by Sakharam as shown above. But defendants Nos. 1 and 2 now plead that, if an account is directed to be taken of Sakharam's residuary estate, this sum of Rs. 16,000 odd with interest from the date of its receipt must be deducted from the monies which have come into their hands, as they are entitled to hold the cash received from the Master as ancestral estate in which Sonabai and Benabai would have no share. In my opinion, they are not so [587] entitled. The circumstances under which the Master called upon the executors of Sakharam's will to receive the money cannot now be made clear. But it would be very difficult to suppose that Sakharam had, when he made his will in 1865, entirely lost sight of the decree which had been passed in 1864 and under which he would be eventually entitled to receive a large sum of money representing his share of the ancestral estate. Seeing the details recited in the will, *e. g.*, the debt due to testator from Jamnabai, it is strange that the testator did not mention the money coming to him under the decree of 1864. But, having regard to the very wide terms in which the testator described his residuary estate, including real as well as personal, it must, I think, be taken that he did profess to dispose of the money coming to him under the decree. When defendant No. 1 took upon himself the trusteeship he knew that the previous trustee and executor had received and dealt with the money as part of the residuary estate disposed of by the will. At that time, as shown above, the members of the

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family seem to have been uncertain whether defendants Nos. 1 and 2 were the sole residuary legatees. But, at any rate, both these defendants were perfectly competent to apply to the Court for a correction of the accounts so that the fund received from the Master could have been excluded from the account of the residuary estate covered by the will. They did not do so. It would be inequitable now to allow defendants Nos. 1 and 2 to re-open the accounts which they have accepted and acted on for so many years. I have now dealt with all the points arising on the pleadings, and can dispose of the issues *seriatim*.

1. I find that plaintiff is entitled to the interest of the Rs. 7,000 only as she may require it; that if she demands it as it accrues it must be paid over to her. Of course she would be entitled to a reasonable time for demand, and there would be no lapse simply because she did not ask for the interest on the very day it accrued. In the same way I see no objection to her giving a standing order that the money should be paid over to her or to a certain person on her account till further notice.

2. I find that defendants Nos. 1 and 2 have not been always ready to set apart the Rs. 7,000. That is admitted by defendant No. 1. No doubt all the members of the family were aware of the way in which defendants Nos. 1 and 2 were dealing with the estate, and **[588]** expressed no disapproval, but that does not alter the fact that defendants Nos. 1 and 2 so acted as to be unable to set apart the Rs. 7,000 when called on to do so. They admit their liability now to set apart the money.

3. I find that plaintiff made no demand prior to 30th July, 1892

4. I find that plaintiff is entitled to demand the interest, whether she is supported by any member of the family or otherwise.

5. I find that plaintiff cannot demand arrears of interest prior to 30th July, 1892. The arrears from July, 1892, may fairly be taken to cover the first half-yearly interest for 1892.

6. I find that the gift over of the Rs. 7,000 after Benabai's death is void, and that the same falls into the residuary estate of Sakharam.

7. I find that the bequest of the residuary estate, after the death of Kashi, is not void.

8. I find that plaintiff has a $\frac{1}{4}$th share in that residuary estate.

9. I find that defendants are not entitled to deduct any sum on account of ancestral estate.

10. I find that defendants Nos. 1 and 2 are not solely entitled to Sakharam's residuary estate.

11. I find that the agreement of 1888 made between defendants Nos. 1 and 2 was made with the knowledge of the plaintiff, but that fact does not estop the plaintiff from claiming her just rights under the will.

12. I find that, to ascertain the residuary estate for which defendants Nos. 1 and 2 are liable, a reference must be made to the Commissioner.

13. (General issue).

14. I find that defendant No. 3 is entitled to the Rs. 8,000 which on the death of Sonabai by the will of Sakharam became the property of Sonabai's child, defendant No. 3, who was alive at the death of the testator. In so finding I follow the view adopted in regard to the bequest of the residuary estate. I find also that defendants Nos. 3 to 10 are entitled to Sonabai's $\frac{1}{4}$th share in the residuary estate of Sakharam.

[589] 15. I find that under the will of Sakharam defendant No. 11 is not entitled to the Rs. 7,000 on the death of the plaintiff. Her mother (the plaintiff) is entitled absolutely to one-fourth share of the residuary estate of Sakharam;

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It only remains to deal with the prayers of the plaint in accordance with the above findings.

(*a*) Plaintiff's right, having been ascertained as just shown, will be declared and there will be a direction to carry out the trusts of the will as regards the investment of the Rs. 7,000. There will be a similar direction to secure the Rs. 8,000 for the benefit of defendant No. 3.

(*b*) I cannot consent to the proposal to remove the present trustees, defendants Nos. 1 and 2, unless they themselves are anxious to be relieved from the trust. I cannot adopt the very strong language used by the learned counsel for the plaintiff in regard to the conduct of defendants Nos. 1 and 2. They have acted unwisely but not fraudulently.

(*c*) The necessary declaration will be made to have the Rs. 7,000 set apart and secured to plaintiff for her life, provided she demands the income thereof.

(*d*) And to entitle her to receive the interest from 30th July, 1892, the same should be calculated at compound interest with half-yearly rests.

(*e*) I do not think that any injunction is necessary, nor is the appointment of a receiver necessary.

(*f*) No arrears of interest can be allowed prior to 30th July, 1892, the same covering the first half-year's interest of 1892.

(*g*) As to the costs. Plaintiff must bear all costs occasioned by the plea that there had been a demand prior to 30th July, 1892. Her other costs up to date and the costs of defendants Nos. 1 and 2 up to date must be borne by defendants Nos. 1 and 2 personally. Their omission to give any answer to plaintiff's demand necessitated the suit. In any case, defendants Nos. 1 and 2 are not entitled to have separate costs.

The costs of defendants Nos. 3 to 11 to come out of the residuary estate, for the ascertainment of which there must be a reference to the Commissioner.

[590] At the request of the Advocate-General the findings to be inserted in the decree.

The first and second defendants appealed. They contended (1) that Benabai was not entitled to a share in the residuary estate; (2) that the children of Sonabai were not entitled to a one-fourth share in the residuary estate; (3) that the defendants should be declared entitled to deduct from the estate, before the residue thereof was available for distribution, the sum of Rs. 16,436 and interest thereon received by the executors of Sakharam.

The plaintiff Benabai filed cross-objections to the decree.

Macpherson and *Lowndes*, for the appellants (defendants Nos. 1 and 2).

Starling and *Scott*, for respondent (plaintiff).

The following authorities were referred to:—William on Executors, p. 1114; Seton on Decrees (5th Ed.), p. 1355; Theobold on Wills, p. 404; Henderson on Wills, pp. 217—219; *Mangaldas Parmanandas* v. *Tribhuvandas* (1); *Ram Lal Sett* v. *Kanai Lal Sett* (2); *Rai Bishen Chand* v. *Asmaida Koer* (3); *Dorrell* v. *Dorrell* (4); Lewin on Trusts (9th Ed.), pp. 377—379.

JUDGMENT.

FARRAN, C. J.—This is an appeal from the judgment of Candy, J., upon the construction of the will of Sakahram Luxumonji. The appellants

(1) 15 B. 652. (2) 12 C. 663. (3) 11 I.A. 164. (4) (1895) 2 Ch. 698.

complain of the learned Judge's decision in so far as it gives the plaintiff Benabai and the defendants Nos. 3 to 10 collectively, who represent Sonabai, shares, respectively, in the residuary estate of the testator.

The will is dated the 12th August, 1865. The family for a lengthened period were under the impression that the sons of Ramchandra Sakharam to the exclusion of his daughters were entitled to the residuary estate. The judgment appealed against has determined that the daughters equally with the sons are entitled to share in it.

The clause which gives rise to the question is this :—

"And I hereby declare that from and after the determination of the trusts aforesaid the said trustees or trustee for the time being of this my will shall stand possessed of and interested in the said residuary real and personal estate and the stocks, funds, shares and securities in or upon which the same or any part of that may [591] be invested, and the rents, dividends and the income thereof *in trust* for all or any the children or child of my said son who shall be living at the time of his decease or who shall leave lawful issue living at the time of his decease in equal shares and proportions if more than one, and if there be no such child who shall be living or whose issue shall be living at the time of the decease of the survivors of them my said son and his present wife, then the said trustees or trustee for the time being of this my will shall stand possessed of and interested in the said residuary estate and the stocks, funds, &c., *in trust* for the persons or person who would become entitled thereto in case the same had belonged absolutely to my said son and he had died intestate."

Upon this it is firstly contended that the context of the will shows that the testator used the expression "children" in the above clause as the equivalent of sons who alone, he desired, should take. The will was written in English, and it is suggested that the testator had not an accurate knowledge of that language, and that, therefore, it is by no means improbable that he misunderstood the term which he employed and used it in an unusual sense. As giving colour to this contention it is pointed out that legacies, which are strictly tied up, are given to the testator's granddaughters Benabai and Sonabai, and it is argued that it is highly improbable that in addition the testator should have given them absolute and uncontrolled shares in the residue which would place them in a better position than their brothers to whom nothing is given but their shares in the residue. It is also provided in the will that, in the event of the failure of issue of the granddaughters, the legacies to them shall fall into the residue. This is, it is contended, a clear indication that the testator did not intend that his granddaughters should share in the residue.

These considerations, though they are calculated to induce a very careful scrutiny of the whole will with a view to ascertain whether its context does not show that the testator used the term "children" in other than its usual grammatical sense, are in themselves insufficient to control or vary the meaning of the term. They only show that the testator has made a disposition by his will which the Court is surprised to find such a testator or indeed any testator making. If there was any ambiguity in the expression, such considerations might determine the sense in which the testator used it, but they cannot lead the Court to refuse to give effect to the plain language which he has employed. In support of the contentions that the context of the will indicates that the testator used the expression [592] "children" instead of "sons" the appellants rely upon the fact that the testator when referring to Sonabai and Benabai in the early portions

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of the will designates them his "*granddaughters*," while in the final clause of the will he appoints the executors of the will guardians for his infant "*grand-children*" Krishnarao and Balkrishna, not for his infant "*grandsons*." We should readily lend ourselves to this contention if we thought we should be justified in doing so. But it appears to us too slender a basis from which to draw the suggested conclusion. There is no antithesis between the two expressions. The testator merely uses one appropriate expression to designate Krishnarao and Balkrishna instead of another hardly more, or, we should rather say, equally appropriate. This is the only foundation for the argument; and in other clauses of the will the testator uses the expression children where it is not contended that he means to confine it to sons. If we were to accept the argument of the appellants, we should have to attribute two entirely different meanings to the same word in the same instrument without any context to justify us in doing so, contrary to one of the most fundamental canons of construction. We, therefore, come to the conclusion that the judgment of the Division Court upon this point is correct.

It is further contended that the gift to the children of Ramchandra who shall be living at his decease is a gift to a class of which some may have come into existence after the death of the testator, as to whom the gift would be void under the rule in the *Tagore case*, and that, therefore, the whole gift is void. At the time when the testator made his will, his son Ramchandra had two daughters, Sonabai and Benabai, and two sons, Krishnanath or Krishnarao and Balkrishna, who are all named in the will, though not in this particular clause. It would manifestly defeat the intention of the testator if the whole bequest were declared to be inoperative, merely because the testator indicated his wish that, if further children should be born to Ramchandra, the class should be enlarged so as to embrace them. A uniform series of decisions ending with that of *Tribhuvandas* v. *Gangadas* (1) show that we are not bound to adopt a construction which would in many, if **[593]** not in most, cases defeat the primary intention of the testator, because effect cannot be given to his secondary intention. We think that we ought to follow these decisions in preference to some earlier cases that are opposed to them. Upon this question also we agree with the view taken by the Division Court.

The next ground of appeal is with reference to a sum of Rupees 16,436-5-0 which the Division Court has treated as forming part of the testator's estate or liable to be treated as part of such estate. This was a sum admittedly arising from the sale of the testator's share in certain ancestral estate by the Master in Equity. which the executors of the testator received after his death and dealt with as though it belonged to his estate. It is admittedly money over which the testator had no power of disposition, but which upon the death of the testator passed to his son Ramchandra. The will does not refer to this money specifically and there is nothing in its terms to indicate that the testator intended to dispose of or deal with it. No question of election can, therefore, arise in reference to it. It was apparently allowed to be received and dealt with by the executors as part of the estate in consequence of the understanding in the family, that it in common with the rest of the residuary estate would devolve ultimately upon the sons of Ramchandra. That understanding having now been found to be erroneous, the sons of

(1) 18 B. 7.

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Ramchandra are of course entitled to have it from the estate and restored to them, unless the law of limitation bars their right. We do not think that it does.

When the sum was received by the executors, one of the sons of Ramchandra, the appellant Krishnarao, was acting as an executor and the other son, the appellant Balkrishna, soon afterwards assumed that office. Their case is that this money was used for the purposes of the estate, or, in other words, lent to it. The executors have thus used their own monies or money procured by one of them for estate purposes. In taking the accounts of the estate, executors are entitled to be allowed such money—*Spackman* v. *Hilbrook* (1); Seton on Decrees (4th Ed.), p. 894. Under certain circumstances they are allowed it with interest. We are unable **[594]** to see how the Statute of Limitation applies to such a case, as the account of the executors has still to be taken. Whether this sum has been advanced to, or used in, the estate will be decided when the account is gone into. For these reasons we are of opinion that the finding on the 9th issue must be set aside and the decree varied so as to give effect to our judgment in this respect.

The respondent Benabai has filed cross-objections to the decree in reference to her claim for interest on her legacy of Rs. 7,000. By the clause in the will upon which her contention is based, the testator gives a sum of Rs. 4,000 (by a codicil raised to Rs. 7,000) to his executors upon trust that they do invest the sum in the name of the trustees and "do pay so much and such part of the dividends, interest and income of the same monies or of the stocks, &c., upon which the same may be invested as she may from time to time require for her own use and support" to Benabai during her life for her sole, and separate use independently of her husband without power of anticipation and upon trust that they do and shall accumulate the surplus of such dividends, interest and income (if any) which shall not be required by Benabai, in the way of compound interest by investing the same and the resulting income thereof for the benefit of the persons or person who under the trusts of the will shall become entitled to the principal fund from which the same may have proceeded. These trusts were for all or any of the children or child of Benabai who shall be living at her death or who shall leave lawful issue living at her death, failing whom they were to fall into the residue. The bequest to the children of Benabai having been void under the rule in the *Tagore case*, the accumulations are held in trust to form part of the residue. Benabai's legacy has never, in fact, been set aside. The interest upon it was paid to her down to 1872. After that she lived on amicable terms with, and was supported by, her mother and her brothers, the executors and other members of the family, down to the time of the disputes between them; and the Division Court has held that she did not, after 1872, require or demand payment of the interest upon her legacy until 30th July, 1892. The latter finding has not been seriously contested before us, and we **[595]** think we ought to accept it. Upon the construction of the clause we agree in the view taken by the Division Court. The plaintiff was entitled, we think, as she required money for her support from time to time, to receive it from the executors up to the full amount of the interest, but if she did not require the interest, or any part of it, the trustees are directed to invest the amount not required, and are directed to hold such accumulations

(1) 2 Gif. 198.

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upon trust for the persons who will be ultimately entitled to the fund. After it is once accumulated, the accumulations appear to us to become impressed with that trust, and Benabai is no longer entitled to receive them. The failure of this ultimate trust cannot alter or enlarge the meaning of the bequest for life in favour of Benabai. That remains the same as if the ultimate trusts were good and could be given effect to. Benabai cannot, therefore, claim to have the interest prior to 30th July, 1892, which she did not require and demand as it accrued due, now paid to her.

She demands, however, as a person interested in the residue to have the fund now made up to the amount at which it would have stood had the trustees set apart and invested this legacy as they should have done at least in 1873. The learned Judge in the Court below has refused to give directions to that effect on the ground that Benabai was well aware of the dealings of the executors with the estate since 1873 until the disputes, and acquiesced in them, and we think that he was justified in taking that view. The executors themselves and Sonabai's children are entitled to $\frac{3}{4}$ of the residue, and they do not seek to have this provision made. The legacy money appears to have been employed in estate purposes, and it is not shown that it has not benefited the estate to the same extent as if it had been invested and the surplus income accumulated. It has not, in fact, been shown that the residue has suffered any actual loss by reason of this direction not having been carried out. Under these circumstances we do not, on the whole, consider that equity requires us to take the extreme steps of giving this alternative direction which Benabai asks for against the wish of the other beneficiaries. We, therefore, disallow the cross-objections.

As to costs, we do not think that the Division Court has assigned adequate reasons for departing from the usual rule in such [596] cases and making the executors personally liable to pay them. Since we have varied the decree in a material point we consider that the whole question as to costs is open to us.

The parties respectively will have their costs out of the estate in the Court below and will pay their own costs, respectively, of the appeal as it has in part succeeded and in part failed. We do not, under the circumstances, make any order as to attorney and client costs.

Decree varied.

Attorneys for the appellants (defendants Nos. 1 and 2) :—Messrs. *Bhaishankar and Kanga.*

Attorneys for the respondent No. 1 (plaintiff) :—Messrs. *Chitnis, Motilal and Malvi.*

Attorney for other respondents :—Mr. *Balkrishna V. N. Kirtikar.*

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20 B. 596 = Chitty's S. C. C. R. 472.

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Before Sir Charles Farran, Kt., Chief Justice, and Mr. Justice Strachey.

TEJPUR DEWCHAND AND ANOTHER (*Plaintiffs*) *v.* MAHOMED JAMAL AND OTHERS (*Defendants.*)* [10th January, 1896.]

Arbitration—Application to file award—Civil Procedure Code (Act XIV of 1882), ss. 525, 526—Objections as to the factum or validity of submission and award—Ss. 521 and 522 of the Civil Procedure Code (Act XIV of 1882)—Practice—Procedure.

Where on an application to file an award under ss. 525 and 526, Civil Procedure Code (Act XIV of 1882), objections, which in the opinion of the Court are not merely frivolous or colourable, are raised to the factum or validity of the submission and award, the Court has no jurisdiction to deal with them and must refer the parties to a regular suit.

Samal v. *Jaishankar* (1) and *Surjan* v. *Bhikari* (2), followed.

Amrit Ram v. *Dasrat Ram* (3), not followed.

[N.F., 112 P.L.R. 1901 (F.B.); R., 29 B. 621 (626) = 7 Bom. L.R. 644 ; 25 C. 757 (F.B.) = 2 C.W.N. 529 ; 11 C.L.J. 131 (133) = 5 Ind. Cas. 98 ; 13 C.P.L.R. 53 ; D., 28 B. 287 = 6 Bom. L.R. 15 (16).]

CASE stated for the opinion of the High Court, under s. 69 of the Presidency Small Cause Courts' Act (XV of 1882), by C. W. Chitty, Chief Judge :—

"This was a suit brought by the plaintiffs, who were father and son, against the three defendants to recover Rs. 1,228-8 as [597] damages for breach of contract to deliver cotton. The first defendant is brother of the second and son of the third defendant.

On the suit being called on before me for hearing on the 8th August, 1895, the plaintiffs' solicitor presented an application stating that the matter in question in the suit had been referred to the arbitration of one Purshotam Sivji, who had made his award, and asking that the submission paper and the award might be recorded as a settlement of the suit under s. 375 of the Code of Civil Procedure, or that, in the alternative, the award might be filed under s. 525.

After hearing the solicitor for the plaintiffs and counsel for the first defendant and the pleader of the first and second defendants I took time to consider the point. On the 12th August I delivered judgment to the effect that the submission paper and the award could not possibly be recorded as a compromise of the suit under s. 375 for many reasons, but more especially because (1) the first plaintiff and second and third defendants were no parties to the alleged arbitration and were not bound by it, and (2) it would preclude the defendants from raising any objections they might have to the validity of the award. I was of opinion that the plaintiffs were entitled to a notice under s. 525 calling on the first defendant to show cause why the award should not be filed.

"I should mention that the submission, although in the body of it purporting to be made by the three defendants, was only signed by the first defendant, the second plaintiff being the only signatory on the part of himself and his father. The award purports to be made against all the three defendants. In accordance with my decision a notice was issued

* Small Cause Court Suit No. $\frac{243}{16989}$ of 1895.

(1) 9 B. 254. (2) 21 C. 213. (3) 17 A. 21.

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against the first defendant, and on the 26th August it came on for hearing. The first defendant by his counsel raised the following objections:—(1) that the matters in dispute were not duly or legally referred to arbitration; (2) that the submission, if any, was imperfect and illegal; (3) that what was sought to be filed was not an award; (4) that the submission, if any, was revoked before the making of the alleged award; (5) that the arbitrator was guilty of misconduct, and (6) that the award was made without any investigation.

[598] "After hearing the arguments on part of the first defendant and the plaintiffs I delivered judgment and held, on the authority of the cases cited, I was justified in refusing to file the award and in referring the plaintiffs to a substantive suit on the award. The objections taken by the first defendant appeared to me serious and substantial and to go to the very root of the matter as to whether there had been any binding submission or award. They did not appear to me to be merely frivolous or colourable objections raised for the purpose of hampering the plaintiffs. The cases on which I relied were *Samal Nathu* v. *Jaishankar Dalsukhram* (1); *Hirjibhai* v. *Jamsetji* (2); *Venkatesh* v. *Chanapgavda* (3) and *Bijadhur* v. *Monohur* (4).

"I am aware that it was decided in the case of *Dandekar* v. *Dandekars* (5) that to show cause means not merely to allege but to prove it. But I was of opinion that that case did not preclude me from exercising the discretion which would appear to be left to the Judge by ss. 525 and 526. That section provides no procedure for an elaborate investigation into difficult questions of law and fact.

"As I was delivering judgment, and had in fact expressed my opinion, the plaintiffs' solicitor interrupted me and asked for a case to be stated. Though technically speaking he was too late in his application, I do not wish to deprive the plaintiffs of the satisfaction of obtaining the higher opinion. I, therefore, submit this question for the consideration of their Lordships:—

"(1) Whether, after issuing a notice under s. 525, the Court was bound to go into evidence on the objections raised?

"(2) Whether, under the circumstances above stated, I was justified in refusing to file the award and in referring the plaintiffs to a substantive suit?

"The plaintiffs have deposited in Court Rs. 68, the first defendant's costs of the day, and Rs. 50 to meet the costs of reference."

Raikes appeared for the plaintiffs.

[599] *Lang* (Advocate-General), for the defendants.

The following cases were cited and commented upon:—*Samal Nathu* v. *Jaishankar Dalsukhram* (1); *Hirjibhai* v. *Jamsetji* (2); *Bijadhur* v. *Monohur* (4); *Venkatesh* v. *Chanapgavda* (3); *Dandekar* v. *Dandekars* (5); *Jagan Nath* v. *Mannu Lal* (6); *Amrit Ram* v. *Dasrat Ram* (7); *Surjan Raot* v. *Bhikari Raot* (8).

JUDGMENT.

FARRAN, C. J.—The questions submitted to us upon this reference arise under the following circumstances. The plaintiffs, who are partners, filed a suit in the Small Cause Court to recover damages from the defendants for breach of a contract to deliver cotton. The defendants were

(1) 9 B. 254. (2) P.J. (1890), p. 250. (3) 17 B. 674.
(4) 10 C. 11. (5) 6 B. 663. (6) 16 A. 231.
(7) 17 A. 21. (8) 21 C. 213.

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three partners carrying on business in the name of Mahomed Jamal, which was also the name of the first defendant. On the suit being called on, the plaintiffs made an application to the Court stating that the suit had been privately referred to arbitration, and that an award had been made and (*inter alia*) asking that the award might be filed under ss. 525 and 526 of the Civil Procedure Code. It then appeared that the alleged submission had been signed by the defendant Mahomed Jamal alone, although in its body it purported to be made by all the three defendants. The award purported to be made against all the three defendants. The learned Judge directed a notice to issue under s. 525 to the defendant Mahomed Jamal. That defendant appeared, and while admitting his signature to the submission paper raised several objections as to its legal validity and its binding effect upon him, and as to the award, of which it is sufficient to say that to the Judge they "did not appear to be merely frivolous or colourable objections raised for the purpose of hampering the plaintiffs." The learned Judge, considering that he had a discretion in the matter, and that ss. 525 and 526 provided no procedure for an elaborate investigation into difficult questions of law and fact, refused to file the award, and referred the plaintiffs to a regular suit. The fifth and sixth objections related to the conduct of the arbitrator. The rest were objections to the validity of the **[600]** submission and award independent of the character of the arbitrator's proceedings.

The questions submitted are :—

1. Whether, after issuing a notice under s. 525, the Court was bound to go into evidence on the objections raised ?

2. Whether, under the circumstances stated, the Judge was justified in refusing to file the award and in referring the plaintiffs to a substantive suit ?

The decisions of this Court on which the learned Judge of the Small Cause Court relied are *Samal Nathu* v. *Jaishankar Dalsukhram* (1), *Hirjibhai* v. *Jamsetji* (2) and *Venkatesh* v. *Chanapgavda* (3), while he distinguished *Dandekar* v. *Dandekars* (4). The former judgments have been referred to with approval by three of the five Judges of the Calcutta High Court who decided the Full Bench case of *Surjan Raot* v. *Bhikari Raot* (5). The Full Bench unanimously ruled in that case that when an application is made to a Court for filing a private award, and objections are raised, and the objections are such as fall within s. 521 of the Civil Procedure Code, the Court is not bound to hold its hand and reject the application, but it is the duty of the Court to inquire into the validity of the objections raised and thereupon to determine whether the award should be filed or not. Three of the Judges, however, further expressed their opinion that where in such an application an objection is taken that the matters in dispute were never referred to arbitration and is, therefore, not on one of the grounds mentioned in s. 521, the Court has no jurisdiction to deal with it, but should reject the application and refer the parties to a regular suit. The objections taken to the award in *Samal Nathu* v. *Jaishanker* (*supra*) and in the case in the Printed Judgments of 1890 were objections which went to the root of the submission, while those taken in *Dandekar* v. *Dandekars* were objections to the conduct of the arbitrators, and, as such, clearly fell within the s. 520 or 521 of the Code.

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(1) 9 B. 254. (2) P.J. (1890), p. 260. (3) 17 B. 674.
(4) 6 B. 663. (5) 21 C. 213.

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[601] In the present case the main objections were of the former character, and the Judge rightly considered that the case was governed by *Samal Nathu* v. *Jaishankar Dalsukhram* (*supra*).

The Full Bench decision of the Allahabad High Court in *Amrit Ram* v. *Dasrat* (1) which gives a more extended application to the words of s. 526 than has hitherto been applied to them, has, however, been cited to us, and we are asked, upon the reasoning contained in that judgment, to dissent from the ruling of our own Court in *Samal Nathu* v. *Jaishankar* (*supra*) and *Venkatesh* v. *Chanapgavda* (*supra*), and the question before us is whether we ought to do so and refer the matter to a Full Bench. Before considering it I may say that I entirely agree with the ruling of the Full Bench of the Calcutta High Court in *Surjan Raot* v. *Bhikari Raot* (*supra*) to which I have referred. It appears to me that the Legislature intended that the Court, when dealing with an award made without the intervention of a Court, should institute the same inquiries, and that the order made upon such inquiry should be final or be subject to correction by a Court of appeal in the same way and to the same extent only as if the award had been made under an order of reference by the Court, and that they have expressed that intention with clearness in the 526th section of the Code. The only difference between the procedure in the two cases is that the inquiry in the latter case takes place after the award has been filed *ex parte*, while in the former it takes place before the filing.

I think, however, that notwithstanding the decision in *Amrit Ram* v. *Dasrat* (*supra*) we ought not to depart or dissent from the rulings of our Court which I have mentioned. The inquiry which the Legislature has directed the Court to embark on by ss. 525 and 526 of the Code is, I cannot doubt, an inquiry such as the Court dealing with objections made under s. 522 could be called upon to make. The latter inquiry from the very nature of the case cannot embrace an inquiry into the factum or validity of the submission or order of reference. It is in terms confined to events taking place subsequent to such order. The [602] existence of such an order is assumed as a fact. So, too, the existence of a submission appears to me to be assumed by the Legislature in ss. 525 and 526, and the Court is only directed to inquire into events subsequent to such submission. The enactment that, if "no ground such as is mentioned or referred to in ss. 520 or 521 be shown against the award, the Court shall order it to be filed" read in its ordinary sense means, I think, "if no ground of the nature of those mentioned or referred to in ss. 520 or 521 be shown," and it is only by a somewhat forced interpretation of the section that it can bear the meaning attributed to it by the Allahabad High Court. If it were necessary to read it in that forced sense, in order to give effect to a plain intention of the Legislature, I should not hesitate so to read it; but I see no reason for straining words in the present instance. The reasoning of the Court in *Samal* v. *Jaishankar* (*supra*) goes far to show that the intention of the Legislature is not that which such an interpretation would attribute to it. But, whether that be so or not, I think that the present is peculiarly a case to which the maxim *stare decisis* is applicable. It is not a case of declining jurisdiction, but of holding that a particular procedure is not applicable to circumstances apparently not contemplated by its framers. I would answer both questions accordingly, the first in the negative and the second in the affirmative. Costs of reference costs in cause.

(1) 17 A. 21.

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STRACHEY, J.—I agree with the learned Chief Justice that we ought to follow the decisions of this Court in *Samal Nathu* v. *Jaishankar Dalsukhram*(1), *Hirjibhai* v. *Jamsetji*(2) and *Venkatesh* v. *Chanapgavda* (3). I think with West, J., in the first of these cases, and with Prinsep, J., in *Surjan Raot* v. *Bhikari Raot* (4), that ss. 525 and 526 of the Code are obscure on the question which we are considering. To such a state of things the rule of *stare decisis* is applicable. We ought to follow the decisions of our own Court, unless we are clearly satisfied that they are wrong; and I certainly do not pretend to be so satisfied in the present case.

20 B. 596 = Chitty's S. C. C. R. 472.

[603] If the question were *res integra*, I think that there would be strong reasons for adopting the conclusion arrived at by the Full Bench of the Allahabad High Court in *Amrit Ram* v. *Dasrat Ram*(5). It is common ground that ss. 525 and 526 apply only when there has been a submission to arbitration without the intervention of a Court of Justice, and when an award has been made thereon. It appears to me that the effect of the sections read together is that, where there has been such a submission and award, any person interested in the award has an absolute right to have it filed, unless the other parties show against it some ground such as is mentioned in s. 520 or 521. The right to have the award filed, except where such ground is shown, depends exclusively upon the conditions specified in s. 525, a submission, an award, and an interest in the award, and cannot be denied to any one who shows that those conditions exist. It seems to follow that a person claiming the right is entitled to prove it if it is denied; and that to say that the right exists where there has been a submission and an award, but that upon a mere denial of either the Court is not to enforce it, is very like a contradiction in terms. The absence of challenge or denial is not specified as a condition of the right. The sections do not say that where there is an admitted submission and an admitted award, any person admittedly interested in the award has a right to have it filed, unless cause is shown to the contrary. They say that where a matter *has been* referred to arbitration out of Court, and an award *has been* made, the right of a person interested in the award, to have it filed, subject to certain objections, follows. Apart from the decisions I should have thought that a mere denial by the other parties could not, more than in any other case, destroy or defeat the right or prevent the party claiming it from proving the conditions upon which it depends. I should have thought that the effect of the denial would be to put the existence of the submission or the award in issue in the suit in which, under the second paragraph of s. 525, the applicant is plaintiff and the other parties defendants. Upon that issue it would be for the plaintiff to establish his right to have the alleged award filed, by proving that there had been a submission and an **[604]** award thereon, in which he was interested. If he succeeded, then, in the absence of cause shown by the defendants upon any of the grounds mentioned in s. 520 or s. 521, the Court would be bound to order the award to be filed. It has been said that no provision is made for such an inquiry, but only for an inquiry into the matters referred to in ss. 520 and 521. In *Micharaya Guruvu* v. *Sadasiva Parama Guruvu*(6), it was held by Turner, C. J., and Muttusami Ayyar, J., "that the power to file the award includes the power to inquire if there was a submission to arbitration." But even if the provisions giving the right to have the award filed, do not imply a duty in the Court to decide, in the event of dispute, whether

(1) 9 B. 254.
(2) P. J. (1890), p. 250.
(3) 17 B. 674.
(4) 21 C. 213 (225).
(5) 17 A. 21.
(6) 4 M. 319.

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the right exists, is not such an inquiry in effect provided for by treating the application as a suit between the applicant and the other parties? According to Petheram, C. J., in *Surjan Raot* v. *Bhikari Raot*, (p. 223), "everything which could be pleaded as an answer to an action to enforce the award could be pleaded as an answer to the petition to file the award." When once the submission and the award have been established by admission or proof, but not till then, the inquiry under s. 526 appears to me to be co-extensive with that under s. 522, in which, the reference having been made by the Court itself at an earlier stage of the proceedings, there can of course be no question as to its existence. It has been said that an objection that there was no submission or no award may give rise to a long inquiry into difficult questions of law and fact, and that the Legislature cannot have intended that a Subordinate Court should be competent to decide such questions upon an application to file an award, and without appeal. An exactly similar objection was the ground upon which it was at one time held that the Court could not under s. 526 even consider the validity of cause shown against an award within the provisions of ss. 520 and 521, but must refuse to file the award, if such cause were merely alleged and not proved. See the judgment of Melvill, J., in *Dandekar* v. *Dandekars* (1). That objection is not now accepted as conclusive. Again, it is not clear that, if a Court is competent under ss. 525 and 526 to decide whether there was, in fact, a submission or an award, its **[605]** decision upon the question is necessarily final. Upon the award being filed, judgment and decree according to the award follow, and under s. 522 "no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award." But it has been held, in several cases, that s. 522 presupposes the existence of a valid award as the basis of the decree; that it does not apply to a case in which there has been no award in law or in fact, and that the decree may be appealed against on that ground—*Suppu* v. *Govindacharyar* (2); *Debendra Nath Shaw* v. *Aubhoy Churn Bagchi* (3)—explaining the judgment of the majority of the Full Bench in *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (4): *Lachman Das* v. *Brijpal* (5); *Bindessuri Pershad Singh* v. *Jankee Pershad Singh* (6) and *Joy Prokash Lal* v. *Sheo Golam Singh* (7). In the last-mentioned case, it was held that an appeal would lie from a decree given in accordance with the award where the objection was that all the parties to the suit had not agreed to the reference.

I agree with the learned Chief Justice that objections, denying the existence of the submission and the award, are not, within the meaning of s. 526, grounds such as are mentioned or referred to in s. 520 or s. 521. If they were such grounds, it would under s. 526 be for the defendant to prove them; but I think that here, as in other cases, where the right claimed by the plaintiff is denied, it is for the plaintiff to establish it by proving the existence of the conditions upon which it depends. Upon the issue being raised, it is for him to prove that there has been a submission and an award, and it is not until this has been proved, or admitted, that the defendant under s. 526 has to show against the award any of the grounds mentioned in s. 520 or s. 521. If this is so, the question whether there has been a submission and an award must be determined before any inquiry into objections under s. 520 or s. 521 can commence, and, therefore,

(1) 6 B. 663 (665). (2) 11 M. 85. (3) 9 C. 905.
(4) 8 B. L.R. 315. (5) 6 A. 174 (F.B.). (6) 16 C. 432.
(7) 11 C. 37.

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cannot fall within the scope of such objections. The Allahabad High [606] Court express the opinion that an objection that there was no agreement to refer any question to arbitration would not only be *ejusdem generis* with, but would be one of the precise grounds mentioned in cl. (*a*) of s. 520. But the meaning and scope of s. 520 cannot be altered or enlarged by its incorporation in s. 526 : if in cases not falling within s. 526 it does not include such an objection, it cannot do so in cases to which s. 526 applies. That s. 520, in cases not falling within s. 526, assumes a reference to arbitration as an established fact, and does not include an objection that there has been no reference, follows not only from the fact that the reference which it speaks of has been made by the Court's own order, but from the provision for a remission of the award to the reconsideration of the arbitrators, where any of the objections contemplated by the section are made good. That provision would be meaningless if one of those objections was that there had been no reference and no award to be remitted.

While these are the conclusions to which, in the absence of authority, I should probably have come, there is in this Court very strong authority for a more restricted reading of ss. 525 and 526. I do not, of course, deny that there is great force in the reasoning of West, J., in *Samal Nathu* v. *Jaishankar Dalsukhram* and in the considerations referred to by the learned Chief Justice. Upon the construction of the sections there is, no doubt, much to be said for the view that the Legislature intended to provide a summary procedure for the enforcements of awards as to the existence of which there was no substantial or *bona fide* dispute, and did not intend that in all cases, however contentious, a person seeking to enforce an award should be exempt from the necessity of bringing a regular suit and paying full Court-fee on his plaint. In these circumstances, following the previous decisions of this Court, I agree to the answers proposed by the learned Chief Justice to the questions referred.

Attorneys for plaintiffs :—Messrs. *Bicknell, Merwanji and Motilal.*

Attorneys for defendants :—Messrs. *Mathubhai and Jamietram.*

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20 B. 607.

[607] APPELLATE CIVIL.

Before the Honourable Mr. Justice Farran, Chief Justice and Mr. Justice Parsons.

BHAURAO DADAJIRAO (*Original Petitioner*), *Appellant v.* LAKSHMIBAI, WIDOW OF RANOJIRAO AND ANOTHER (*Original Caveators*), *Respondents.** [17th July, 1895].

Probate and Administration Act (V of 1881), ss. 56 and 57—Testator subject of the Baroda State—Will executed at Baroda—Disposition of immoveable property in British India—Courts in British India—Jurisdiction Probate.

Under s. 56 of the Probate and Administration Act (V of 1881), a District Judge has jurisdiction to grant probate of a will executed out of British India by a person who is not a British subject, if the testator had at the time of his death moveable or immoveable property within the jurisdiction of the Judge.

The discretion vested in a Judge by s. 57 of that Act does not extend to a case where there is no Court of concurrent jurisdiction in India to which application for probate can be made.

* Appeal No. 128 of 1894.

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20 B. 607.

The validity of a will which purports to dispose of immoveable property in British India must be tested by the rules applicable to the execution of wills in British India.

APPEAL from the decree of C. G. W. Macpherson, District Judge of Belgaum.

Application for probate. Bhaurao Dadajirao applied to the District Judge of Belgaum for probate of the will of one Ranojirao Ghorpade, deceased.

The deceased was a subject of the Baroda State and the will was executed at Baroda, but the petition for probate stated that the testator had left immoveable property situate in the district of Belgaum.

The application for probate was made under s. 56 of the Probate Act (V of 1881).

The Judge rejected the application on the following ground:—

"The testator is the subject of the Baroda State, and it does not appear to me that I can determine whether the document, probate of which is sought, is a will, *i.e.*, whether it is the legal declaration of the intentions of the testator (s. 3 of Act V of 1881), as the testamentary law of Baroda may be altogether different to that of British India.

[608] "It appears to me that the proper place to prove a will made in Baroda by a Baroda subject is Baroda itself, after which action can be taken under s. 5.

"It is said that the testator is not only a Baroda subject but also a British subject, but I cannot see that for the purposes now in question he can be the latter when he is admittedly the former.

"I must reject the application both for want of jurisdiction and on the analogy of s. 57 of Act V of 1881."

The applicant appealed.

Ganesh K. Deshmukh, for the appellant (applicant).—The will was made at Baroda. It disposed of immoveable property situate in the Belgaum District. The property is situate in British territory, and under s. 56 of the Probate and Administration Act, the Judge had jurisdiction to entertain our application.

Balaji A. Bhagvat, for the respondents (opponents).—The testator had his domicil at Baroda and the will must be proved to be a valid will, having regard to the law of the testator's domicil.

[FARRAN, C. J.—But there is immoveable property in the Belgaum District: therefore the law of British India is applicable to the will.]

In the case of *In the goods of Elliott* (1), the question of domicil was considered in determining the legality of a will.

[FARRAN, C. J.—The law of domicil applies to moveable and not to immoveable property.]

The Probate Act makes no distinction between moveable and immoveable property. Section 56 of the Act refers only to wills made in British India, inasmuch as the Act applies to British India. Section 3 of the Act, which defines a will, speaks of "property" only and not of moveable and immoveable property. We contend that the will being made at Baroda is not governed by the Probate Act.

JUDGMENT.

FARRAN, C. J.—In this case one Bhaurao Dadajirao applied to the Judge of the District Court of Belgaum, under s. 56 of Act V of 1881, for

(1) 4 C. 106.

probate of the will of Ranojirao Ghorpade, stating in his petition that the testator had left immoveable property within the district of Belgaum. The testator is stated to [609] have been a subject of the Baroda State. There is no finding as to where his domicil was. The will was executed at Baroda.

Section 56 of the Probate and Administration Act, 1881, gives jurisdiction to the District Judge to grant probate of a will, if it appears from the petition of the applicant that * * * * the testator had, at the time of his death, any property, moveable or immoveable, within the jurisdiction of the Judge. That provision is general and is quite irrespective of the place where the will was executed or of the nationality of the testator or of the place of his domicil.

It has always been the practice of the Courts of Probate in England to grant probate of foreign wills, whether executed abroad or not, if the testator has left personal property in England. The cases of *In the goods of De Pradel*(1), *In the goods of Donna Maria De Vera Maraver*(2), *In the goods of De La Saussaye*(3) are instances of the exercise of this jurisdiction. In *Bloxam* v. *Favre* (4) the plea was filed to a petition for probate of a will that the will, which was that of a woman domiciled in Germany, had not been made according to German law. The Court in such cases, if requisite, takes evidence as to the law relating to the execution of wills in force in the country where the testator was domiciled. The late Supreme Court and this High Court have always followed the same practice in the exercise of their testamentary jurisdiction. There is, therefore, no warrant for limiting the express words of s. 56 of the Probate and Administration Act, 1881, in the manner in which the learned Judge has limited them, or for his holding that he has no jurisdiction in the case.

The District Judge was also in error in applying the provisions of s. 57 of the Act by analogy to this application. When between Courts of different districts in British India there is a question as to which of such Courts can most justly or conveniently grant probate, the Judge has a discretion to refer the applicant to the more convenient Court; but when there is no Court of concurrent jurisdiction in British India to which the [610] applicant can apply for probate, the Judge is vested with no such discretion. An executor whose testator has left property in British India is entitled to probate of the will in the Court in British India which has jurisdiction in the case or where there is more than one such Court in the most convenient of them. Baroda is not a district within the meaning of the Act, and the Judge has no discretion to refer the applicant to the Baroda Court. Analogy has no place in the case of a positive enactment such as this. If a foreign will has already been proved and deposited in a competent Court abroad, s. 5 of the Act, following the English law, enables a Court in British India to grant letters of administration to the applicant with a properly authenticated copy of such will annexed, and thus to dispense with a necessity of proof of the original will; but where a foreign will has not been so proved, the Judge will have himself to take evidence as to the due execution of the will, according to the law of the country in which the testator was domiciled, in cases where the property in respect of which probate is sought is moveable or personal property, and must, if necessary, satisfy himself by evidence as to the law relating to the execution of wills in force in such country. In the present case no

(1) L. R. 1 P. & D. 454.
(2) 1 Hagg. 498.
(3) L. R. 3 P. & D. 42.
(4) 8 Pro. Div. 101.

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such inquiry is necessary, as the property left by the testator in British India is immoveable. The validity of a will which purports to dispose of immoveable property in British India must be tested by the rules applicable to the execution of wills in British India. This has been established by a series of decisions too numerous to refer to. They will be found collected in Jarman on Wills, Vol. I, p. 76.

We reverse the order of the District Judge and remand the case in order that the application may be dealt with on its merits. Costs to abide the result.

Order reversed and case remanded.

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20 B. 611.

[611] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

DAGDUSA SHEVAKDAS AND ANOTHER (*Original Plaintiffs*), *Appellants* *v.* RAMCHANDRA AND OTHERS (*Original Defendants*), *Respondents.**
[22nd July, 1895.]

Hindu law—Interest—Damdupat—*Amount of interest allowed cannot exceed the balance of principal actually due at date of suit—Part payments of principal deducted.*

The rule of *damdupat* limits the arrears of interest recoverable at any one time by the amount of principal remaining due at that time.

[R., 24 B. 305 (309); 15 M.C.C.R. 195 (F.B.); 2 S.L.R. 10; Expl., 30 B. 452=8 Bom. L.R. 82=1 M.L.T. 49.]

SECOND APPEAL from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge with Appellate Powers at Dhulia.

The plaintiffs sued to recover Rs. 150 principal and Rs. 37-8-0 interest in advance, in all Rs. 187-8-0, due upon a mortgage-bond dated 31st July, 1880.

The bond provided that the amount should be paid by weekly instalments of Re. 1-8-0. The first seventy-five instalments were duly paid.

The present suit was brought to recover the amount of the remaining fifty instalments, *viz.*, Rs. 75, together with Rs. 185 on account of interest calculated at the stipulated rate.

The defendant pleaded that the plaintiffs were entitled to recover Rs. 60 only on account of the unpaid instalments, and he contended that he could not recover more than the same amount as interest.

The Subordinate Judge passed a decree awarding Rs. 75 as principal and Rs. 150 as interest.

This decree was amended, in appeal, by giving as interest a sum equal to the amount of principal, *viz.*, Rs. 75.

Against this decision the plaintiffs perferred a second appeal to the High Court.

Daji Abaji Khare, for appellants.—According to the rule of *damdupat* the amount of interest recoverable at any one time cannot exceed the principal sum. What is meant by the principal sum? It means the original amount of the debt, and not the balance of principal that may be due. The original text of Manu is thus

* Second Appeal No. 558 of 1893.

translated by Mandlik at p. 104 of his work on Hindu Law :— **[612]** "Interest on money received at once must never be more than double the debt (that is, more than the amount of the principal paid at one and the same time)." In Kulluka's comment on this text the word *mul* is used to denote principal, that is, the original sum lent and not the reduced amount of principal. Refers to *Dhondu* v. *Narayan* (1); *Narayan* v. *Satvaji* (2); *Kakarlapudi Sitaramraj* v. *Uppalapudi Janakaya* (3).

B. A. Bhagvat (for respondent) :—The word *debt* in Manu means the money due, or existing obligation, and not the original loan. In *Dhondu* v. *Narayan* (1) it is held to mean the outstanding debt. Any other interpretation would defeat the object of the *damdupat* rule, which was intended to relieve debtors from usurious contracts.

JUDGMENT.

JARDINE, J —The rule stated in Manu, VIII, 151, is thus translated by Dr. Buhler :—"In money transactions interest paid at one time (not by instalments) shall never exceed the double of the principal." The learned writer adds the following in a note :—

"Gaut. XII, 31, 36, Vi, VI, 11—15. Yajnavalkya II, 39. The interest here intended is such which is not paid by instalments, but becomes due together with the principal. According to the commentators, the whole sum payable, *i. e.*, the interest, together with the principal, shall not exceed the double of the sum lent."

The above passage of Manu is translated by Colebrooke in para. 61 in his Chapter on Interest. I Colebrooke, Bk. I, Chap. I, s. 3, along with many other sacred texts on the same matter.

It appears to me that no translator or commentator has noticed that the words *principal* and *debt* are ambiguous, and may refer either to an original amount or to the balance thereof presently due. The reported decisions of the High Courts have the same ambiguity. The sages of the Hindu law did not foresee every case that might arise; and probably left this question to be decided by Judges, who give weight to the general spirit of that law including the regard to custom and equity.

I have had the advantage of seeing the judgment written by my brother Ranade, and I concur in his impression that the Courts have been in the habit of interpreting the word "principal" as meaning **[613]** the balance of principal unpaid at the time of suit. The case of *Nanchand* v. *Bapu Saheb* (4) is, however, the only printed instance I can find; but the practice, as I understand it, has been enacted in the Dekkhan Agriculturists' Relief Act, XVII of 1879, s. 13, cl. *g*.

For these reasons, I would confirm the decree with costs.

RANADE, J.—The sole question at issue in this appeal is whether, in the case of a suit on an instalment bond, where the instalments paid have satisfied in part the principal claim along with interest, the arrears of interest claimable at any one time must, under the *damdupat* rule, be limited to the principal balance due, or to the original principal of the bond.

The point is one of some importance at the present time, when it is in contemplation to extend the principle of the *damdupat* rule, hitherto confined to Hindus in this Presidency, to all classes and to all parts of India as a measure of equitable relief to which the Courts are bound to give effect. A clear statement of this rule is found in *Dhondu* v. *Narayan* (1),

(1) 1 B.H. C. R. 47. (2) 9 B H.C.R. 93. (3) 1 M.H.C. R. 5.
(4) 3 B. 131.

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where after quoting Manu's text, Chap. VIII, 151, and the comments of Mayukha and Vachaspati Misra, the judgment goes on to state :—"The rule of Hindu law is simply this that no greater arrear of interest can be recovered at any one time than what will amount to the principal sum."

The question at issue in the present case is as to the precise meaning of the words "principal sum" in respect of a bond where the original principal claim has been partially satisfied by the payments made. The original text of Manu makes this clear. Rav Saheb Mandlik translates this text thus :—"Interest on money received at once must never be more than double the debt (that is, more than the amount of the principal paid at one and the same time)." Mandlik's Hindu Law, p. 104. Colebrooke translates this same text in the same words. Colebrooke, Vol. I, p. 79. Mr. Khare referred to Kulluka's comment, where the words used are मूलवृद्धिः द्विगुणवद्भवति and mean that the principal increase becomes only double. There is nothing in these words to justify the contention that it is the original principal, and not the principal due when the arrears of interest accrue. The explanatory words in the translation of Manu's [614] text are quite clear. The principal payable at one and the same time is the limit of the increase then payable.

Mr. Khare's contention is apparently based on the head-note in the case of *Narayan* v. *Satvaji* (1), which states that the rule of Hindu law is that interest exceeding the principal sum lent cannot be recovered at any one time. The use of the word *lent* in this headnote is clearly unwarranted by any expressions in the judgment, where the words used are "By Hindu law the amount of interest recoverable at any one time cannot exceed the principal." The case of *Nanchand* v. *Bapu Saheb*(2) is not exactly in point, because it only decided that the rule of *damdupat* did not apply to Mahomedans. It, however, shows how the rule has been interpreted in the Courts of this Presidency. Both the lower Courts had applied the *damdupat* rule, and in consequence only allowed 291 rupees interest, because the principal balance due on the bond sued upon was 291 rupees, though the bond itself was for 1,901 rupees, and the plaintiff in that case had claimed Rs. 374 as interest. This view also was given effect to in *Shri Ganesh Dharnidhar* v. *Keshavrav* (3). The exclusion of the *damdupat* rule in cases of mortgages, where the rents and profits have to be set off against interest and principal, and its limitation to cases where the account has to be taken only on one side, are also based on this same consideration—*Nathubhai* v. *Mulchand* (4); *Rango* v. *Balaji* (5); *Sadhu* v. *Ganu* (6); *Shankarbawa* v. *Babaji* (7); and *Daji Gopal* v. *Daji Hari* (8). The provision of s. 13 of the Dekkhan Agriculturists' Relief Act, which was intended to give effect to the *damdupat* rule, has expressly recognized this same principle, and it allows interest balance only so far as it does not exceed the principal balance due.

The Madras High Court has placed a similar interpretation on this same rule of the law as administered in that Presidency—*Kakarlapudi Sitaramraj* v. *Uppalapudi Janakayya* (9). In this Madras case, part-payments had been made and credited in discharge of the principal, and the action was brought for the principal balance and for interest exceeding that balance, and though the lower Court had [615] decreed the excess interest, the High Court varied the decree by allowing interest equal to the principal balance only.

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(1) 9 B. H. C. R. 83.
(2) 3 B. 131.
(3) 15 B. 625.
(4) 5 B.H C.R. A.C. J. 196.
(5) P. J. (1886), p. 76.
(6) P J. (1887), p. 215.
(7) P. J. (1881) p. 291.
(8) P.J. (1873), p. 74.
(9) 1 M. H. C. R. 5.

On a careful consideration of all these authorities, we feel satisfied that the lower Court of appeal has correctly applied the *damdupat* rule in limiting the amount of the interest arrears to the principal balance due (Rs. 75), and awarding 150 rupees. A contrary interpretation would make this rule of equity, intended for the relief of debtors, press hard upon them in a way not contemplated by Hindu law.

We accordingly confirm the decree, and reject the appeal with costs.

Decree confirmed.

20 B. 615.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

CHAGANDAS MAGANDAS AND ANOTHER (*Original Plaintiffs*), *Appellants v.* GANSING VALAD ISHRAM (*Original Defendant No.* 1), *Respondent.** [22nd July, 1895.]

Contribution—Mortgage—Sale of property subject to mortgage in execution of money decrees against mortgagors—Subsequent suit by mortgagee to recover his mortgage-debt by sale of part of mortgaged property only—Payment of mortgage-debt by holder of part of mortgaged property—Right on such payment to sue for contribution from other holders of the mortgaged property.

The owner of a portion of property comprised in a mortgage who, in order to save his share from sale, has satisfied a decree obtained by the mortgagee on the mortgage against him, can exact contribution from the owner of another portion of the mortgaged property who was not a defendant in the mortgagee's suit.

Jagat Narain v. *Qutub Husain* (1), followed.

[F., 20 M. 217.]

SECOND appeal from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge with appellate powers at Dhulia.

Suit for contribution.

In 1884, six brothers mortgaged certain property (Surveys Nos. 19 and 28 and other lands) to one Bhau. Subsequently certain money decrees were passed against the mortgagors and in execution the **[616]** mortgaged property was sold. At the sales defendant No. 1 (Gansing) bought Survey No. 19, one Chunilal bought Survey No. 28 and the plaintiff bought the rest of the land.

In 1889 the mortgagee (Bhau) sued the six mortgagors and the plaintiff and Chunilal to recover Rs. 2,800 (the mortgage-debt) by the sale of all the property except Survey No. 19 which was in the hands of Gansing (defendant No. 1) and he got a decree. In execution a part of the property was sold, and realised Rs. 860. In order to save his lands from sale, the plaintiff paid the balance of the decree. The plaintiff now sued Gansing (defendant No. 1) for Rs. 477-12-0 as contribution, alleging that to be the share of the mortgage-debt due from Survey No. 19. He claimed to recover this amount by the sale of No. 19 and from Gansing and the mortgagors personally.

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* Second Appeal No. 715 of 1893.

(1) 2 A. 807.

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20 B. 615.

Gansing (defendant No. 1) contended that he had purchased Survey No. 19 at an auction sale; that the plaintiff had voluntarily paid the balance of the mortgage debt, because the property purchased by him was superior in value to that purchased by others, and that he was not entitled to claim contribution.

The Subordinate Judge found that the plaintiff was entitled to recover the sum claimed by sale of Survey No. 19 and from defendants Nos. 2 and 3 (the mortgagors). On appeal the Judge raised the issue "Is the plaintiff entitled to claim contribution?" He found this issue in the negative, reversed the decree, and rejected the plaintiff's claim.

The plaintiffs preferred a second appeal.

Mahadeo V. Bhat, for the appellants (plaintiffs).—We paid the balance of the sum due under the decree to avoid the sale of the lands. All the mortgaged properties were liable to contribute rateably to the whole debt secured by the mortgage. Each sharer of the equity of redemption has to contribute in proportion to his share. When the whole mortgage-debt is apportioned on all the properties, a burden of Rs. 477-12-0 falls on Survey No. 19, which is in the possession of defendant No. 1. We rely on *Jagat Narain* v. *Qutub Husain* (1).

Balaji A. Bhagvat, for the respondent (defendant No. 1).—When Bhau Nathu brought a suit on his mortgage he omitted to claim **[617]** against Survey No. 19. He gave up his claim against that part of the property. He did not make Gansing a party to the suit. The plaintiff was a party to that suit and he ought to have insisted that Gansing should be joined. If he had done so, then his due proportion of the mortgage-debt would have been required from Gansing. But the plaintiff is now estopped from making this claim.

JUDGMENT.

PARSONS, J.—This case is on all fours with that of *Jagat Narain* v. *Qutub Husain* (1) and we follow the decision. The correct finding on the second issue raised in the lower appellate Court is, therefore, in the affirmative. As the lower appellate Court wrongly found on this issue, and disposed of the appeal on a preliminary point, we reverse its decree, and remand the appeal to be disposed of on the merits. Costs to abide the result.

Decree reversed and case remanded.

(1) 2 A. 807.

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Before Mr. Justice Jardine and Mr. Justice Ranade.

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THE MUNICIPALITY OF BOMBAY *v.* SHAPURJI DINSHA.*
[22nd July, 1895.]

Bombay Municipal Act (III of 1888), s. 248—Fazendar—Fazendar not liable to provide privy accommodation—"Owner"—"Premises"—Meaning of the words—Construction—Construction of statutes.

A fazendar is not the person liable, as owner of the premises, to provide privy accommodation under s. 248 of the Bombay Municipal Act (III of 1888) (1), the beneficial owner of the house built on the fazendar's land being "the owner" within the meaning of the section.

Per RANADE, J.—The word "premises" in s. 248 (1) of the Municipal Act is used with reference to the building to which the privy belongs.

[R., 34 B. 593=12 Bom. L.R. 669=11 Cr.L.J. 544=7 Ind. Cas. 935.]

THIS was a reference by W. R. Hamilton, Second Presidency [618] Magistrate, under s. 432 of the Code of Criminal Procedure (Act X of 1882).

The reference was as follows:—

"Under s. 432, Criminal Procedure Code, I have the honour to refer for the opinion of the High Court a question of law, namely, the precise meaning which should be attached to the words 'owner' and 'premises' in s. 248 of the Bombay Municipal Act.

"2. Some time ago a native gentleman complained to the Municipal Commissioner of the filthy state of an oart or *wadi* in Mahim which was used for natural purposes by the residents in the *wadi* more than 100 in number. The Commissioner in consequence required several of the owners of the huts to construct suitable privies, and on their failing to comply prosecuted them. It then appeared that these persons were tenants of a fazendar, and that while they were owners of these huts, the land on which the huts stood, belonged to the fazendar to whom they paid ground-rent. None of these persons had any land appurtenant to the huts where they could build a privy, and under the circumstances it was impossible for them to carry out the orders of the Commissioner, unless they pulled down a part of the huts for the purpose of a privy.

"3. It will be noticed that s. 250 (*e*) of the Municipal Act prevents the Commissioner from destroying any portion of a permanent building for the improvement of an existing privy, and this would indicate very strongly that he could not destroy a building in order to erect a privy where none

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* Criminal Reference No. 66 of 1895.

(1) Section 248 of Act III of 1888 (Bombay):—

(1) If it appears to the Commissioner that any premises are without a water-closet or privy or urinal, or that the existing water-closet or privy or urinal available for the occupiers of any premises is insufficient, inefficient or, for sanitary reasons, objectionable, the Commissioner shall, by written notice, require the owner of such premises to provide a water-closet, or privy or urinal or an additional water-closet, privy or urinal, as the case may be, to his satisfaction.

(2) Provided that where a water-closet, privy or urinal has been or is used in common by the occupiers of two or more premises, or if in the opinion of the Commissioner a water-closet, privy or urinal may be so used and is sufficient for all the occupiers of the two or more premises using or intending to use the same, he need not require a separate water-closet or privy or urinal to be provided on or for each of the said premises.

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ever existed before. The charge against the tenants was, therefore, withdrawn, and the owner of the *wadi*, the fazendar himself, was called upon to provide a privy for the use of the tenants in the *wadi*. He has not done so and disputes his liability.

"4. Mr. Roughton, his solicitor, has argued that the fazendar gets a ground-rent or quit-rent only for the sites occupied by the huts, and he has no rights over the huts themselves, which may be inherited or sold without interference on his part. He referred to Perry's Oriental Cases as explanatory of the limited rights of a fazendar, and contended that 'owner' is defined in the Municipal Act to mean the person who receives the rent of the premises, and that rent does not mean ground-rent; that he is not the owner of the premises, but merely of a ground-rent issuing out of the premises, and he concluded by stating that the fazendar would not object to allow tenants more lands for the purpose of a privy, provided they would pay a ground-rent for the land so assigned.

"5. Mr. Crawford for the Municipality urged that if the fazendar cannot be compelled to build privies, the Act would be a dead letter. Section 248 empowers the Commissioner to call upon owners of premises to provide privies, and 'premises' may mean either the whole *wadi* or the separate occupancies of each tenant. He cited an unreported case, *Smith* v. *The Municipal Commissioner* (Suit 41 of 1891), in which the meaning of the word 'premises' was discussed by the High Court in connection with s. 142 of the Municipal Act, when it was held that it may mean a single building, a piece of land, or several buildings or pieces of land constituting in the aggregate a distinct property. The object of the section was to protect the municipal **[619]** revenue, and a construction was not to be adopted which would make it nugatory if any other constructions which will effect the object of the Act can fairly be placed on the language of the clause. In the same sense Mr. Crawford contended that a construction should be put upon the word 'premises' in s. 248 which should compel the fazendar to carry out the Act and provide a privy where a privy is necessary. He also argued that as the fazendar received the ground-rent for the sites occupied by huts, he, in fact, received rent within the meaning of the word 'owner' in s. 3 (*m*), and he pointed out that if the fazendar cannot be compelled to build a privy, the nuisance must continue for ever, and he, therefore, urged that a construction should be put upon the section which would make it workable. He urged that, considering the importance of the case, the question might be referred to the High Court for decision.

"6. The question is certainly important, for there are many properties held on *fazendari* tenure in which tenants have no land upon which to build privies, and the effect of a decision against fazendars would be to compel them to provide privies and privy sites for a large number of huts with which they have no concern except as recipients of a ground-rent. It was pointed out that the buildings at Dhobi Talao stand on ground belonging to fazendars, and that they might be compelled to provide costly privies in large buildings occupied by hundreds of people where the only income they derive from these properties is a nominal ground-rent. In the interests of fazendars, it would be important to define rent as the full competitive rent depending upon contract and not as the nominal and customary rent paid merely in recognition of the alternate interest of the fazendars in the land.

"7. On the other hand it is impossible to compel tenants to build privies where they have no land on which to build. In this particular

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case the fazendar professes his willingness to assign land for privies, provided the tenants pay an additional rent, and the difficulty might be got over by mutual arrangement. But there may be cases in which the fazendar might refuse to assign land, and then as long as such places are without privies, there must be a nuisance. But this state of things would disappear gradually as old huts or houses require to be rebuilt, for under s. 247 the new building must be provided with a privy. In this very *wadi* the houses which have been rebuilt have privies attached to them, and in course of time the whole must have privies. The nuisance is, therefore, being quietly, although slowly, abated, and I am not prepared to say that a construction should be put upon the Act which would suppress the mischief and provide the remedy at the expense of fazendars who have a very limited and nominal interest in the sites occupied by tenants. The tenants create the nuisance, and primarily they should provide the remedy where this can be done, but where it cannot be done, it may be left to stand over until the tenant is obliged to rebuild.

"8. In s. 234 (*b*) the word 'building' is used as distinct from the 'premises appurtenant thereto.' In s. 247 the word 'building' alone is used. It seems, however, to be implied that the building and the premises should be, under the contract, of one and the same owner. In s. 248 the word 'premises' is used and appears to mean the building and premises appurtenant thereto held by one and the same owner. In the case of the *wadi* the buildings belong to tenants, but the land on which they stand belongs to the fazendar, and there are no premises appurtenant to the buildings. **[620]** The action of the Municipality is intended apparently to force the owner of adjoining premises to provide privies for the use of other people. These buildings may be assumed to have stood in this *wadi* for generations and they were built without privies long before the Municipal Act was passed. The common practice in suburban or rural places is to use the adjoining fields or jungles for the purposes of nature, and the Municipal Act is hardly applicable to such places. It is designed for the ordinary conditions of urban residences and workshops, and it would be a hardship to enforce the law in suburban places more strictly than the occasion warrants. The Act itself provides in s. 250 that improvements in existing privies should be made gradually and considerately, and when there are no privies, they may be required to be built, but every new building must have a privy. Under the circumstances it would seem to be prudent to wait until the buildings in the *wadi* are rebuilt, when the municipal requirements might be enforced."

Under the circumstances above stated the Magistrate referred the following questions for the opinion of the High Court :—

"1. Whether under the circumstances disclosed the fazendar (accused) is liable under s. 248, Bombay Act III of 1888, to provide a privy in this *wadi* for the use of the owners and occupiers of the huts which have no privies attached to them ?

"2. Does the word 'owner' in s. 248 include a fazendar who receives the ground-rent of sites occupied by huts and who has no interest in the huts or the rents of the huts ? The word 'owner' is defined in s. 3 (*m*) as the person who receives the rent of the premises."

The reference was heard by a Division Bench (Jardine and Ranade, JJ.).

Russell (with Messrs. *Roughton and Byrne*), for the fazendar.—The question is whether a fazendar in the island of Bombay is "owner of the

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premises" within the meaning of s. 248, so as to be liable to provide privy accommodation. A fazendar as owner of the soil is only entitled to a nominal quit-rent, which is not liable to enhancement—*Doe dem Dorabji Daji Santuk* v. *The Bishop of Bombay* (1). The huts built on the *fazendari* land belong to the tenants. They live there, and can realise rent if they let those huts. They are, therefore, the beneficial owners of the premises, and as such liable to provide the necessary accommodation. The word "owner" in s. 3, cl. (*m*), of the Municipal Act is used in a sense similar to that in which the same word is used in s. 3 of Stat. 18 and 19 Vict., c. 122. It applies to every person who is in possession or receipt of the whole or any part of the rents and profits of any land or tenement. It applies to the case of buildings which are either **[621]** actually let or are capable of being let. And the person is called "owner" who has the immediate right of letting them: see *Caudwell* v. *Hanson* (2); *Evelyn* v. *Whichcord* (3); *Maurilyan* v. *Labalmondiere* (4). The word "owner" is also held to include an occupier: see *Lewis* v. *Arnold* (5); *Parker* v. *Inge* (6); *Cook* v. *Montague*(7); *Woodard* v. *Billericay Highway Board* (8). I submit, therefore, that "*the owner*" contemplated by s. 248 is owner of the buildings to which a privy, urinal, &c., is attached. The Legislature could not have meant to attack the whole class of fazendars. If a fazendar were compelled to build a privy, he would have to alter the houses built on his land by his tenants, thereby rendering himself liable for trespass. The proper construction to put on this section would be to apply the expression "owners of such premises" the owners of buildings for which a privy accommodation has to be made.

Macpherson (Acting Advocate-General) (with Mr. *L. Crawford*), for the Municipality.—The expression "premises" s. 248 should be read as applicable to the whole oart and not merely to the huts built therein. The oart is walled round on all sides, contains twenty-two houses and is held on *fazendari* tenure. The tenant gets merely his house and nothing more and pays quit-rent. Of course I cannot argue that a fazendar is an owner. A fazendar gets a quit-rent. Unless "premises" means the whole oart, s. 248 of the Act will often remain a dead letter. The Public Health Act, 1875 (Stat. 38 and 39 Vict., c. 55), s. 4, gives a wide definition; Stat. 31 and 32 Vict., c. 130, Artizans Act, has a narrower one. The twenty-two tenants use the whole oart, the fazendar is the owner of the whole oart, and it will be no hardship to him if he is compelled to provide privy accommodation.

JUDGMENT.

JARDINE, J.—The Presidency Magistrate has referred two questions of law under s. 432 of the Code of Criminal Procedure (X of 1882) along with some statement of the case and of the particular facts found. We take these to be that there is no **[622]** privy accommodation for the families dwelling in the twenty-two houses built under the palm trees in an oart at Mahim, which oart belongs to the accused fazendar, and that these families use the land of the oart as a privy, as in *Esubai* v. *Damodar* (9). The Municipal Commissioner on complaint by a neighbour of the stench and nuisance so caused has called on the fazendar to provide privy accommodation. The Magistrate assumes in his second

(1) Perry's O. Cases 498. (2) L.R. 7 Q. B. 55. (3) E. B. and E. 126.
(4) 1 E. and E. 533. (5) L.R., 10 Q.B. 245. (6) 17 Q. B. D. 584.
(7) L. R. 7 Q. B. 418. (8) 11 Ch. D. 214. (9) 16 B. 552.

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question that the fazendar is not the owner of the houses, though he is the owner of the land on which they stand, for which he receives ground rents from the owners of the houses. The latter do not own or rent any of the land there, except what their houses cover. Section 3 (*m*) of Bombay Act III of 1888 being evidently modelled on similar sections in Acts of Parliament dealing for sanitary purposes with owners and occupiers of property, Mr. Russell, as counsel for the fazendar, rightly rested his argument on English cases dealing with the word "owner," and the question which in a variety of ways has occupied the Judges of England in construing divers statutes as to which of the persons holding an interest in a property is primarily liable as owner to fulfil the requirements of the statute. It was admitted at the hearing in this Court that s. 248 is enabling; the object is clearly to give powers to the Municipal Commissioner to get these nuisances abated. The suggestion that in the slow course of years the nuisance may disappear as new houses replace the present ones, is not relevant to the questions of law, and we cannot interfere with the Commissioner or tell him how to use his discretion. The families must not be clothed with a privilege to commit a nuisance which it is the object of the impartial law to abate; and the Magistrate may have to put that law in force, even if its provisions will have a harsh operation. See *In re Ganesh Narayan Sathe* (1). Still it does not appear that the person liable will be put to any hardship more than usual, as everybody who improves his premises is put to some expense. As the law does not require each person to erect a privy on his own premises, it does not appear that there is any need to pull down the houses. If the house-owners are the persons liable, they can apparently combine to hire land for erecting proper privies.

[623] The real question is whether the fazendar as owner of the land or the tenant paying ground rent as owner of the house is the person primarily liable as owner of the premises. The word "owner" is elastic in meaning, as is said in the English cases, where arguments from convenience and common sense have always weighed with the Judges. Mr. Russell relied on *Caudwell* v. *Hanson* (2), *Evelon* v. *Whichcord* (3), *Mouriyan* v. *Labalmondiere* (4). We agree with him that the application of the word "owner" in s. 3 of 18 and 19 Victoria, chap. 122, has a resemblance to the construction of the same word in s. 3 of the Bombay Act. The effect of these cases is that the owner in fee entitled to a ground-rent or quit-rent is not to be taken to be the person primarily liable as owner, where there is a lessee or other person in beneficial occupation actually getting the rents or capable of getting it if he chooses to let the premises. The reasons given by Lush, J., in *Caudwell* v. *Hanson* (2), that the statute was not intended to require investigations into titles, and that the owner of the house was the beneficial owner, may be reasonably extended to the present case.

I will now refer to several other cases which may perhaps assist the Magistrates in the like perplexities. *Cook* v. *Montague* (5) is authority for inferring that, in regard to notice about defective construction of a structural work, a privy, the beneficial owner of a house should be treated as the person first to be served. He was held by Blackburn, J., to be the "owner of the premises." This case does not conflict with *Parker* v. *Inge* (6) which deals with the remedy the procedure affords to an owner served

(1) 13 B. 600 (608). (2) L. R. 7 Q. B. 55. (3) E. B. & E. 126.
(4) 1 E. & D. 533. (5) L.R. 7 Q. B. 418. (6) 17 Q. B. D. 584.

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with a notice to improve a structural defect in a privy in his house, and who, after using due diligence to get his lessee to allow him to put it right, is baffled by the absence of power to enter the premises during the period of the lease. The case also affirms the principle that the beneficial owner of the house is the person who ought to incur the expense of altering the structure; that principle appears to fix the house-owner here who would get the whole benefit, and not the fazendar, who on [624] the statement sent up by the Magistrate has no interest in the house, whose interest is confined to a quit-rent for the soil. That the person who gets the benefit should bear the burden is affirmed in *Lewis* v. *Arnold* (1) where the phrase "owner of lands and buildings" is treated as meaning the occupier, and is applied in regard to expenses of a fire-brigade to the farmer whose haystack had been burnt, and not to his landlord. The same interpretation to avoid certain inconveniences mentioned by the Judges was applied in *Woodard* v. *Billericay Highway Board* (2), as to the lopping of trees overhanging a highway. There Jessel, M. R., remarked that every man in occupation of land has a kind of limited ownership, and he read the word "owner of the lands" along with an interpretation clause which stated that "owner shall be understood to include occupier," showing the word means occupier when the person in occupation is not the full owner. The Advocate-General, who appeared for the Municipality, argued that in s. 248 the word "premises" should be treated as meaning the whole oart so as to fix the fazendar as owner. This would be contrary to the spirit of the decisions I have reviewed.

The Magistrate should, therefore, be informed that the fazendar is not the person liable, as owner of the premises, to provide the privy accommodation, the beneficial owner of the house built on the fazendar's land being the owner within the meaning of the statutable provision. Under s. 433 of the Code of Criminal Procedure the Municipal Commissioner is directed to pay the costs of this reference.

RANADE, J.—I concur. As the reasons which lead me to this conclusion are, however, somewhat different from those stated by Mr. Justice Jardine, I deem it necessary to state them here with some fulness. In my opinion, the decision of the question referred to this Court depends not so much upon the proper construction of the word "owner" by itself, but of the words "owner of such premises" used in s. 248 of the Municipal Act. If the word "owner" stood by itself, it might, as defined in cl. (*m*) of s. 3, apply equally to the fazendar who owns the land as to the owners of the [625] huts built on that land, for he receives the rent of his land just as much as the owners of the huts might receive the rent of the huts if they let them to others and did not occupy them.

The proper construction of the section thus turns more upon the interpretation of the words "such premises," which limit the wider scope of the word "owner" used in it. Section 248 enacts that "if it appears to the Commissioner that any *premises* are without a water closet, privy, or urinal or the existing water closet, privy, or urinal available for the *occupants* of any *premises* is insufficient or inefficient, ... the Commissioner shall by written notice require the *owner of such premises* to provide a water closet, privy, or urinal. . . . A clear distinction is made here between the owner and occupier of the premises, and the obligation to construct the privy is placed on the owner of *such* premises. Taken in its context, the word "premises"

(1) L. R. 10 Q. B. 245.

(2) 11 Ch. D. 214.

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here cannot properly be applied to the land, and obviously applies to buildings erected on the land. The preceding s. 247 makes it unlawful to erect any new building, or rebuild any building, without a sufficient water closet, privy, or urinal. New erections being thus provided for, the next two sections relate to old buildings, s. 248 to buildings for private residence, and s. 249 to buildings intended for public use, such as markets, railway stations, factories, docks, wharfs, &c. In the first case, the responsibility is placed on the *owners* of such premises, and in the second, on account of their importance, on the *owners or occupiers* of the said premises, *i.e.*, factories, &c., to provide sufficient accommodation in the way of water closets, privies, &c. Section 250 lays down the conditions which regulate the efficiency of existing privies in both cases. The words used are: "The owner or occupier of any *premises on which there is a privy* shall leave between such privy and any building or place used or intended to be used for human residence (s. 248), or in which any persons may be employed in any manufacture, trade, or business (s. 249) an airspace of a certain width, &c." The next s. (251) refers to similar regulations about water closets. All these provisions seem to confine and narrow the more general meaning of the word "premises" used in s. 248 to buildings, *i.e.*, the huts in the land in dispute. A careful perusal of other parts of the Act satisfies me that the word "premises" is not used throughout the Act in one and the same sense, and that its sense **[626]** has to be determined in connection with the context. It is used in a more general sense so as to include lands and buildings in the sections which relate to the taxation of property (ss. 159, 170, 209, and 226). In s. 172 it is used in the narrower sense, coming as it does after hotel, club. In ss. 174-175 it is used in the wider sense in juxtaposition with "land" and "building," as being a taxable unit defined in s. 158. In the sections which relate to drainage the word is used in the larger sense (ss. 227-228, 230-233, &c.). Section 234 is important in this connection; for, in respect of drains, it is the parallel section to s. 248, which relates to water closets, privies, and urinals. In this section the word "premises" is mentioned as something appurtenant to the building newly built or rebuilt. The context determines its sense and narrows it. It is used in this same narrow sense in s. 242, so as to limit it to land unbuilt in which drains are constructed. In the sections relating to buildings the word is intended to have reference thereto. In the sanitary regulation sections, such as 377, it obviously has reference to the land overgrown with vegetation, &c. It is hardly necessary to notice the other sections of the Act in which the word "premises" occurs.

The instances given above will show clearly that the word is not used throughout in the same sense, and may signify land or building, or land and building, or land appurtenant to a building, according as the context requires it. In the section now under consideration, it is obviously used with reference to the building to which the privy belongs. Quite apart from the provisions of the Act, the primary liability to have a privy, water closet, or urinal must attach to the owner of the building, and not to the owner of the land in which the building is situated, when the two owners happen, as in this case, to be different persons. The words "such premises" must, therefore, be construed in this case to refer to the huts for whose residents privy accommodation is necessary. The owners of the huts, therefore, are the persons directly contemplated in this section as the persons on whom the obligation rests to comply with the Commissioner's notice. They were, in fact, accordingly in the first instance served with notices, and it was

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chiefly on account of the difficulty created by s. 250 (*a*) of finding room in the small huts and of getting unbuilt land outside the huts on which to erect [627] the privies, that proceedings appear to have been taken against the owner of the land, though he had no interest or property in the huts, receives no rent therefrom, and could not pull them down. The argument based on inconvenience may be a matter for executive consideration. We do not think it is insuperable, for the Commissioner may erect public privies under s. 252. Any how we cannot take it into consideration in interpreting the precise words of s. 248. The same reasoning which would seek to make the fazendars liable under this section might be applied with equal effect to Government, where it has let State lands on long leases to private persons for building purposes. Such an application could never have been in contemplation in enacting these regulations for promoting the sanitary efficiency of private houses.

For the reasons stated above, I am of opinion that the questions referred to this Court must be answered in the negative.

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20 B. 627.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

NANA BIN BHIKAPPA RAHATE (*Original Defendant No.* 1), *Appellant* *v.* APPA BIN BABAJI RAHATE (*Original Plaintiff*), *Respondent.**

[23rd July, 1895.]

Possession—Joint property—Suit by co-owner for exclusive possession—Practice—Procedure.

The plaintiff sued for possession of certain land. The lower Court held that the land was the joint property of the plaintiff and defendant, but finding that the plaintiff had been in exclusive possession allowed his claim and gave him a decree. On second appeal,

Held, that exclusive possession could not be awarded unless exclusive title was proved. On plaintiff's application, which was not opposed by the defendant, the decree of the lower Court was varied, and the plaintiff was awarded joint possession of the property in suit.

[R., 26 B. 141=3 Bom.L.R. 593; 8 Bom.L.R. 99.]

SECOND appeal from the decision of Rao Bahadur Chintaman Narayan Bhat, Joint First Class Subordinate Judge of Satara, with appellate powers. Suit for possession of land. The plaintiff alleged that he had purchased it in the year 1889 and had [628] leased it to one Bhagai, whom the defendants had wrongfully dispossessed on the 16th August, 1890. The plaintiff had previously brought a possessory suit against the defendants, but his claim had been rejected.

The first defendant alleged that the land was the joint property of himself and the plaintiff, and he contended that the plaintiff's only right was to partition, and that he could not sue for possession.

Defendants Nos. 2 and 3 did not contest the plaintiff's claim.

The Subordinate Judge found that the land was the joint property of the plaintiff and defendant No. 1 and he dismissed the suit, holding that the plaintiff's proper remedy was a suit for partition.

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* Second Appeal, No. 878 of 1893.

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On appeal by the plaintiff the Judge found that the property was joint, but that the plaintiff had enjoyed it separately since the time of its acquisition. He held that the first defendant had no right to take it out of the plaintiff's possession, and he, therefore, reversed the decree and allowed the plaintiff's claim.

Defendant No. 1 appealed to the High Court.

Balaji A. Bhagvat, for the appellant (defendant No. 1).—The plaintiff sought to recover possession on the ground that he was the sole owner of the land. The Judge found that the land was joint property, and the plaintiff, therefore, has no right to exclusive possession. The plaintiff must sue for partition—*Parashram* v. *Miraji* (1).

Mahadeo V. Bhat, for the respondent (plaintiff).—The plaintiff has been in possession since the land was purchased. He leased it to Bhagai, from whom defendant No. 1 took wrongful possession. The defendant is a trespasser and ought not to be allowed to retain possession which he has wrongfully taken. The question is whether a co-parcener who is not in possession can dispossess a tenant of a co-parcener who is in possession. We submit that he cannot. He may sue to set aside the alienation of a co-parcener, so far as his interest is concerned, or he may sue for a general partition. If the plaintiff cannot retain exclusive possession he should be given **[629]** joint possession with the defendant—*Balaji Anant* v. *Ganesh Janardan* (2) ; *Krishnarav* v. *Govind Trimbak* (3) ; *Mahabalaya* v. *Timaya* (4) ; *Wahid Alam* v. *Safat Alam* (5); and *Kallapa* v. *Venkatesh* (6).

JUDGMENT.

PARSONS, J.—Plaintiff having failed in a possessory suit brought this action to obtain possession of a certain piece of land of which he alleged he was the owner by purchase in October, 1889. The defendant No. 1's contention was that the land was the joint property of himself and the plaintiff, but he asserted his own sole right to retain possession, and said that plaintiff's remedy was to bring a suit for partition. The other defendants were tenants only of the land.

The first Court found that the land was joint, and dismissed the suit. The Subordinate Judge remarks :—"As the defendant No. 1 has a right to retain the possession of the property in dispute as a tenant-in-common, the plaintiff is not entitled to maintain this suit. His proper remedy, if so advised, is a suit for partition." The appellate Court, though it agreed that the land was joint, awarded the plaintiff exclusive possession. The Judge says: "Although the land was brought out of the joint funds, still the plaintiff has been enjoying it separately from the date of its acquisition, and defendant No. 1 cannot take it collusively or forcibly out of the hands of plaintiff's tenant. Defendant No. 1 can claim a share in the land and other undivided property, if any, in a properly constituted partition suit." He refused, however, to give either mesne profits or costs.

In our opinion, the decree of the lower appellate Court is wrong and cannot be maintained. Unless exclusive title is proved, exclusive possession cannot be awarded in a suit of this nature (see the ruling of this Court in *Parashram* v. *Miraji* (1). The plaintiff failed to prove his exclusive title, and, therefore, the decree of the first Court dismissing his suit is strictly right. Upon the state of facts, however, that after a full inquiry the lower Courts found to exist, it was open to either of them to

(1) P.J. (1895) p. 161 ; 20 B. 569. (2) 5 B. 499.
(3) 12 B H.C.R. 85. (4) 12 B.H.C.R. 138. (5) 12 A. 556.
(6) 2 B. 676.

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20 B. 627.

have given the plaintiff a decree for joint possession, that being the only relief to which on those facts he was [630] entitled. Apparently no such request was made to those Courts, each of the parties being anxious only to establish his own right to exclusive possession and so to throw on the other the *onus* of bringing a partition suit.

In this Court the plaintiff has asked us to give him this relief, and his right to obtain it is not seriously disputed by the other side. Amending, therefore, the decree of the lower appellate Court, we award the plaintiff joint possession of the property in suit. Had the defendant No. 1 not contended for his own right to exclusive possession, we should have given him his costs, but as it is, we think that plaintiff should bear his own, and pay a moiety of the costs of the defendant No. 1 throughout.

Decree amended.

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20 B. 630.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

RAMRAO TATYAJI PATIL (*Original Plaintiff*), *Applicant v.* BABAJI DHONDJI BIBVE (*Original Defendant*), *Opponent.**

[26th July, 1895.]

Mamlatdars Act (Bombay Act III of 1876)—Jurisdiction of Mamlatdar—Irregular decree of Mamlatdar made by consent of parties—Subsequent refusal by Mamlatdar to order execution of decree—Extraordinary jurisdiction of High Court—Questions of fact—Practice—Procedure.

The applicant brought two possessory suits against the opponent in the Mamlatdar's Court for the recovery of certain pieces of land. By consent, decrees were passed in these suits, that unless the opponent paid a certain sum of money to the applicant within two months, the latter should get possession. After the expiration of two months the applicant, alleging that the money had not been paid as agreed, applied for execution of the decrees. The Mamlatdar found that the money had been tendered to the applicant, but had been wrongfully refused by him. He ordered execution to issue as to costs, but declined to make any order as to possession. The applicant thereupon applied to the High Court in its extraordinary jurisdiction and alleged that the money had not been duly tendered.

Held, that the decrees were such as the Mamlatdar could not legally make under the provisions of the Mamlatdars' Act (Bombay Act III of 1876), and the consent of parties could not give him power to do so.

[631] *Held*, also, that the High Court would not go into the question as to the due tender of the money. It was not open to the High Court, in the exercise of its extraordinary jurisdiction, to go into this question of fact, nor would it be proper to further the execution of an irregular decree, especially as the applicant had a clear remedy by suit.

APPLICATIONS under the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the orders of Rao Saheb P. K. Shahane, Mamlatdar of Haveli, in the Poona District.

On the 5th September, 1891, the opponent sold two pieces of land to the applicant and subsequently leased them from him for a year under two rent-notes, dated 26th October, 1892. At the end of the year, however, he (the opponent) did not give up possession, and the applicant accordingly filed two possessory suits against him in the Mamlatdar's Court.

While the suits were pending, however, the parties made an agreement, that if the opponent (the defendant in the suits) should return to

* Applications Nos. 104 and 105 of 1895 under the extraordinary jurisdiction.

the applicant (the plaintiff) within two months the purchase-money which he had paid for the lands, and should also pay the amount of rent due under the rent-notes, he (the opponent) should keep the lands, but that, in default, the applicant should recover possession through the bhag karkun.

Accordingly on the 17th February, 1894, a consent decree was passed in each of the above suits that "should the defendant fail to satisfy the plaintiff in two months from this day in accordance with the mutual understanding come to between them, steps for delivering possession should be taken through the bhag karkun. All costs on defendant (opponent)." The opponent failed to pay the amount within two months, and thereupon the applicant presented a *darkhast* for the execution of the decrees as to costs and possession. The Mamlatdar ordered execution to issue as to costs only, and declined to make any order as to possession.

The applicant thereupon applied to the High Court in its extraordinary jurisdiction praying that the Mamlatdar should be directed to give him immediate possession of the lands. A *rule nisi* was granted requiring the opponent to show cause why the execution of the decrees should not be allowed, and the Mamlatdar was called upon to report on the applications. The Mamlatdar **[632]** reported that the money offered by the opponent had been wrongfully refused by the applicant.

Mahadeo B. Chavbal (with *Narayan M. Samarth*) appeared for the applicant in support of the rule.—The Mamlatdar having passed the decree with the consent of the parties, he could not refuse to execute it in its entirety. It was wrong to issue execution in part. The Mamlatdar does not say in his report which was called for by this Court, that the money was paid or even tendered to us within two months. It was incumbent on the opponent to pay the money within that time, and it is not alleged that he did so. If the money had been brought to us within the time agreed on, we could not have refused to accept it.

Shivram V. Bhandarkar appeared for the opponent to show cause. —The Mamlatdar's decrees are illegal and, therefore, they cannot be executed. The decrees being illegal and inoperative, it was not necessary for us to comply with them by paying the amount within the prescribed time.

JUDGMENT.

PARSONS, J.—The decree is one that the Mamlatdar could not legally make under the provisions of the Mamlatdars' Act—*cf. Shidlingapa* v. *Karibasapa* (1)—and consent of parties could not give him power to make it. The complaint of the applicant, however, is, not that the decree is bad, but that the Mamlatdar has wrongly found that the money was paid within the two months' time allowed for its payment, and has wrongly, therefore, refused to give him the possession which was decreed to him if the money was not paid. He asks us to find that the full amount of money ordered to be paid was not duly tendered by the opponent, and to direct the Mamlatdar to put him into possession. We are of opinion that it is not open to us in the exercise of our extraordinary jurisdiction to go into this question of fact, and that it would not be proper for us to further the execution of the irregular decree, especially as the applicant has a clear remedy by suit. We, therefore, discharge the rule in both cases, but, under the circumstances, without costs.

Rule discharged.

(1) P.J. (1887), p. 109.

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20 B 633.

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[633] ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

MANCHUBHAI NAVALCHAND *(Original Plaintiff)*, *Appellant v.* JOHN H. TOD AND ANOTHER *(Original Defendants)*, *Respondents.**

[14th December, 1894.]

Principal and agent—Consignment for sale—Unauthorized sale by agent below limit—Measure of damages.

The measure of damages, in a case where an agent has in breach of his duty sold goods of his principal below the limit placed upon them by the principal, is the loss which the principal has sustained, and if he has sustained no loss he can only ask for nominal damages.

[D, 12 M.L.J. 375 (378).]

THE plaintiff, a Bombay merchant, sued the defendants, a London firm carrying on business in Bombay by their constituted attorney, to recover a sum of Rs. 6,144-1-6 deposited by the plaintiff in the Bombay Bank in his own name and in that of the Agra Bank on behalf of the defendants.

This amount represented the difference between the plaintiff's and defendants' statement of accounts current between them, and the difference included the equivalent, in Rupees, of £280—about Rs. 4,000 at the exchange of the day—which the plaintiff claimed to be entitled to charge to the defendants as the difference between £270, the price at which their London firm had sold a parcel of pearls (No. 183) which he had consigned to them for sale, and £550, the limit he had placed on the parcel.

The suit was heard by Mr. Justice Parsons, who decided that the terms of the agreement between the parties as to the consignment justified the defendants' sale of the pearls, and disallowed the plaintiff's claim on that ground, and also found on the facts that the plaintiff had not proved that he had sustained any damages.

The plaintiff appealed from this decision.

The following are the grounds of appeal material to this report:—

(1) The learned Judge should have held that the plaintiff was entitled to be credited with the sum of £550, the limit placed by him upon the parcel of pearls No. 183.

[634] (2) The said learned Judge should in any case have held that the plaintiff was entitled to a larger sum than the said parcel of pearls had realized when sold by the defendants.

(3) The said learned Judge should have held that the defendants were not entitled to sell the said parcel of pearls at the time when they sold the same.

(4) That the defendants committed a breach of their contract with the plaintiff by selling the said parcel when they did, and that the plaintiff sustained damages by such sale, and the said Judge should have assessed such damages.

The appeal came on for hearing before Sir Charles Sargent, Chief Justice, and Farran, J.

B. Tyabji and *Lowndes*, for appellant.

Lang (Advocate General) and *Scott*, for respondents.

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* Suit No. 692 of 1891. Appeal No. 811.

B. Tyabji.—We are entitled to the difference between the price at which the parcel was sold and our limit price. We put our own value upon the pearls, as we were entitled to do, and if defendant thought that value wrong, he should have returned them to us. There is no question of market value here, where the goods are fancy goods. This case resembles that of a picture. In such cases there is no market value. The test is what is its worth to the owner.

Scott, contra.—There is no evidence of damages here. They must be proved to be recovered—Mayne, pp. 537-8; *Cassaboglou* v. *Gibb* (1). If there has been any breach of duty here, it has been a mere technical one, and has caused no loss to the plaintiff. The only damages recoverable in such a case would be the difference between the price realized and the price the plaintiff would have to pay to repurchase similar goods.

JUDGMENT.

FARRAN, J. (after finding on the facts that the defendants were not justified under the circumstances in selling the parcel at a price lower than the limit placed on it by the plaintiff, and were, therefore, liable to the plaintiff for any damages which he could show resulted to him from the improper sale) continued:—The form of the action is not one actually sounding in damages, **[635]** but as the suit was brought for the express purpose of raising this question, counsel for the respondents took no objection on that ground and expressly invited us to determine the case upon the merits. The appeal, therefore, raises the interesting question what the measure of damages is when an agent sells goods, such as pearls, consigned to him for sale, below the limits placed upon them by his principal and without being able to justify the sale by the terms of his contract. Counsel for the appellant contended that the measure of damages in such a case was the difference between the price fixed by the limit and the price which the pearls actually realized. It must be taken, he said, that the agent as between him and the principal sold the pearls at the fixed limit and should be debited with their price ascertained in accordance with it. He argued it was the same in principle as the case of a purchaser in a shop taking away an article such as a picture and insisting on paying for it a lower price than that placed upon it by the shopkeeper. The latter, he said, would be entitled to recover the price he fixed upon his picture irrespective of its real value.

That case, however, sounding in contract rather than in tort or on the case, is not the one with which we have to deal. What we have to determine is what is the measure of damages where an agent in breach of his duty sells the goods of his principal. The answer appears to me to be that the measure of damages in such a case is the loss which the principal sustains by the sale, and if he has suffered no loss he can only ask for nominal damages. Mr. B. Tyabji cited no authority in support of his argument, but on the other hand the general principle, as I have stated it, is laid down in Mayne on Damages (2nd Ed.), p. 411, and Sedgwick on Damages, p. 693, and that principle is the one which, under different circumstances it is true, was adopted in *Cassaboglou* v. *Gibb* (1). Where a unique article like a picture is sold, theoretically the most correct measure of damages would be not the fancy price which the owner placed upon it, but the price which he would have to pay in order to repurchase it. In the case of articles of common merchandise, the state of the market

(1) 11 Q.B.D. 797.

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subsequent to the sale would afford the criterion by which to fix the loss. If the market rose, the principal would sustain, and could [636] prove a loss: if it fell, he could not, as he could without loss put himself in his original position by purchasing merchandize of the same quality. In the case of an intermediate article like pearls, unless there were a rise in the market, he could purchase similar pearls at the same rate. The damages would be the expenses of the sale and of the repurchase. In all cases alike, however, the principal must prove his damages, and if he can show none they can be no more than nominal. On this point the Court below has, in my opinion, come to a correct conclusion. If Mr. Tyabji's argument were adopted, his measure of damages must, I think, logically be applied to all classes of goods alike; and applied to ordinary merchandize, it would amount almost to an absurdity. In my judgment it cannot be applied to any.

Attorneys for plaintiff (appellant).—Messrs. *Tyabji and Dayabhai.*
Attorneys for defendants (respondents).—Messrs. *Brown and Moir.*

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20 B. 636=Chitty's S.C.C.R. 486.

ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Strachey.

NAOROJI NUSSERWANJI THOONTHI (*Plaintiff*) *v.* KAZI SIDICK MIRZA (*Defendant*).* [14th and 27th February, 1896.]

Insolvent—Debt incurred before insolvency—Bond given after personal discharge in respect of—Private settlement with creditor, validity of—Absence of notice to Official Assignee and creditors—Position of insolvent with respect to property acquired after personal discharge—Agreement by creditor not to oppose final discharge—Validity of—Evidence—Untrue recital in bond—Contradiction by obligor allowed.

An agreement, by which an insolvent who has obtained his personal but not his final discharge, without notice to the Official Assignee or his other creditors, settles the claim of one creditor, and by which that creditor agrees not to oppose his final discharge, is void as in fraud of the creditors and as inconsistent with the policy of the Insolvent Debtors' Act.

In a suit on a bond containing such an agreement, evidence is admissible on behalf of the obligor to prove that a recital in it that all the other creditors had been settled with, was untrue.

[637] Though no creditor is bound to oppose the final discharge of an insolvent, yet a private agreement by a creditor with the insolvent, by which in consideration of a money payment the creditor binds himself not to oppose, is void as opposed to the policy of the Insolvent Debtors' Act and as in fraud of creditors.

[R., 34 M. 156=6 Ind. Cas. 758=20 M.L.J. 383=7 M.L.T. 392=(1910) M.W.N. 191; 7 Bom.L.R. 341.]

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Couse Courts Act (XV of 1882) by C. W. Chitty, Chief Judge. The case was stated as follows:—

"(1) This was a suit brought by the plaintiff to recover from the defendant a sum of Rs. 1,600 alleged to be due to him under a bond passed to him by the defendant and dated the 7th June, 1893.

"(2) The facts of the case, together with the reasons for my decision, are fully set out in my judgment.

"(3) A copy of the bond is annexed hereto.

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* Small Cause Court Reference, No. $\frac{256}{17772}$ of 1895.

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"(4) The questions for their Lordships' consideration will be three in number :—

"(i) Whether a debt which has been inserted in an insolvent's schedule, and in respect of which he has obtained his personal discharge, and which has, moreover, been included in the judgment entered up against him, in favour of the Official Assignee, can form a good consideration for a new promise to pay the same debt?

"(ii) Whether evidence was admissible to contradict the recital contained in the bond that all the creditors of the obligee (*sic*) (other than the plaintiff) have been settled with?

"(iii) Whether, if such evidence be admissible, and it is shown that all the creditors (other than the plaintiff) have not been settled with, the bond is not void as being passed in fraud of such creditors?

"For the reasons set out in my judgment, I dismissed the suit and certified Rs. 165 as the professional costs of the defendant. This amount, together with Rs. 50 to meet the costs of reference, has been deposited by the plaintiff."

The bond was in the following terms :—

"Know all men by these presents that I, Kazi Sidick Mirza Kazi Ahmed Mirza, of Bombay Mahomedan inhabitant, am held and firmly bound to Naoroji Nusserwanji Thoonthi, also of Bombay Parsi inhabitant, in the sum of Rs. 3,200 (three thousand and **[638]** two hundred) to be paid to the said Naoroji Nusserwanji Thoonthi or to his executors, administrators or assigns, for which payment to be well and truly made I bind myself, my heirs, executors and administrators firmly by these presents. Whereas the above bounden Kazi Sidick Mirza Kazi Ahmed Mirza being unable to pay his debts filed a petition and schedule in the Court for the Relief of Insolvent Debtors holden at Bombay on the 7th day of June, 1893(1), and by an order made by the said Court all the property and effects of the said Kazi Sidick Mirza Kazi Ahmed Mirza were vested in the Official Assignee, and whereas on the day of 189 the said Kazi Sidick Mirza Kazi Ahmed Mirza got his personal discharge from the said Court, in respect of the debts mentioned in the schedule, and judgment was entered in favour of the Official Assignee for the total amount of the debts due by the said Kazi Sidick Mirza Kazi Ahmed Mirza in the said schedule, and whereas subsequently the said Kazi Sidick Mirza Kazi Ahmed Mirza settled with all his creditors, except the said Naoroji Nusserwanji Thoonthi, and whereas the said Kazi Sidick Mirza Kazi Ahmed Mirza then proposed also to settle the claim of the said Naoroji Nusserwanji Thoonthi of Rs. 4,000, costs and interest, and the said Naoroji Nusserwanji Thoonthi has ultimately agreed to settle his said claim in the manner following :—That the said Kazi Sidick Mirza Kazi Ahmed Mirza should pay Rs. 800 (eight hundred) in cash and apply immediately after the execution of these presents to the Insolvent Debtors' Court at his own expense to get satisfaction entered of the judgment passed as aforesaid against the said Kazi Sidick Mirza Kazi Ahmed Mirza in favour of the Official Assignee and upon such satisfaction being entered the said Kazi Sidick Mirza Kazi Ahmed Mirza should execute in favour of the said Naoroji Nusserwanji Thoonthi a conveyance at the cost of the said Naoroji Nusserwanji Thoonthi of the properties described in the schedule hereunder written subject to a certain indenture of mortgage dated the day of 189 made

(1) This should be 12th December, 1890, the date 7th June, 1893, being the date of the bond (Reporter's note).

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between the said Kazi Sidick Mirza Kazi Ahmed Mirza of the one part and one Mr. Pestonji Rustomji Kanga of the other part and to the payment of the principal amount and interest due at the foot of the said mortgage: Provided, however, that if Karamali Pirbhai and Meherali Khakhi to whom the said Kazi Sidick Mirza Kazi Ahmed Mirza has contracted to sell the said properties should insist on carrying out the said contract, and they are entitled by law to do so, the said Kazi Sidick Mirza Kazi Ahmed Mirza shall, in lieu of the conveyance hereinbefore mentioned, execute an assignment to the said Naoroji Nusserwanji Thoonthi at the cost of Naoroji Nusserwanji Thoonthi of the right, title and interest of the said Kazi Sidick Mirza Kazi Ahmed Mirza in the balance of the purchase-monies remaining to be paid by the said Karamali Pirbhai and Meherali to the said Kazi Sidick Mirza Kazi Ahmed Mirza, and that, in the event of the said Kazi Sidick Mirza Kazi Ahmed Mirza failing to execute the said conveyance or assignment as aforesaid, the said Kazi Sidick Mirza Kazi Ahmed Mirza should pay the said Naoroji Nusserwanji Thoontbi a further sum of Rs. 1,600 (sixteen hundred) in cash, and that he the said Kazi Sidick Mirza Kazi Ahmed Mirza should to secure payment of the same execute the above-written bond subject to the conditions hereafter appearing. Now the conditions of the above-written bond or obligation are such that if the said Kazi Sidick Mirza Kazi Ahmed Mirza shall forthwith apply at his own expense to the insolvent Debtor's Court to enter and cause to be entered satisfaction of the judgment passed against the said Kazi Sidick Mirza Kazi Ahmed Mirza in favour **[639]** of the Official Assignee as aforesaid, and upon satisfaction being entered if the said Kazi Sidick Mirza Kazi Ahmed Mirza shall execute in favour of the said Naoroji Nusserwanji Thoonthi a conveyanee at the cost of the said Naoroji Nusserwanji Thoonthi of the properties described in the schedule hereunder written subject to a certain indenture of mortgage dated the day of 189 made between the said Kazi Sidick Mirza Kazi Ahmed Mirza of the one part and the said Pestonji Rustomji Kanga of the other part and to the payment of the principal amount and interest thereby secured: Provided, however, that in the event of Karamali Pirbhai and Meherali Khakhi, to whom the said Kazi Sidick Mirza Kazi Ahmed Mirza has contracted to sell the said properties, insisting on carrying out the said contract and their being entitled by law to do so if the said Kazi Sidick Mirza Kazi Ahmed Mirza shall, in lieu of the said conveyance hereinbefore mentioned, execute an assignment in favour of the said Naoroji Nusserwanji Thoonthi of the right, title and interest of the said Kazi Sidick Mirza Kazi Ahmed Mirza in the balance of the purchase-monies remaining to be paid by the said Karamali Pirbhai and Meherali to the said Kazi Sidick Mirza Kazi Ahmed Mirza, and in the event of the said Kazi Sidick Mirza Kazi Ahmed Mirza failing to apply to the Court and to execute the conveyance or assignment as aforesaid, if the said Kazi Sidick Mirza Kazi Ahmed Mirza shall pay the said Naoroji Nusserwanji Thoonthi Rs. 1,600 (sixteen hundred) in cash, then and in such event the above-written bond or obligation shall be void: otherwise the same shall remain in full force and virtue. In witness whereof, &c."

The following extract from the Chief Judge's judgment states the facts of the case:—

"There is no great difficulty in arriving at the true state of the facts of the case. On 12th December, 1890, the defendant filed his petition and schedule in the Insolvent Debtors' Court. In the schedule five creditors are mentioned: (1) the plaintiff in respect of a decree in High

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Court Suit No. 387 of 1890 against defendant and his mother Jinabai for Rs. 4,734-4-10, and the balance of a Small Cause Court decree Rs. 188-11-0; (2) a Marvadi for Rs. 1,000; (3) Pestonji Rustomji Kanga, in respect of a mortgage, dated 28th September, 1888, on land at Bhiwandi for Rs. 7,000 and also a promissory note on personal security for Rs. 500; (4) Jinabai, defendant's mother, in respect of two promissory notes for Rs. 1,000 and Rs. 2,000 respectively (of which Rs. 1,000 were paid off); and (5) another Marvadi for Rs. 200. The insolvency of defendant was proceeded with and his discharge was opposed by the plaintiff. He, however, obtained his personal discharge on the 11th April, 1892, and on the same day judgment was entered up against him in the name of the Official Assignee for Rs. 15,623-6-10, the amount of the debts stated in the schedule.

"Before his insolvency the defendant had contracted to sell the Bhiwandi property to Pirbhai Khakibhai and others for Rs. 11,000 subject to the mortgage of Pestonji Rustomji Kanga. It was referred to Mr. Bhaishankar Nanabhai, the mortgagee's solicitor, to take the account of what was due on the mortgage, and he ascertained the amount to be Rs. 11,037-3-6. Pirbhai Khakibhai and his brothers had agreed to be bound by the finding, and it was accordingly on the 6th February, 1894, made an order of the Court that they should pay the amount to the mortgagee, and that he should reconvey the property to them.

[640] "In the meanwhile, in 1893, the plaintiff had taken from the defendant the bond in this case. That bond is dated 7th June, 1893, and provides for the payment of Rs. 800 in cash by defendant, which was paid. The bond contains a recital that all the creditors of the defendant have been settled with, except the plaintiff, and it contains the conditions to the effect that defendant shall forthwith apply to have satisfaction of the judgment in favour of the Official Assignee entered up, and that defendant should then execute to plaintiff a conveyance of the Bhiwandi property, subject to the mortgage in favour of Pestonji Rustomji Kanga, and the amount thereby secured, or in case Pirbhai Khakibhai and his brothers should insist on carrying out the sale, then that defendant should execute in favour of plaintiff an assignment of his (defendant's) right, title and interest in the balance of the purchase-money, and in the event of defendant's failing to apply to the Court or execute such conveyance or assignment, then that if defendant should pay the plaintiff Rs. 1,600 the bond should be void: otherwise it should continue in full force and effect. On this state of things, three questions arise for determination: (1) Was there any consideration for this bond? (2) Is the bond a fraud on creditors? (3) Have the conditions been fulfilled to enable plaintiff to recover?"

Inverarity, for the plaintiff.—Is the agreement void? There is no authority for holding it to be an undue preference. There can be no undue preference after the date of the insolvency.

We say a person who has obtained his discharge can make any arrangement he likes; his after-acquired property does not belong to the Official Assignee, and till the Official Assignee intervenes he can do what he likes with it—*Cohen* v. *Mitchell*(1). The Chief Judge is wrong in saying that it ought to go to the Official Assignee. The object of entering into the bond was to get rid of the insolvency by getting satisfaction

(1) 25 Q.B.D. 262.

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entered up on the judgment. If an insolvent has many creditors, he must, to effect this, go to them, and settle with them, one by one. There is no undue preference in this, unless the Official Assignee is entitled to the after-acquired property directly it is acquired.

There is ample consideration in our giving up a great part of our debt. We could not, after this, claim any dividend from the Official Assignee. Also by this arrangement we agree not to oppose the debtor's final discharge.

As to the evidence given to contradict the recital in the bond, we say the defendant is bound by the recital and estopped from saying it is untrue.

[641] *Scott*, for defendant.—There is no consideration. The debt existed before the insolvency and is no consideration after insolvency. Therefore, in this country at all events, the agreement is void. In India the exception to the rule that agreements without consideration are void under s. 25 of the Contract Act (IX of 1872) only saves agreements barred by limitation. In England the rule was different. See *Heather* v. *Webb* (1).

Giving up part of an old debt is not a new consideration. The remedy of the judgment-creditor, moreover, is not gone, but only transferred to the Official Assignee.

There is no consent of the plaintiff in the bond to have satisfaction entered up. If he had so consented, he could have withdrawn the consent—*Foakes* v. *Beer* (2).

Had the Official Assignee after the execution of this document proceeded under the decree to recover the full amount, we should have been bound to pay—*Peakman* v. *Harrison* (3).

Cohen v. *Mitchell* only applies as between the Official Assignee and third parties.

Evidence can be given to show that the recital in the bond is untrue.

Inverarity in reply.—Section 63, Contract Act, is contrary to *Foakes* v. *Beer*. See *Manohar Koyal* v. *Thakur Das* (4).

JUDGMENT.

STRACHEY, J.—This is a case stated for the opinion of the High Court by the Chief Judge of the Court of Small Causes at Bombay. The facts are fully stated in the reference. The suit was for the recovery of Rs. 1,600 under a bond executed by the defendant in favour of the plaintiff on the 7th June, 1893. At the date of the execution of the bond the defendant was an insolvent who had obtained his personal discharge under s. 47, but not his final discharge under s. 59 or s. 60 of the Indian Insolvent Act, 11 and 12 Vict., c. 21, and against whom judgment had been entered up in the name of the Official Assignee under s. 86. The plaintiff was one of the scheduled creditors, his debt being for more than Rs. 4,000, **[642]** and he had opposed the insolvent's discharge. The bond recites the insolvency proceedings, and states that subsequently to the entering up of judgment the insolvent had settled with all his creditors except the plaintiff. That statement is found by the Chief Judge to be untrue. The bond then sets forth that the plaintiff had agreed to a proposal made by the insolvent to settle the claim for Rs. 4,000 odd in the manner following, namely, that the insolvent should pay Rs. 800 in cash; that he should immediately apply to the Insolvent Court to have satisfaction entered up

(1) 2 C.P.D. 5.
(2) 9 Ap. Ca. 605.
(3) L.R. 14 Eq. 484 (491).
(4) 15 C. 319 (326).

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on the judgment; that upon this being done, he should execute in favour of the plaintiff a conveyance of certain property subject to a mortgage; that if, owing to certain persons who had previously contracted to purchase the property insisting on carrying out their contract, this could not be done, he should execute an assignment to the plaintiff of his right, title and interest in the balance of the purchase-money; and that, in the event of his failing to apply to the Court and to execute the conveyance or assignment, he should pay to the plaintiff a further sum of Rs. 1,600 in cash. The Chief Judge dismissed the suit, subject to the opinion of this Court upon three questions which he has stated.

The first question is "whether a debt which has been inserted in an insolvent's schedule, and in respect of which he has obtained his personal discharge, and which has, moreover, been included in the judgment entered up against him in favour of the Official Assignee, can form a good consideration for a new promise to pay the same debt." If it were necessary to decide that question, I should have great difficulty in answering it in the affirmative. In England it is settled that a promise to pay a debt barred by bankruptcy is a mere *nudum pactum*, as there is no consideration for it—*Jones* v. *Phelps* (1); *Heather* v. *Webb* (2)—though it is binding if there is new consideration—*Jakeman* v. *Cook* (3). In India the same principle would apply to a promise by an insolvent without new consideration to pay a debt from which he had obtained his final discharge, the Contract Act containing no exception in favour of such promises such as s. 25 (3), in [643] favour of promises to pay debts barred by limitation. How far the principle would apply to a promise without new consideration to pay a debt in respect of which the insolvent has obtained only his personal and not his final discharge, which is included in the judgment entered up against him in favour of the Official Assignee, and as to which the creditor's remedy, though not, strictly speaking, barred, is transferred to the Official Assignee, who alone can recover the debt in the manner and subject to the conditions provided by the statute, is a question which we need not consider, because it has not really been argued before us. What the learned counsel for the plaintiff contended was that there was ample new consideration for the bond in suit. He argued that, in the first place, the plaintiff gave up a considerable part of the debt and impliedly assented to satisfaction being entered up on the judgment so far as concerned him, and that, secondly, he impliedly gave up his right to oppose the insolvent's final discharge. Whether this argument is sound, depends chiefly upon the construction to be placed upon the bond. Having regard to the document as a whole, and in particular to the recital that the insolvent had proposed to "settle the claim" of the plaintiff in the manner following, I think that the bond must be regarded as a compromise by which the plaintiff, in satisfaction of his claim for Rs. 4,000, agreed to accept from the defendant a present cash payment of Rs. 800, and either the execution of a conveyance or assignment or the payment of a further Rs. 1,600 in cash. I think that he impliedly gave up, in consideration of the bond, his right to share in any future rateable distribution under s. 86 of the Act. If, after the execution of the bond, any sum were obtained by the Official Assignee for the purpose of such distribution, it would under s. 86 be distributed according to the mode directed in the case of a dividend, and under s. 40, the plaintiff would have to prove his claim to share in the distribution in the same manner

(1) 20 W. R. 92. (2) 2 C.P.D. 1. (3) 4 Ex. D. 26.

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and subject to the like deductions, conditions and provisions as in the English Bankruptcy Acts for the time being in force. Under the rules contained in the second schedule of the Bankruptcy Act, 1883, he would have to verify it by an affidavit showing its particulars, [644] and under Form 72 of the forms in the Appendix of the Bankruptcy Rules, 1886, made under s. 127 of the Act, the affidavit must state that the debt still remains due and unsatisfied, and that neither the claimant nor any person by his order has received any manner of satisfaction or security except as specified. If Rs. 800 or any other sum had been received on account of the scheduled debt, that would have to be stated in the affidavit, and the Official Assignee in making a rateable distribution under s. 86 would take such payment into account. If, upon any such claim being made, it were brought to the knowledge of the Official Assignee that the claim had been fully satisfied by payment or the acceptance of a bond or otherwise, he would disallow it. I understand that this represents the practice of the Official Assignee of the Insolvent Court at Bombay. Whether the Official Assignee, in addition to disallowing the claim, would or could take steps to recover, for the benefit of the creditors generally, so much of the money paid to the claimant as exceeded the sum to which he would be entitled on a rateable distribution, is another question. At all events, the plaintiff could not, in disregard of a settlement of this kind, still claim for the whole debt under s. 86, and that being so, I think that he does give up a part of his claim. It was contended for the defendant that the plaintiff would not be bound by any undertaking to give up part of the claim, and in support of this contention the case of *Foakes* v. *Beer* (1) was cited. That case, however, which was decided by the House of Lords with great reluctance, Lord Blackburn almost dissenting, does not represent the law of British India: see Dr. Whitley Stokes' note to s. 63 of the Contract Act: Pollock on Contracts (6th Ed.), p. 177, note (*d*); and *Manohar Koyal* v. *Thakurdas Naskar* (2). If this view is correct, if the plaintiff by accepting the bond impliedly gives up his right as a scheduled creditor under s. 86, I think it follows, as contended by Mr. Inverarity, that he also impliedly gives up the right, which is accessory to it, of opposing the final discharge of the insolvent. Whether a consideration of that kind is lawful, whether an agreement by a scheduled creditor not to oppose the discharge, in consideration of a promise by the insolvent to pay part of the debt, is in [645] accordance with public policy, is a point which I shall discuss in connection with the third question referred to us by the Chief Judge. So far as the first question is concerned, I think, for the reasons which I have given, that there is consideration for the bond in suit.

The second question is "whether evidence was admissible to contradict the recital contained in the bond that all the creditors of the obligor (other than the plaintiff) had been settled with." Upon this question I agree with the learned Chief Judge. The fact that the other creditors had not been settled with, is material upon the question whether the object of the bond was to give the plaintiff an unfair advantage over the other creditors. and whether the bond was for that reason void as a fraud upon them and as opposed to public policy. Evidence of such a fact, in contradiction of the terms of the bond, was admissible under the first proviso to s. 92 of the Evidence Act, and in accordance with the authorities cited in the notes to *Collins* v. *Blantern* (3) and

(1) 9 Ap. Ca. 605. (2) 15 C. 319 (326). (3) 1 Sm. L. Cas. (9th Ed.) 393.

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para. 93 of Taylor on Evidence (9th Ed.). In such a case there is no estoppel. Apart from the principle that a party is not estopped from proving that the instrument was executed for an unlawful purpose, there is nothing to bring the facts of the present case within s. 115 of the Evidence Act. I am, therefore, of opinion that the second question must be answered in the affirmative.

The third question is "whether if such evidence be admissible, and it is shown that all the creditors other than the plaintiff have not been settled with, the bond is not void as being passed in fraud of creditors." To decide this it is necessary to look at the provisions of the Insolvent Act and to consider their policy. By the vesting order under s. 7 the insolvent's after-acquired as well as his existing property vests in the Official Assignee who has full powers for its recovery, and who holds it as a trustee for all the creditors admitted on the schedule—*In re Dewcurn Jewraj* (1). By ss. 59 and 60 a final order of discharge can only be made after notice to the creditors, any of whom is at liberty to oppose it; and its effect is to discharge the insolvent personally and also his after-acquired property, in the case of a **[646]** trader, from all demands with certain specified exceptions, and in the case of a non-trader from the demands of all the creditors named in the order *nisi*. By s. 86, the Court may, before making an order of final discharge, direct judgment to be entered up against the insolvent in the High Court in the name of the Official Assignee for the amount of the debts stated in the schedule and established, the judgment may under certain conditions be executed against any after-acquired property of the insolvent, and the proceeds of the execution must be distributed rateably among the creditors as in the case of a dividend. When the debts have been satisfied, the Court may under s. 87 direct satisfaction to be entered up on the judgment, and then, if any property of the insolvent remains with the Official Assignee, the Court may order that it shall be vested in and delivered up to the insolvent. It is only by such an order or by dismissal of the petition or the revocation of the adjudication that the original vesting order ceases to have effect. From these and other provisions it is obvious that the policy of the Act is to make the relief of the insolvent conditional upon the whole of his property, after-acquired as well as existing, being given up to the Official Assignee and made available for rateable distribution among all creditors whose claims are established, without preference of any of them, and upon all being free to oppose the discharge. A bargain made by the insolvent before discharge, behind the backs of the Official Assignee and the creditors generally, which might have the effect of giving a particular creditor more than he would be entitled to receive on a rateable distribution, and by which the creditor in return agrees not to oppose the discharge, is, in my opinion, inconsistent with that policy. It appears to me that this is a substantially correct description of the bond in suit. It is an agreement by the insolvent in certain events to transfer certain property or to pay Rs. 1,600 to the plaintiff in settlement of his claim. If the other creditors had been paid, or if the agreement were to pay the plaintiff in the event of their being paid in full, or of satisfaction being entered up on the judgment, it might not be open to objection. But, in the first place, the recital that the other creditors have been settled with, is found to be untrue, and in the **[647]** second place, it is not in the event of satisfaction being entered up,

(1) 12 B. 342.

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but in the event of the insolvent failing to apply for its being entered up and to do certain other things, that the Rs. 1,600 is to be paid. It is not alleged that satisfaction has been entered up, the Chief Judge finds that the insolvent has not applied to have it entered up, and so long as any creditors remained unsatisfied, no application for that purpose could be entertained. The Rs. 800 which under the bond has already been paid to the plaintiff, and the Rs. 1,600 which the insolvent binds himself to pay, and to recover which the suit is brought, are not the property of the insolvent, but that of the Official Assignee in trust for all the creditors, and every creditor and not only the plaintiff is entitled to share in it. The bargain is carried out behind the backs of the Official Assignee and the other creditors, who are not shown to have had notice of it or to have assented to it. To hold that such an agreement should be given effect as between the insolvent and the plaintiff so long as the Official Assignee does not interfere, but that the Official Assignee if he thinks fit can step in and protect the other creditors by claiming the money, would be to put a premium on secret dealings between the insolvents and particular creditors whom they may be induced to favour. Such a result is inconsistent with the provisions of the statute securing to the creditors a rateable distribution of all the insolvent's property, and implying that the insolvent is to deal with them openly and impartially, and to assist in the appropriation of the property for their benefit. In cases where the Official Assignee became aware of a disposition of moveable property by the insolvent in favour of a particular creditor, he might be hindered or delayed in recovering it from the creditor or from any transferee from the creditor. If, as was contended, the doctrine of *Cohen* v. *Mitchell* (1) applied to such a case, the further consequence would follow that when once the money had been paid over, or other property had passed from the insolvent under the agreement, whether by voluntary act or in execution of decree, it would be too late for the Official Assignee to intervene, and, the creditor acquiring a complete title, the property [648] would be irrevocably lost to the other creditors. In that view the Rs. 800 already paid to the plaintiff could not be recovered. Again, if the insolvent could make a bargain of this kind with one of his creditors, he could do so with others. If he had ten creditors he might secretly agree with five to pay them the greater part of their claims, leaving the others wholly unpaid, and thus effect a distribution of assets altogether inconsistent with that contemplated by the statute. It is, of course, conceivable that a compromise by which a particular creditor gave up his right to future dividends in consideration of a present part payment, might ultimately turn out advantageous to the other creditors. Whether it would do so or not, it would be impossible, at the time of the compromise, to determine. It would depend upon whether, subsequently to the payment, the insolvent acquired property of such value as to realize for each of the other creditors a larger dividend than he would have been entitled to if no compromise had been made and if the creditor settled with had not been excluded from the subsequent distribution. If, subsequent to the payment, the insolvent acquired no property at all, each of the other creditors would necessarily lose the dividend to which he was entitled out of the money paid. Again, accepting the contention that part of the consideration for the bond is an implied agreement by the plaintiff not to oppose the final discharge of the insolvent, is such an agreement in accordance with public policy and with the spirit of the statute? I am of opinion that it is not.

(1) 25 Q.B.D. 262.

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The right to oppose the final discharge is given to a creditor not only for his own benefit, but for the benefit of all the creditors and of the whole community, which is interested in the bringing to light of anything in the conduct of the insolvent which disentitles him to recommence business free from past liabilities. In considering whether the discharge should be granted, the Court has to consider the insolvent's entire conduct, and not merely his conduct with reference to the opposing creditor. That principle was laid down by Mr. Justice Gibbs in *In re Pastanjee Shapurjee Kaka* (1). If it is correct, then although a creditor is not bound to oppose the final discharge, it cannot be in accordance with public policy that, by a private agreement with the insolvent and [649] in consideration of a money payment, he should bind himself not to oppose it.

In England there are many cases in which such agreements have been held to be void as opposed to the policy of the Insolvency and Bankruptcy Acts and as in fraud of creditors. In *Jackson* v. *Davison* (2), a case of 1821 decided under 1 Geo. IV, c. 119, an insolvent, in order to induce a creditor to withdraw opposition to his discharge, agreed to execute a warrant of attorney for the debt, and, in pursuance of the agreement, the insolvent was discharged, the warrant of attorney executed, and judgment entered up thereon by the creditor. A rule *nisi* having been obtained to set aside the warrant of attorney and the judgment, the Court set both aside on the ground that the agreement on which they were founded was contrary to the policy of the Insolvent Act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects which the Legislature intended to be distributed among all the creditors, and defeated the effect of the judgment entered up by order of the Insolvent Court. In *Murray* v. *Reeves* (3), the debt due to the opposing creditor was a judgment debt of £2,686. In consideration of the creditor withdrawing his opposition to the discharge, the attorney of the insolvent undertook that he should be the sole assignee of the estate and should receive £100 out of it within three weeks from his appointment. It was held that this agreement was contrary to the policy of the Insolvent Act and, therefore, void. That decision was followed in *Hall* v. *Dyson* (4), a case decided under the 1 and 2 Vict., c. 110. There the opposing creditor's claim was for £400. It was held that an agreement by the insolvent to pay him £50 in consideration of his withdrawing his opposition was void, being contrary to the policy of the Insolvent Debtors' Act and a fraud upon the creditors. In his judgment Lord Campbell, C. J., said: "There is no doubt that the plaintiff might have withdrawn his opposition if he chose but he had no right to do so in consideration of a money payment." In *Hills* v. *Mitson* (5), decided under the same statute, the Court consisting of Pollock, C. B., and [650] Parke, Alderson and Martin, BB., applied the principle *Hall* v. *Dyson* to an action upon a promissory note executed in favour of a particular creditor, not by the insolvent but by a third person, in consideration of the creditor ceasing to oppose, and undertaking not in future to oppose the insolvent's discharge. It was attempted, but without success, to distinguish *Jackson* v. *Davison* and similar cases on the ground that in them the agreement, being made with the insolvent himself, had the effect of giving to a particular creditor property which ought to be distributed among all the creditors. On the other hand, it was pointed out that "it is not the

(1) 8 B.H.C R. 37 (39). (2) 4 B. and Ald. 691. (3) 8 B. and C. 421.
(4) 17 Q. B. 785. (5) 5 Exch. 751.

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opposing creditor alone who is interested in the opposition, but that it enures to the benefit of the other creditors," and that if such an agreement were allowed, the insolvent might arrange with particular creditor, whose opposition he feared, by means of a third person, at the same time undertaking to pay the latter after his discharge. In *Humphreys* v. *Welling* (1) decided in 1862 under the 7 and 8 Vict., c. 96, an agreement was entered into between an opposing creditor and the insolvent that the latter should give the former a promissory note as a security for the debt, and that the creditor in consideration thereof should not oppose the making of a final order for protection. This arrangement was sanctioned by the Commissioner of the Court, who adjourned the final hearing to allow of its being effected. The promissory note was accordingly given, the opposition withdrawn, and the final order for protection made. It was held that "the Court had no authority to sanction such an arrangement; that it was illegal notwithstanding such sanction, and that no action could be maintained upon the note." That case is important not only because there the agreement had actually been sanctioned by the Commissioner of the Insolvent Court, but because it was argued that from the absence in the 7 and 8 Vict., c. 96, of any provision such as s. 61 of the 7 Geo. IV, c. 57, or s. 91 of the 1 and 2 Vict, c. 110, preventing a creditor from suing upon any new contract or security for payment of a debt from which the insolvent had obtained his discharge, it should be inferred that the Legislature **[651]** did not intend that such actions should be prohibited; and the Court nevertheless decided against the agreement upon general grounds of public policy. It follows that no inference in favour of such an agreement can be drawn from the absence of any provision in the Indian Insolvent Act, and that *Hall* v. *Dyson* and other cases decided under the 1 and 2 Vict., c. 110, cannot be distinguished on that ground, but are based, as indeed the reports show, upon the general policy of the statute. If that view of the decisions is correct, they have an obvious application to cases under the Indian Insolvent Act, which, as pointed out by Mr. Justice West in *In the matter of Candas Narrondas* (2), was largely copied from the English law then in force and the 1 and 2 Vict., c. 110, in particular.

The case of *Peakman* v. *Harrison* (3), cited by the learned Chief Judge in his reference and decided in 1872, was in some respects different from those which I have mentioned. There the insolvent had obtained his discharge and given a warrant of attorney as required by the insolvency statutes. He gave a scheduled creditor, whose claim was for £200, a bill of sale on his effects to cover the prior debt and further advances. The creditor having seized under the bill of sale and sold the effects, the debtor was adjudicated a bankrupt under the Bankruptcy Acts, and the creditor's assignee filed a bill praying that the revival of the debt of £200 might be declared illegal, that accounts might be taken of the proceeds of the sale and of the sum justly due to the defendant, and that the defendant might be ordered to pay to the plaintiff what on taking such accounts might be found due. The Court held that the old debt could not be revived. The judgment certainly appears to have been based, in part, on the view that the bill of sale, so far as it related to the old debt, was an evasion of s. 91 of the 1 and 2 Vict., c. 110 (which re-enacted the provisions of s. 61 of the 7 Geo. IV, c. 57); but it also proceeded upon the broader ground of public policy taken in the other cases to which I have referred. Thus, the Vice-Chancellor said: "If an insolvent were at liberty to pledge after-acquired

(1) 1 H. and C. 7. (2) 11 B. 138 (150). (3) L. R. 14 Eq. 484.

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property, the consequence would be that it would give undue preference to one creditor over another, and the law is clear that in such a [652] case the security is void. . . . . The distinction between bankruptcy and insolvency is clear. The insolvent only gets a discharge for his person; his after-acquired property remains liable, after satisfying the demands of subsequent creditors, to be seized under the insolvency, and applied for the equal benefit of all creditors under the insolvency. If, therefore, a creditor under the insolvency were to be allowed to take after-acquired property to secure a scheduled debt, he would defeat the object of the insolvency statutes by taking to himself alone what those statutes say shall be applied for the benefit of all. This is a fraud upon the Act of Parliament."

In *McKewan* v. *Sanderson* (1) Malins, V. C., cited *Hall* v. *Dyson* as applying the principle that "whenever there are proceedings in bankurptcy and insolvency, or any arrangement between a debtor and his creditors generally, and one of the creditors stipulates either for the payment of a greater dividend to him than is paid to the other creditors, or for any collateral advantage whatever, even such as giving the right to purchase a horse, or any advantage whatever not common to the creditors, any payment made will be ordered to be repaid, any security given will be ordered to be given up, and this Court will treat the whole thing as fraudulent against the other creditors; and anything done in favour of the creditor, who obtains this advantage will be set aside by this Court."

The case of *Kearley* v. *Thomson* (2) was decided by the Court of Appeal in 1890 when the Bankruptcy Act, 1883, was in force. Neither that Act nor the Act of 1869 contains any provision similar to s. 91 of the 1 and 2 Vict., c. 110, or to s. 167 of the Act of 1861 (re-enacting the substance of s. 202 of the Bankruptcy Law Consolidation Act, 1849, and repealed by the Bankruptcy Repeal Act, 1869) which made void all contract or securities made or given as a consideration or with intent to persuade a creditor to forbear opposing the allowance of a certificate. The Court of Appeal held, on the authority of *Hall* v. *Dyson*; that an agreement, the consideration for which was an undertaking by a creditor not to appear at the public examination of the bankrupt and not to oppose the order of [653] discharge, was illegal, as obviously tending to prevent further the course of justice. "Although," said Lord Justice Fry, "the defendants were under no obligation to appear, they certainly were under an obligation not to contract themselves out of the opportunity of appearing."

In *In re Barham* (3), a case of 1893, Mr. Justice Vaughan Williams held that a payment by a bankrupt to one of his creditors, made before the receiving order but after the petition and consequently after the time to which the trustee's title related back, with the view of giving that creditor a preference over the others, though not within the section relating to fraudulent preference, was a disposal of money which *prima facie* belonged to the trustee, and should be set aside as contrary to the policy of the bankruptcy laws.

It was, however, contended that the doctrine laid down by the Court of Appeal in *Cohen* v. *Mitchell* (4) was applicable to the case; that according to that doctrine the after-acquired property of an insolvent who has not obtained his final discharge does not vest in the Official Assignee until the latter intervenes; and that, consequently, an agreement,

(1) L. R. 15 Eq. 229; 20 Eq. 65.
(2) 24 Q.B.D 742.
(3) 69 L T. 356.
(4) 25 Q. B. D. 262.

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such as the bond in suit, is valid and should be enforced subject to his right to intervene and claim the money. When that decision is read with the later cases which explain and limit the general language which it uses, it will not be found to justify that conclusion. It was pointed out in *In re Rogers, ex parte Woodthorpe* (1), *In re New Land Development Association and Grey* (2), *In re Clark, ex parte Beardmore* (3) and *In re Rogers, ex parte Collins* (4) that the rule in *Cohen* v. *Mitchell* was only applied for the purpose of protecting persons who had been trading with an undischarged bankrupt, and dealing with him *bona fide* for value without interference by the trustee, who had given him credit and been paid with money acquired by carrying on such business, and who on that ground were held to have a good title as against the trustee. Again, in *Kerakoose* v. *Brooks* (5), **[654]** the Privy Council held that the only qualification of the Official Assignee's title to after-acquired property (apart from a qualification not material to the present case) was "that if the insolvent carries on trade at a subsequent period with the assent of the assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade will be subject, in equity, to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency." There is nothing in *Cohen* v. *Mitchell* which applies to an agreement by which a scheduled creditor accepts a present cash payment and a promise of a further payment in settlement of the debt from an undischarged insolvent not shown to have carried on any trade or business, and without the assent or knowledge of the Official Assignee. For these reasons I think that s. 23 of the Contract Act applies to the case, and that the third question must be answered in the affirmative. Costs will be costs in the case.

Mr. Justice Parsons authorizes me to say that he concurs in this judgment.

Attorneys for the plaintiff:—Messrs. *Framji, Moos and Mehta.*

Attorneys for the defendant:—Messrs. *Dikshit and Dhunjishaw.*

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

SORABJI JAMSETJI (*Appellant*) *v.* ISHWARDAS JAGJIWANDAS STORE AND ANOTHER (*Respondents*).*

[12th March, 1895.]

Company—Indian Companies Act (VI of 1882), ss. 61, 126, 144, cl. (g)—Contributory—Liability of the heirs of a deceased contributory—Calls—Calls made before the winding up—Limitation—Official liquidators not bound to take out letters of administration to the estate of a deceased contributory before settling the list of contributories—Shares duly issued, cancellation of—Reduction of capital.

Section 61, Indian Companies' Act (VI of 1882) (corresponding with s. 38 of the English Companies' Act of 1862) creates a new liability in the shareholders, and that liability includes contribution, not only in respect of calls made since the winding up, but also in respect of unpaid calls made before the date of the winding up, whether barred by limitation at that date or not.

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* Appeal No. 112 of 1894.

(1) 8 Morrell 236. (2) (1892) 2 Ch. 147. (3) (1894) 2 Q. B. 393.
(4) (1894) 1 Q. B. 425. (5) 8 M.I.A. 339.

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[655] The official liquidator need not take out letters of administration to the estate of a deceased shareholder before settling the list of contributories.

There is nothing in ss. 126 and 148 requiring the official liquidator to place on the list all the persons who may as representatives be liable to contribute in discharge of the liability of a deceased shareholder as contemplated by s. 126. Nor can the liability, under that section, of a person who has been placed on the list as his representative be affected by the omission of the official liquidator to do so.

Directors have no power to cancel shares duly issued to a shareholder at his request and so reduce the capital of the company.

Bhimbhai v. *Ishwardas Jugjiwandas* (1), followed.

[F., 31 M. 66=3 M L.T. 250; 12 Ind. Cas. 958=67 P.R. 1911; R., 70 P.R. 1903=160 P.L.R. 1903.]

APPEAL from the order of T. Hamilton, District Judge of Surat.

The Nawab of Baila Spinning and Weaving Company, Limited, was registered under the Indian Companies' Act, 1866.

The appellant's father Jamsetji signed the memorandum of association of the company and subscribed for twenty-five shares, which were duly allotted to him. On allotment he paid Rs. 25 per share and his name was entered in the register of shareholders. Shortly afterwards he sold the shares to one Amirbhai and handed over to him the receipts which he had obtained for the sums paid on allotment. The directors, however, refused to transfer the shares to Amirbhai's name, as the transfer was not made in the manner required by the company's articles of association, and on Amirbhai's application the directors on the 14th June, 1882, passed a resolution cancelling the shares and directing the money which he had paid for the shares to be paid to him.

The first call payable on these shares was due on 31st January, 1882; the second call on 5th May, 1882; the third call on 8th August, 1882, and the last call on 15th November, 1882.

On the 30th October, 1886, the Court made an order to wind up the company.

On 28th April, 1888, Jamsetji died intestate, leaving him surviving two sons (one of whom was the appellant Sorabji) and four daughters.

[656] On 8th July, 1888, the official liquidators served a notice on the appellant, calling upon him to show cause why he should not be placed on the list of contributories as heir of his father Jamsetji, the original shareholder.

The appellant contended that his father Jamsetji had ceased to be a shareholder of the company long before the date of the winding up; and that in any case his liability to pay calls was barred by limitation.

The District Judge overruled these objections and passed an order placing him on the list of contributories for Rs. 5,625, the unpaid balance due on the twenty-five shares.

Against this order the present appeal was brought.

Macpherson (with him *K. D. Shroff*), for appellant.—The shares allotted to Jamsetji were cancelled by the directors. From the date of the cancellation Jamsetji ceased to be a shareholder and was no longer liable to pay calls. The cancellation of the shares operated, no doubt, as a reduction of the capital of the company, and so far the resolution of the directors is invalid. But the directors ought to have put the name of Amirbhai on the register. Their omission to do so cannot prejudice our rights. See s. 29 of Act VI of 1882.

(1) 18 B. 152.

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Next we say that the calls were barred by limitation at the date of the order to wind up—art. 178 of the Limitation Act (XV of 1877). The winding up cannot revive the liability to pay them.

Lastly, we say that the appellant's father Jamestji having died intestate, the official liquidators cannot recover without letters of administration to the estate of the deceased. Section 190 of the Indian Succession Act (X of 1865) applies. If it does not apply, then the liquidators must proceed against *all* the heirs of the deceased shareholder. They have no right to proceed against one of the heirs alone.

Ganpat Sadashiv Rao, for respondents.—Section 148 of the Companies' Act (VI of 1882) does not require the official liquidators to take out letters of administration to the estate of a deceased shareholder at the time of settling the list of contributories. **[657]** Under s. 126 the heirs of a deceased contributory are liable both jointly and severally. Any one of them can be proceeded against, and he may sue the rest for contribution.

As to limitation, the winding-up order creates new rights and new liabilities. Under s. 61 of the Indian Companies' Act (VI of 1882) the liability of a shareholder to contribute to the assets of the company is a new liability—a liability to pay calls made both before and after the winding up—*The Parell Spinning and Weaving Company, Limited* v. *Manek* (1); *In re Whitehouse & Co.* (2). The claim is, therefore, not time-barred.

Lastly, as to cancellation of shares, the directors had no power to cancel shares which had once been allotted. Such cancellation amounts to a reduction of the capital, and is, therefore, illegal. The appellant's father Jamsetji signed the memorandum of association, and paid a deposit of Rs. 25 on each share. His name was entered in the register. He was, therefore, a member of the company and remained so till the date of the winding up. He is, therefore, liable as a contributory. His transfer of the shares to Amirbhai not being in accordance with the articles of association, the directors were not bound to recognize it. Section 29 of Act VI of 1882 does not, therefore, apply.

JUDGMENT.

SARGENT, C. J.—The appellant's father Jamsetji, who was an original allottee of twenty-five shares, never ceased to be the legal holder of them and liable for calls. The agreement to transfer the shares to Amirbhai in February, 1882, was not carried into effect in accordance with art. 28 of the company's articles of association or assented to by the company, and the cancellation of the shares by the company was beyond their powers. See the decision of this Court in *Bhimbhai* v. *Ishwardas Jugjiwandas* (3). Jamsetji was, therefore, the legal holder of the shares at the date of the winding-up order.

As to the calls being barred, it is to be remarked that s. 61 of the Companies' Act (VI of 1882) makes every member of the company liable to contribute to the assets of the company to an amount necessary for the payment of the debts and liabilities **[658]** of the company, the costs, charges and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves; and by sub-clause (*d*) in the case of a company limited by shares no contribution shall be required from any member

(1) 10 B. 483. (2) 9 Ch. D. 595. (3) 18 B. 152.

exceeding the amount (if any) unpaid on the shares in respect of which he is at present a member. This section corresponds with s. 38 of the English Companies' Act of 1862, the effect of which was fully considered by Sir George Jessel in *In re Whitehouse & Co.* (1). After pointing out that the section creates a new liability as regards the shareholders, the Master of the Rolls held that the contribution under the section includes unpaid calls made before the winding up as well as those made after the winding up. "It is true," he says, "that a call made before the winding up is a debt due to the company, but that does not affect the new liability to contribute." Nor can it in this view of the section affect the liability created by the section that the debt was barred.

As to the objection that letters of administration to the estate of the appellant's deceased father Jamsetji have not been taken out under Act X of 1865, it may or may not be necessary in the future for official liquidators to take them out as contemplated by s. 144, sub-clause (*g*), but there is no obligation to do so before settling the list of contributories. As to placing on the list all the persons who may as representatives be liable to contribute in discharge of the deceased's liability as contemplated by s. 126, there is nothing in that section or in s. 148 which requires it to be done, nor can the omission to do so affect the appellant's liability under s. 126.

For the above reasons we must confirm the order of the Court below with costs on appellant.

Order confirmed.

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20 B. 659.

[659] APPELLATE CIVIL.

Before Mr. Justice Farran, Chief Justice, and Mr. Justice Parsons.

TRIMBAKLAL GOVANDAS (*Original Applicant*), *Appellant v.* HIRALAL ITCHHALAL (*Original Opponent*), *Respondent.** [26th July, 1895.]

Lunacy—Act XXXV of 1858, ss. 15, 16, 17, 18 and 20—Hindu lunatic—Guardian—Manager—Joint member of the lunatic's family appointed manager of the lunatic's estate, not bound to render account—Manager charged with mismangement is entitled to have particulars of the charges made against him—Order or certificate of appointment.

The manager of a Hindu lunatic's estate appointed under Act XXXV of 1858, who is in possession with others of joint family property, is not, in his capacity of manager of the lunatic's estate, bound by the provisions of s. 15 of the Act to exhibit an inventory and account of the family property. The lunatic is possessed of no property for which the manager is liable to account. It does not make any difference if the manager is himself a joint owner or not. The Act provides no machinery, nor does it confer any power upon the Court, to deal with joint family property or interfere in the affairs of a joint family.

If a manager is charged with mismanagement he is entitled to some particulars of the charges made against him.

In all cases of lunacy in which a guardian or a manager of the lunatic's estate is appointed by the Court under the Act, it is desirable to issue a formal order or certificate of appointment.

[R., 8 Ind. Cas. 660=12 O.C. 209; 17 Ind. Cas. 473=23 M.L.J. 706=12 M.L.T. 585=(1913) M.W.N. 79.]

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* Appeal No. 11 of 1895.

(1) 9 Ch. D. 595 (600)

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20 B. 659.

APPEAL from the decision of R. S. Tipnis, Assistant Judge at Broach.

Three brothers —Navnidhalal, Chhotalal and Hiralal— were members of an undivided Hindu family governed by Mitakshara law. Navnidhalal was a lunatic. In the lifetime of the father Itchhalal a family arrangement was made by registered deed whereby provision was made for the maintenance of the lunatic.

After Itchhalal's death the appellant Trimbaklal, who was the son-in-law of the lunatic, applied to the District Court under Act XXXV of 1858 for a certificate of guardianship of the lunatic's person and property. The object of the application was that steps might be taken to set aside the deed of family arrangement and to effect partition of the family property.

The application was opposed by Hiralal Itchhalal, who contended (*inter alia*) that, if a certificate to any one was necessary, it should be given to him.

[660] On the 7th December, 1891, the Judge appointed Hiralal manager of the lunatic's property and Bai Godavari (the lunatic's wife) the guardian of his person. The order made was as follows :—

"Under s. 13 of the Act I order that Hiralal Itchhalal should provide for the maintenance of the lunatic and his family and for extraordinary expenditure on occasions of feasts, ceremonies, &c., as if he were a member of the joint family, out of the joint family property and as laid down in the deed of the family arrangement, and at the same time pay to the lunatic's wife Rs. 25 a month for miscellaneous expenditure. This is certianly not a large allowance, considering the income of the family is Rs. 10,000 a year as admitted by Hiralal ; Rs. 15 per month provided in the deed seems to me too small a sum."

The following is an extract from the Judge's judgment :—

"The real questions at issue are whether any appointment of a guardian of his (Navnidhalal's) person and a manager of his property should be made, and, if so, who shall be appointed ?

"I hold that the wife of the lunatic should be appointed guardian of his person, and the opponent Hiralal manager of his property. This case is very similar to that reported at p. 539, I.L.R., 6 Cal., with the difference that in this case the wife of the lunatic is alive and lives with him in a part of the ancestral house.

"There is no ill-treatment of the lunatic alleged or proved, although it appears from the lunatic's wife's evidence that there are occasional disputes between her and Hiralal about little matters. The reason why the present applicant seeks a certificate of management is clearly stated by him in his application to be to take legal measures for a partition of the estste, so that his share may descend to the wife and daughter instead of lapsing to the surviving brothers. Whether such a suit would be allowed or not, or whether it would be successful or not in the Bombay Presidency looking to the provisions of the Hindu law about disqualifications for inheritance, and how far all or any of the persons who have signed the deed of family arrangement put in this case are bound by it, are questions which it is not necessary for me to answer at present, although a good deal has been said on them in argument. But, I think, so long as no ill-treatment of the lunatic or his family is made out, it is to his best interests, and in accordance with the policy of the English law, not to allow interference with the course of his inheritance. At the same time whilst his wife is alive she seems to be the person best able to take care of him, and watch over his interests if they are at any time neglected by Hiralal."

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Against this order Trimbaklal appealed to the High Court (Jardine and Telang, JJ.), which without writing a judgment confirmed it on the 10th August, 1892.

In the year 1894 Trimbaklal applied under ss. 17 and 18 of Act XXXV of 1858 alleging that Hiralal was mismanaging the property and had not filed accounts as required by s. [661] 15 of the Act. He prayed that Hiralal should be required to furnish accounts, and that his appointment as manager should be cancelled.

The Judge rejected the application. The following are extracts from his judgment :—

"It would seem, from the judgment of this Court, that Hiralal was appointed manager of the lunatic's property, and the lunatic's wife was appointed guardian of his person. Such is the finding on the issue raised. But the order itself is silent as to whether Hiralal was appointed manager or not, though such appointment ought necessarily to be presumed from the fact that the order was made under s. 13 of the Act, and it would have directed Hiralal to provide for the maintenance of the lunatic and his family and for extraordinary expenditure on occasions of feasts, ceremonies, &c., as if he were a member of the joint family, out of the joint property as laid down in the deed of family arrangement, and at the same time pay to the lunatic's wife Rs. 25 a month for miscellaneous expenditure. Section 13 contemplates an order to the manager appointed by the Act. I, therefore, hold that Hiralal was appointed manager of the lunatic's estate under s. 10.

"But the Court held that the lunatic was only a member of the joint family, of which Hiralal was another member. There was no specific direction in the order or judgment as to how the management of the lunatic's share in the undivided property of the family should be conducted by Hiralal. The Calcutta High Court in the two decisions (one of which was referred to by Mr. Khareghat in his judgment, the other being reported in 13 C. L. R., 86) expressed no positive opinion as to whether a manager under this Act in regard to joint property can be appointed. However, in the present case the appointment being made, this point arises only in connection with the manager's liability to furnish accounts as required by s. 15.

"In my opinion, it is impossible for Hiralal to produce any accounts of the lunatic's undivided share of the property, for the property is joint and there can be no separate accounts of his share and none have been kept. It is impossible to predicate of the lunatic's share in the joint property or of the several items of the joint property until a division takes place.

"It seems that, unless Hiralal produces accounts of the whole estate and allows inspection thereof, there is no other course open for finding if the lunatic's share is properly managed or not. But there is no law for requiring a person to disclose accounts of the property other than that of the lunatic, and the course proposed would simply place the entire family accounts at the disposal of strangers and of the Court. Moreover, according to strict law, even the lunatic's share cannot be definitely predicated at this moment to admit of seeing what might be the income and expenditure regarding his share by inspection of the entire family accounts.

"This difficulty is further enhanced by the deed of family arrangement, which is alleged to have been executed. I cannot in this matter pronounce

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any opinion as to the validity or otherwise of this deed or any of its provisions. Mr. Khareghat, however, was fully aware of the difficulty in appointing a manager in this case, and [662] he ordered that the lunatic should be maintained as laid down in the deed of family arrangement. It seems to me, from this special order, that separate management of the lunatic's estate or share in the joint property was not entrusted to Hiralal, who cannot, therefore, be expected to give an inventory of the lunatic's property or account of the management of the lunatic's estate. His management was to be in accordance with the deed, and this he has been doing.

"In any view of the case, I cannot see my way in requiring accounts to be furnished.

"The petitioner alleges that Hiralal mismanages the property, and his appointment should be cancelled. His pleader is unable to state what specific acts of mismanagement Hiralal committed. But he says that he will be able to show if the accounts are furnished. I am unable to comply with this request. I do not think it necessary to record any evidence on this point of mismanagement, as I am of opinion that should Hiralal be removed from the management of the lunatic's estate, this removal would be tantamount to his removal from the management of the entire joint property,—a thing which I have no right to do; and, moreover, my own opinion is that no manager can legally be appointed to the estate of a lunatic who is only a member of the joint family and possesses no separate property. I should, in the event of cancelment of the managership, make an order under s. 20 of the Act, for the expressions used in that section are wide enough to include cases not only of properties of small value, but also of joint properties wherein separate management of a share is impossible."

The applicant appealed.

Nagindas T. Marphatia appeared for the appellant (applicant).—As Hiralal was appointed manager of the property of the lunatic under Act XXXV of 1858, it was incumbent upon him to file an inventory of the property within six months under s. 15 of the Act and also to furnish accounts. But he has admittedly not yet done so. The Judge dismissed our application on the ground that as the property is the undivided property of the lunatic and his two brothers, the lunatic cannot be considered to hold a specified portion of the property. But whether the property is divided or undivided, a manager is bound to render accounts—*Damodardas* v. *Uttamram* (1). The interest of the lunatic must be protected—Phillips on the Law of Lunatics, p. 341.

Hiralal's mismanagement of the property could have been proved if copies of the accounts had been furnished to us. An opportunity should be given to us to prove mismanagement.

Macpherson (Advocate General, with *Chitnis* and *Motilal*) appeared for the respondent (opponent).—The lunatic is not the sole owner of the property. The accounts relate to the whole [663] of the joint family property, and copies of such accounts cannot be furnished. The other members have a joint interest in the property, and they would certainly object to the applicant's demand. We rely on *Bhoopendra* v. *Greesh* (2); *Sham Kuar* v. *Mohanunda Sahoy* (3); *Soorbansi Singh* v. *Juggeshur Koer* (4); *Virupakshappa* v. *Nilgangava* (5).

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(1) 17 B. 271. (2) 6 C. 539. (3) 19 C 301.
(4) 13 C.L.R. 86. (5) 19 B. 309.

The applicant did not specifically mention particular acts of waste and mismanagement in his application. A mere vague statement as to mismanagement would not justify a Court in taking action. The Judge's order was, therefore, right.

JUDGMENT.

FARRAN, C.J.—The position of the respondent Hiralal Itchhalal in this case is peculiar. In 1891 the present petitioner and appellant Trimbaklal Govandas applied, under Act XXXV of 1858, to the Assistant Judge, F. P, at Broach to be appointed guardian of the person, and manager of the estate, of his father-in-law Navnidhalal Itchhalal alleged, and subsequently found, to be a lunatic. It was admitted then, as it is now, that the lunatic with his brothers Hiralal and Chhotalal were members of an undivided family governed by the Mitakshara law, and it was not alleged that the lunatic was possessed of any separate estate. The application referred to a family arrangement contained in a registered document, whereby Itchhalal, the deceased father of the lunatic (*inter alia*) made provision for the maintenance of the lunatic, but it was submitted that the arrangement was not binding upon the lunatic. The avowed object of the application was to take steps to set aside the deed of arrangement and to obtain partition of the family estate. No neglect or ill-treatment of the lunatic was alleged or proved, nor is any now alleged. Hiralal opposed the application. He stated that the lunatic was living with him and the other members of the family and was being maintained with the other members out of the property mentioned in the deed and in accordance with its terms. He submitted that no certificate for the management of the property or guardianship of the person of the lunatic should be issued, but that, if it was considered that a certificate to some one was necessary, it should be granted to him.

[664] The Assistant Judge in his written judgment, after holding the lunacy of Navnidhalal to be established, pointed out that the real questions before him were "whether any appointment of a guardian of his person and of a manager of his property should be made," and held that the wife of the lunatic should be appointed guardian of his person, and the opponent Hiralal manager of his property. He ordered under s. 13 of the Act that Hiralal should provide for the maintenance of the lunatic and for extraordinary expenditure on occasions of feasts, ceremonies, &c., as if he were a member of the joint family out of the joint family property as laid down in the deed of family arrangement, and should pay to the lunatic's wife Rs. 25 a month for miscellaneous expenditure.

On an appeal preferred by Trimbaklal to the High Court against that decision the High Court "confirmed the order of the lower Court with costs."

No formal order or certificate of the appointment of Hiralal as manager of the estate of the lunatic was ever drawn up or issued. Hiralal since the date of the decision of the Assistant Judge has been maintaining the lunatic in accordance with the terms of the family arrangement and of the decision, and paying Rs. 25 per mensem to Godavari, the wife of the lunatic. He has not filed an inventory or any accounts under s. 15 of the Act (XXXV of 1858).

Trimbaklal made the present application, praying that Hiralal might be ordered to file an inventory and accounts. He alleged mismanagement of

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the lunatic's estate and sought to have Hiralal's appointment as manager cancelled. The Assistant Judge, F. P., at Broach has rejected the application *in toto*. Hence this appeal.

As the Act does not indicate any particular form in which the order appointing the manager of a lunatic's estate should be made, or enact that a certificate is necessary to complete his title, we think that the written judgment of the Assistant Judge (confirmed by the High Court) is sufficient evidence that the opponent Hiralal has been appointed manager of the lunatic's estate. At the same time we would point out to the Courts the desirability **[665]** of issuing a formal order or certificate of appointment in all cases of lunacy in which a guardian or a manager of a lunatic's estate is appointed under the Act.

The question, whether a manager of the property of a lunatic, who is possessed of no separate estate, but is a member of a joint Hindu family which owns property, can be appointed under the Act, does not seem to have been argued before or considered by the Courts when the original application was before them. The main question was whether Trimbaklal should be appointed, and the submission of Hiralal that he, if necessary, should be appointed manager was probably considered to render the consideration of that question unnecessary, nor is it before us. Hiralal has, as we have pointed out, been appointed manager, and his appointment has been confirmed by the High Court. We, therefore, express no opinion upon the general question.

A careful perusal of the judgment of the Assistant Judge leads us to the conclusion that his intention in appointing Hiralal to be manager of the lunatic's estate was to preserve the *status quo* of the family and the lunatic's position therein and that he did not intend to bring the whole family estate under the superintendence of the Court. That intention would, no doubt, have been more appropriately effected by refusing to appoint a manager and making an order under s. 20 of the Act or by declining to make any order as was done by the Calcutta High Court under almost identical circumstances in the case of *Bhoopendra* v. *Greesh Narain* (1) upon which the Assistant Judge relied; but the intention of the Judge is immaterial if the law imposes upon Hiralal the obligation of rendering an inventory and accounts of the joint family property of which he and his brother are in possession. We refer to such intention for the purpose of pointing out that the order of the Assistant Judge (confirmed by the High Court) did not in terms or impliedly impose that duty upon the manager. This leads us to consider the main question argued before us, whether the manager of a Hindu lunatic's estate appointed under the Act (XXXV of 1858), who is in possession with others of joint family property, is in his capacity of manager of the lunatic's estate bound by the provisions of s. 15 of the Act to exhibit an **[666]** inventory and accounts of the family property. There is a very close analogy between the position of a lunatic and of an infant in relation to such property, and much of the reasoning of the Full Bench in *Virupakshappa* v. *Nilgangava* (2) is applicable to the case before us. It is a mere coincidence that the manager in this case is identical with the joint owner. The law must be the same whether he is identical with the joint owner or distinct. The provisions of ss. 16, 17 and 18 point, we think, to the case of a lunatic possessed of separate property and are inappropriate to joint family property in which he has merely an interest with others. The Act provides no machinery,

(1) 6 C. 539.

(2) 19 B. 309.

nor does it confer any power upon the Court to deal with joint family property or interfere in the affairs of a joint family. Doubtless in cases of alienation or waste or mismanagement so gross as to imperil the lunatic's interest in family property the Court can and will protect that interest by allowing a suit to be brought for partition or other legal means to be taken to secure it, and, if necessary for that purpose, will remove one manager and appoint another; but we think, having regard to the consideration to which we have referred, that such property is not property which falls within the scope of s. 15, and that it is a sufficient answer to the applicant's prayer for an inventory and accounts to say that the lunatic is possessed of no property for which the manager is liable to account.

The decision of this Court in *Damodardas* v. *Uttamram* (1), in which the Chief Justice Sir Charles Sargent points out the circumstances under which a Hindu manager is bound to account, was much pressed upon us by the appellant's pleader in support of his argument as to the liability of Hiralal, but the Chief Justice was there speaking of an account upon partition for the purpose of ascertaining the extent of the property liable to be divided, and his remarks are not applicable to the present case.

The appellant contends, independently of the question of accounts, that he tendered evidence of mismanagement which the Judge refused to record, and that the case ought to be remanded in order that such evidence may be taken. The application, however, contains no particulars whatever of such mismanagement. [667] It is a general allegation, and if a manager is charged with mismanagement he is entitled to some particulars of the charges made against him. We might doubtless allow the application to be amended, or direct that the applicant give particulars of the nature of the mismanagement of which he complains; but when the pleader for the applicant was questioned by the Assistant Judge upon this subject, he stated that he was unable to furnish any particulars, but would be able to do so when the accounts were filed. The appellant's pleader before us was likewise unable to specify any. It would be useless, we think, to remand the case on this ground. Other than the non-filing of the inventory and accounts no cause for the removal of the manager has been urged before us.

We must, therefore, confirm the order under appeal with costs.

Order confirmed.

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20 B. 667.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE BAI HARKHA.* [30th July, 1895.]

Guardian and Wards Act (VIII of 1890), ss. 47 (g) and 48—Order refusing to remove a guardian—Not appealable—Appeal—Practice.

The effect of ss. 47 (g) and 48 of Guardian and Wards Act (VIII of 1890) is to allow no appeal from an order refusing to remove a guardian.

[REF., 20 A. 433 = 18 A.W.N. 97; 14 Ind. Cas. 56 = 195 P.W.R. 1912.]

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* Appeal, No. 9 of 1895.

(1) 17 B. 271.

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APPEL-
LATE
CIVIL.

20 B. 667.

APPEAL from the decision of Venkatrao R. Inamdar, Acting Joint Judge of Ahmedabad.

One Jesang Bhukhan died leaving a widow Bai Harkha and four minor sons. On his death the District Judge of Ahmedabad appointed Shankar Bhaibabhai to act as guardian of the minor's property.

Some time afterwards Bai Harkha applied to the District Judge to remove the guardian, on the ground that he had mismanaged the minor's property, and misappropriated its income, and was otherwise unfit to act as guardian.

[668] The Joint Judge rejected this application, holding that the applicant had not made out a case sufficient for removing the guardian.

Thereupon Bai Harkha appealed to the High Court.

Gokaldas K. Parekh, for appellant.

C. H. Scialvad, for respondent.

JUDGMENT.

PER CURIAM.—The effect of ss. 47 (*g*) and 48 of Act VIII of 1890 is to allow no appeal from an order such as the Joint Judge has made, *viz.*, a refusal to remove a guardian. We, therefore, reject the appeal with costs.

Appeal dismissed.

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20 B. 668.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

GANESH VITHAL (*Original Plaintiff*), *Appellant v.* SHRIPAD DATTOBA NAIK AND OTHERS (*Original Defendants*), *Respondents.**

[1st August, 1895.]

Tolls Act (Bombay Act III of 1875), *s.* 7†—*Lease to levy tolls—Lessee, right of, to admit partners—Accounts, two sets of—False accounts kept to deceive Government.*

A lessee from Government of the right to levy tolls admitted into partnership with him the plaintiff and two others. One of the conditions attached to the lease prohibited sub-letting.

The plaintiff having brought a suit for his share of the profits realized in the transaction, the Judge dismissed the suit on the ground that the partnership was illegal, being of opinion that sub-letting and admitting a partner were identical.

Held, reversing the decree, that the partnership was not illegal.

Where in such a partnership two sets of account were kept, one true and the other false

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* Second Appeal, No. 945 of 1893.

† Section 7 of the Tolls Act (Bombay Act III of 1875):—

Every person other than the persons appointed to collect the tolls under this Act, who shall levy or demand any toll on any public road or bridge, or for passing through any bazar situated thereon, and also every person who shall unlawfully and extortionately demand or take any other higher toll than the lawful toll, or under colour of this Act seize or sell any property, knowing such seizure or sale to be unlawful, or in any manner unlawfully extort money or any valuable thing from any person under colour of this Act, shall be liable, on conviction before a Magistrate. to imprisonment for any term not exceeding six months, or to fine not exceeding Rs. 200, any part of which fine may be awarded by the Magistrate to the person aggrieved, but this remedy shall not be deemed to bar or affect his right to have redress by suit in the Civil Court of the district.

[669] *Held*, that such practice, however reprehensible, was not illegal under s. 7 of the Tolls Act (Bombay Act III of 1875), and did not disentitle the plaintiff to show as between himself and his partners what was the actual profit of the concern.

[R., 11 C.P.L.R. 62 ; 14 C.P.L.R. 67 ; D., 37 B. 320=15 Bom. L.R. 227=19 Ind Cas. 442.]

SECOND appeal from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge of Dharwar with appellate powers, varying the decree of Rao Saheb D. S. Sapre, Second Class Subordinate Judge of Hubli.

The plaintiff sued to recover from the defendants Rs. 1,145-14-9, alleging that the toll contract of Trimalkop, in the Hubli Taluka, was taken by him and the defendants jointly in the year 1889-90; that the profits realized at the end of the year amounted to Rs. 1,530-11-6, and that he was entitled to a moiety of the amount on account of his share. He further alleged that he had deposited with the defendants a sum of Rs. 761 as security and he claimed to recover that sum together with Rs. 5-7-0 as the costs of notice served by him on the defendants. Against the sums due by the defendants the plaintiff gave them credit for Rs. 385-14-0, and claimed the balance of Rs 1,145-14-9.

Defendant No. 1 alleged that he alone had taken the contract, and he denied that the plaintiff was his partner.

Defendant No. 2 did not appear.

Defendant No. 3 answered that he was a servant of defendant No. 1, who was the sole owner of the contract in question.

The Subordinate Judge found that the plaintiff and defendants were partners in the contract, and that the plaintiff was entitled to recover the amount claimed minus the costs of notice, namely, Rs. 1,140-7-9.

At the last stage of the suit the defendants raised the point that the partnership contract on which the plaintiff relied, was void as being contrary to law and public policy, and, therefore, could not be enforced. In support of their contention they put in a copy (Ex. 69) of the rules framed by the Collector of the district in connection with the toll contracts. The Subordinate Judge disallowed the contention, holding that these rules simply prohibited the sub-letting of such contracts.

On appeal by the defendants the Judge found that the profits realized amounted to Rs. 1,530-11-6, but he amended the decree **[670]** by awarding to the plaintiff the Rs. 761 which were deposited by him with the defendants, and rejected the rest of the claim. The following are extracts from his judgment :—

"*Issue* 6.—Are the private accounts kept in fraud on Government admissible in evidence?

"The plaintiff admits in his deposition that the private accounts (which the Judge in a previous part of the judgment found to be accurate and show the actual profits) were kept in order to deceive Government. These accounts cannot, therefore, be made use of so as to derive any benefit accruing from the keeping of such accounts. It is held by the Bombay High Court, I. L. R., 12 Bom., 422, that the partners in an illegal contract cannot claim an account of the partnership profits. The ruling in I. L. R., 10 All., 577 is in the same spirit The old Madras case (Madras High Court Reports, Vol. II, p. 249) was decided on the following principle :—A defendant may plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff seeks to enforce by suit. The keeping of private accounts and the making of profits from a toll

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contract, which according to the accounts kept according to the rules laid down by the Collector of the district was a losing concern, clearly implies the levying of excessive tolls or the passing of no receipts for the tolls levied. Both these circumstances are penal according to the Tolls Act (Bombay Act III of 1875, s. 7), and the keeping of private accounts inconsistent with the public accounts required by the Collector is perfectly illegal, and the private accounts set up by the plaintiff are, therefore, illegal and inadmissible in evidence.

"*Issue* 7.—Does the private partnership of the parties entered into in spite of the Government rules furnish a good and legal cause of action?

"The private partnership set up by the plaintiff was obviously entered into in contravention of the condition No. 10 of the lease of Tirmalkop toll granted to the defendant No. 1. The conditions laid down by the Collector of the district as a representative of Government have the force of law according to s. 10 introduced by Bombay Act No. V of 1881. If the defendant No. 1 entered into a partnership in violation of one of these conditions, the contract of partnership was of course illegal. The lower Court's opinion, that the conditions of the lease granted by the Collector do not prohibit a partnership taking up the lease expressly granted to one individual, is not, I believe, correct. Sub-letting and admitting a partner are identical, I think, and the alleged partnership cannot furnish a good or legal cause of action.

"*Issue* 8.—Is the claim bad as against public policy?

"It is, of course, against public policy to allow persons whom the Collector would not think eligible for the granting of a toll lease, to indirectly partake of the profits of a toll lease. The plaintiff distinctly admits in Ex. 36 that the Collector had forbidden him from taking any toll contract. The plaintiff made default in paying instalments and thus inflicted loss of the public gains, and he was declared unfit to have anything to do with toll contracts. The plaintiff nevertheless takes contracts in other men's names and defeats the public reason for discarding him. It is clearly against public policy to help such a man in securing his share of profits of a toll contract. The claim for a share of profits cannot be awarded.

[671] "*Issue* 9.—Is the plaintiff entitled to any relief?

"It would, however, be unfair to prevent the plaintiff from taking back the money really deposited by him for the benefit of defendant No. 1 and others, who being *in pari delicto* with plaintiff cannot retain the moneys actually received by them with the purpose of returning them. The private accounts are, of course, admissible to the extent of the deposit. These and the oral evidence by itself prove that Rs. 761 were deposited as security for good behaviour. This amount must be returned."

The plaintiff preferred a second appeal.

Vasudeo R. Jogleker, for the appellant (plaintiff).—The Judge erroneously held that sub-letting a contract and taking partners in it are identical. What is prohibited by the rules is sub-letting, but they do not prohibit a man from taking partners. If a man takes a partner, his liability to the Collector does not thereby cease. The Collector holds him liable and not the partner. Sub-letting is prohibited, because it leads to complications. Sub-letting being specifically prohibited would be void as being opposed to law or public policy.

The Judge has left out of consideration the true accounts. In order to determine among the partners what was the correct amount of the profits, they are relevant evidence and are admissible.

Section 7 of the Tolls Act makes the demand of illegal tolls punishable, but it does not say anything with respect to accounts.

Narayan G. Chandavarkar, for respondent No. 1 (defendant No. 1) :—There is no distinction between sub-letting and taking partners. By sub-letting a person is brought in who was not originally a party to the contract. The effect of taking a partner is the same. The prohibition of sub-letting impliedly prohibits the admission of a partner.

The plaintiff cannot now fall back upon the private accounts. The accounts kept according to the rules are to be considered the true accounts, and they show that the partnership concern has suffered a loss.

Shivram V. Bhandarkar, for respondents Nos. 2 and 3 (defendants Nos. 2 and 3) :—The Judge has found that the amount actually but not legally due to the plaintiff was stated in the plaint, and he came to that conclusion on what are alleged to be **[672]** the private accounts of the parties. But these accounts being illegal and, therefore, inadmissible in evidence, the Judge was wrong in referring to them. We submit that the Judge ought not to have awarded to the plaintiff the sum he deposited by way of security, because the deposit was made in furtherance of an object prohibited by law. Further, the alleged private accounts being illegal and inadmissible in evidence, the Judge was wrong in referring to them as proving the alleged deposit.

JUDGMENT.

PARSONS, J.—The first defendant leased from Government the levy of tolls at Tirmalkop for the year 1889-90 and admitted into partnership with him the plaintiff and the other two defendants. Plaintiff brought this suit for his share of the profits realized on the transaction.

The Judge of the lower appellate Court has found the partnership illegal, because Rule No. 10 of the conditions attached to the lease granted to the defendant No. 1 prohibited sub-letting, and he thinks that sub-letting and admitting a partner are one and the same thing. We cannot agree with him on this point. A sub-lease and a partnership are not identical, but denote different legal relationships. The prohibition of one would not necessarily mean the prohibition of the other, and we find that where Government intend to prohibit both, it does so in distinct terms (see the 15th* rule under the Abkari Act, p. 437, of the Legal Remembrancer's Compilation of General Rules in force in the Revenue Department, 1893). The Judge further records his opinion that "it would be contrary to public policy to allow persons whom the Collector would not think eligible for the granting of a toll lease to indirectly partake of the profits of a toll lease." All, however, apparently that the Collector has to do, is to see that the person to whom he leases the right of levying tolls is solvent and able to pay the contract price. It certainly is no part of the Collector's duty to ascertain what the contractor or lessee does with the profits he may make, and we fail to see how his dividing **[673]** them among five partners would be opposed to public policy, provided only that he was not forbidden to admit partners.

Lastly, the Judge has found that the private accounts filed by the plaintiff are illegal and inadmissible in evidence, because they were kept in order to deceive Government. This finding is the result of a strange

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* Rule 15 under the Abkari Act—

(15) That he (lessee) will not, without the previous written permission of the Collector, sub-let, in whole or in part, the right to vend conferred upon him by this license or admit partners into his business.

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confusion of ideas. The private accounts are, as the Judge says, entirely true and show the actual realizations. It appears, however, that other accounts were kept by the firm, which were concocted accounts intended to show that the contract was a losing concern. It would be these last accounts, if any, that were kept in order to deceive Government. We cannot, however, hold with the Judge that the keeping of two sets of accounts, one true and one false, however reprehensible the practice may be, is illegal and penal under s. 7 of the Tolls Act (Bombay Act III of 1875); still less can we hold that it would disentitle the plaintiff to show as between himself and his partners what the actual profit of the concern was. Both the Courts agree that the actual profit made on the transaction is proved to amount to Rs. 1,530-11-6. In this, therefore, the plaintiff is entitled to his share.

We reverse the decree of the lower appellate Court and restore that of the Court of first instance, and award plaintiff his costs in the lower appellate Court and this Court.

Decree reversed.

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20 B. 674.

[674] APPELLATE CIVIL.

Before Mr. Justice Parsons, and Mr. Justice Candy.

BAPUJI JAGANNATH AND ANOTHER (*Original Applicants*), *Appellants.**

[6th August, 1895.]

Will—Execution—Attestation by two witnesses—Indian Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2, cls. (a) and (b) (1).

The Hindu Wills Act (XXI of 1870) applies s. 50 of the Indian Succession Act (X of 1865) to those wills only that are mentioned in s. 2, cls. (*a*) and (*b*), of the former Act.

APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad, in the matter of an application for probate.

Bapuji Jagannath and Govindlal Kasandas applied to the District Court at Ahmedabad for probate of a will executed on the 15th June, 1892, by one Harjivandas Parshotamdas, who died on the 3rd November, 1894.

Citations were duly issued to the persons interested in the property of the deceased, but no caveats were entered.

The Judge rejected the application on the ground that the will was not attested by two witnesses, as required by s. 50 of the Indian Succession Act (X of 1865).

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* Appeal No. 92 of 1895.

(1) Section 2 of the Hindu Wills Act (XXI of 1870) is as follows:—

2. The following portions of the Indian Succession Act, 1865, namely, ss. 46, 48, 49, 50, 51, 55 and 57 to 77 (both inclusive) . . . . . , shall notwithstanding anything contained in s. 331 of the said Act apply—

(*a*) to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist on or after the first day of September one thousand eight hundred and seventy, within the said territories or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(*b*) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situated within those terrritories or limits.

In his judgment he said :—

"Three witnesses have been examined, and they depose that the will propounded is entirely in the handwriting of the deceased testator and is attested by one witness only

* * * * *

"Section 50 of the Indian Succession Act requires that the will shall be attested by two or more witnesses.

"Before the passing of the Hindu Wills Act no particular formalities were required, and it was not even necessary that a will should be signed and attested. In Bombay **[675]** a nuncupative will made in 1871 after the Hindu Wills Act came into force was held to be valid—*Bhugavan Dulabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641.

"In the present instance, however, the testator has made an attempt, but an incomplete one, to carry out the provisions of the law and has failed. In *Fernandez* v. *Alves*, I. L. R., 3 Bom., 382, it was held that the actual signature of at least two witnesses must appear on the face of the will. This ruling was followed in *Nitye Gopal Sircar* v. *Negendranath Mitter*, I. L. R., 11 Cal., 429."

The applicants appealed.

Notice of the appeal was issued to the Judge, and the record and proceedings were sent for.

Bhaishankar Nanabhai appeared for the appellants (original applicants) :—The Hindu Wills Act (XXI of 1870) makes the Succession Act applicable only to Hindu Wills (1) executed within certain local limits or (2) relating to immoveable property within those limits. This will does not fall within either class and, therefore, s. 50 of the Succession Act does not apply. The will is, therefore, valid although not attested by two witnesses.

JUDGMENT.

PARSONS, J.—The Hindu Wills Act (XXI of 1870) applies s. 50 of the Indian Succession Act to those wills only that are mentioned in s. 2, cls. (*a*) and (*b*) of the former Act. The will in question is not such a will. We reverse the order of the District Judge and remand the application to be disposed of according to law.

Order reversed.

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20 B. 675.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

MOTABHAI MOTILAL (*Plaintiff*) *v.* THE SURAT CITY MUNICIPALITY AND ANOTHER (*Defendants*).* [15th August, 1895.]

Practice—Procedure—Amendment of plaint—Original form of plaint the test of jurisdiction.

A plaint praying for a declaration that a certain tax was illegal and also for damages for illegal entry into the plaintiff's house was presented to the Court of the First Class Subordinate Judge of Surat. The Judge amended the plaint by striking out the portion "regarding the reliefs other than the relief for damages,"

* Civil Reference No. 11 of 1895.

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and then holding that the claim for damages would lie only in the Small Cause Court, returned the plaint for presentation in that Court.

[676] *Held*, that the Subordinate Judge was not justified in returning the plaint at that stage of the proceedings. The shape in which the suit was originally instituted is the test of jurisdiction.

REFERENCE from T. Hamilton, District Judge of Surat, under s. 646-B of the Code of Civil Procedure.

The facts are sufficiently stated in the following reference :—

"I have the honour to refer for the orders of their Lordships at the instance of the plaintiff, Mr. Motabhai Motilal, a pleader of this Court, a plaint filed by him first in the Court of the First Class Subordinate Judge, who returned it (on the ground of want of jurisdiction) for presentation in the Court of Small Causes, and then in the latter Court, the Judge of which returned it on the same ground, *viz.*, want of jurisdiction, for presentation in the former Court.

"2. The suit is for a declaration of the illegality of the Surat municipal house-tax recently sanctioned by Government and for damages on account of an alleged illegal entry into plaintiff's house by an officer of the Municipality for purposes connected with the imposition of the said tax.

"3. The Subordinate Judge, First Class, for certain reasons set forth in his judgment, struck out of the plaint the portions "regarding the reliefs other than the relief for damages," and holding that the claim for damages would lie only in the Small Cause Court, returned the plaint for presentation in that Court.

"4. I think it is obvious that he was wrong in so doing, for after exercising jurisdiction by amending the plaint, he could not aver want of jurisdiction with regard to the plaint, so amended.

"5. The plaint as originally filed by plaintiff is certainly not one which a Court of Small Causes can entertain, and, therefore, in my opinion, the suit should be remanded to the Court of the Subordinate Judge, First Class, for disposal on its merits."

Hormasji C. Coyaji (*amicus curiæ*), for the plaintiff.

Krishnalal M. Jhaveri (*amicus curiæ*), for the defendants.

JUDGMENT.

PARSONS, J.—The claim was not one within the cognizance of a Court of Small Causes, and the plaint was properly presented to the Subordinate Judge. The latter should have heard and determined the case. The fact that in the course of the hearing he found that the plaintiff was not entitled to the declaration, but only to damages, [677] would not justify him in returning the plaint at that stage of the proceedings. The shape in which the suit was originally instituted is the test of jurisdiction.

We return the record and direct the Subordinate Judge to proceed with and determine the case. Costs of all proceedings subsequent to the order of the 1st October, 1894, to be costs in the cause.

Order accordingly.

20 B. 677.

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Before Mr. Justice Parsons and Mr. Justice Candy.

SAYAD ABDUL HAK SARDAR DILER JUNG BAHADUR, C.I.E. (*Original Plaintiff*), *Appellant v.* GULAM JILANI VALAD IMDAD ALIKHAN AND ANOTHER (*Original Defendants*), *Respondents.**

[12th August, 1895.]

Practice—Parties—Defendant who has assigned interest—No right to be made co-plaintiff—Plaintiff without right of action—Attempt to remedy defect by joining others in whom right supposed to lie—Civil Procedure Code (Act XIV of 1882), s. 27—Mortgage—Redemption after the expiry of a term—Right of redemption andforeclosure co-extensive—Power expressly given to the mortgagee to call in his money before the expiry of the term—Stipulation unilateral and void of consideration—Right to redeem fettered by confining it to a particular time or to a particular description of persons—Oppressive and unreasonable restraint on the right of redemption.

A defendant who has assigned all his rights in the subject-matter of the suit, and has no longer any interest in it, has no right to be made a co-plaintiff.

A plaintiff who has no right of action when he brings his suit cannot remedy the defect and acquire the right by joining with him persons who have the right of action.

The right of redemption and the right of foreclosure are always co extensive, and from the postponement of the former the Court will infer an intention to postpone the latter in the absence of express provision on the point; where there is such express provision, giving the mortgagee power to foreclose at any time, any stipulation postponing the mortgagor's right to redeem is unilateral and void of consideration.

A Court of Equity will not enforce any agreement in restraint of the right of redemption which is oppressive and unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage.

A mortgagor cannot, by any contract entered into with the mortgagee at the time of the mortgage, give up his right of redemption or fetter it in any manner by confining it to a particular time or a particular description of persons.

[F., 22 B. 375 (377); 11 Ind. Cas. 519=128 P.L.R. 1911; **Rel. on.**, 25 Ind. Cas. 912=17 O.C. 313; **R.**, 26 A. 479=1 A.L.J. 133=24 A.W.N. 60; 39 C. 828=17 C.W.N. 149=15 Ind. Cas. 287; 21 M. 110=8 M.L.J. 62; 10 A.L.J. 157=15 Ind. Cas. 880; 16 C.P.L.R. 59: 6 Ind. Cas. 997=13 O.C. 128 (134); 15 Ind. Cas. 917=227 P.L.R. 1912=13 P.W.R. 1912; 1 O.C. 10 (12); 3 O.C. 347 (349); 39 P.R. 1907 =119 P.L.R. 1907; 61 P.R. 1907=39 P.L.R. 1907=45 P.W.R. 1907 (**F.B.**); 154 P.L.R. 1901: 40 P.L.R. 1903; 126 P.L.R. 1908=54 P.W.R. 1908; 137 P.W.R. 1908; **Disappr.**, 12 C.L.J. 537 (542)=8 Ind. Cas. 87; **D.**, 25 B. 433 (463); 7 O.C. 193 (195,196).]

[678] APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Thana.

Redemption suit.

On the 1st October, 1877, defendant No. 1 mortgaged with possession certain inam villages and house property to defendant No 2, Govind Baba Gujar, in consideration of Rs. 9,999. The mortgage-deed stipulated (*inter alia*) that themortgagor should not pay the debt within ten years and the mortgagee should not receive it within that period, and that notwithstanding the period of ten years, if owing to the mortgagor's negligence or for some reason or other an impediment should occur to the mortgagee remaining in possession, he should be at liberty to call in his money at once.

* Appeal No. 155 of 1893.

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On the 25th September, 1878, defendant No. 1 executed another mortgage to defendant No. 2 for Rs. 5,000, which recited and confirmed the above-mentioned mortgage and contained a stipulation that the mortgagor should redeem the property after the expiration of a term of forty years to be commenced after the expiration of ten years mentioned in the first mortgage. It contained a further clause that if the mortgagor himself, his son or daughter paid the amount of the mortgage after the expiration of fifteen years from the date of the first mortgage, the mortgagee should receive the same and allow redemption; but this right of redemption after the expiration of fifteen years was personal and confined to the mortgagor, his son or daughter and was not to be transferred to any one, nor was it to pass by inheritance.

On the 19th August, 1892, defendant No. 1 conveyed his equity of redemption to the plaintiff, and on the same day executed a power of attorney in his favour.

Afterwards some correspondence took place between the solicitors of the plaintiff and the defendant with respect to the conditions of the mortgage, account and tender; and the solicitors having failed to come to terms.

The plaintiff now filed the present redemption suit against defendants Nos. 1 and 2, mortgagor and mortgagee, on the 3rd October, 1892.

[679] Defendant No. 2 answered (*inter alia*) that according to the agreement in the second mortgage-bond the plaintiff was not entitled to redeem till the expiration of the period mentioned therein; that the negotiations for compromise fell through owing to plaintiff's default, hence what was said during the course of the negotiations was not binding on him; that there was no legal tender, and that there were no terms of a penal character in the mortgage-deed.

While the suit was pending, defendant No. 1 presented an application to the Court that he should be joined as a co-plaintiff. A similar application was also made by the plaintiff. The Judge rejected both the applications and dismissed the suit on the ground that it was premature, the term of forty years mentioned in the second mortgage being binding on the plaintiff and his vendor.

The plaintiff appealed.

Macpherson with *Inverarity* and *Kalabhai Lallubhai*, for the appellant (plaintiff):—The provision as to the tying up of the equity of redemption for fifty years is untenable and cannot be relied on by defendant No. 2. It is utterly oppressive and unconscionable, especially when the relation between the parties was pleader and client—*Cowdry* v. *Day* (1); *Mahomed Muse* v. *Jijibhai Bhagvan* (2); *Trimbak* v. *Sakharam* (3). Such a provision when it is for a short time is allowed on the supposition that it is advantageous to the mortgagor.

The Judge was wrong in rejecting defendant No. 1's application for joining him as co-plaintiff. If the application had been granted, the nature of the suit would not have changed. It would still have remained a redemption suit.

K. R. Daftary, for respondent No. 1 (defendant No. 1):—The application to join first defendant as co-plaintiff ought to have been granted under ss. 27, 31 and 32 of the Civil Procedure Code. Our rights in the subject-matter of the suit ought to have been decided by the Judge—*Ayscough* v. *Bullar* (4).

(1) 29 L.J. Ch. 39. (2) 9 B. 524. (3) 16 B. 599. (4) 41 Ch. Div. 341.

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[680] *Scott* with *Narayan G. Chandavarkar*, for respondent No. 2 (defendant No. 2) :—The term of forty years mentioned in the second mortgage has not yet expired, and, therefore, the plaintiff has no cause of action.

With respect to the provision for redemption after the expiration of the stipulated term, we submit that cases in India cannot be decided by the strict principles of the Courts of Equity in England. It is a practice in India to have long terms for redemption. In *Sakharam N. Sardesai* v. *Vithu* (1) there was a term of twenty-five years. In *Vadju* v. *Vadju* (2) the term was ten years ; similarly in *Raghubar Dayal* v. *Budhu Lal* (3). In *Chandra Kumar* v. *Iswar Chandra* (4) the term was eight years. In *Lila Morji* v. *Vasudeo Moreshvar* (5) the term was fifteen years. In *Waghela Raisangji Sivasangji* v. *Miya Gulam Rassul* (6) the term was twenty-nine years. In a second appeal recently decided the term of thirty years was upheld. Even the Limitation Act lays down a period of sixty years for redemption. Therefore, according to Legislature even any period less than sixty years would be reasonable.

Next as to influence and pressure alleged to have been used by us against defendant No. 1. There was no fiduciary relation between defendants Nos. 1 and 2 at the time of the transaction. That relationship had ceased. They were not pleader and client at the time of the transaction. At that time defendant No. 1 was accompanied by two lawyers and, therefore, he cannot say that he was not properly advised in the matter. He admits in his deposition that he executed the mortgages of his own free will. A case like the present would be upheld in a Court of Chancery in England—*Mainland* v. *UpJohn* (7).

Inverarity in reply :—The mortgages in dispute are not like ordinary mortgages—Fisher on Mortgage, pp. 685-687 ; *George Talbot* v. *Edward Braddil* (8). In ordinary mortgages the remedies of the mortgagor and mortgagee are equal and co-extensive, while in the present case the mortgagor's remedy is postponed [681] and the mortgagee is at liberty to demand his money at any time.

JUDGMENT.

PARSONS, J.—The first point I will consider is the alleged wrongful refusal by the lower Court to grant the application of defendant No. 1 to be made a co-plaintiff and the application of the plaintiff to be allowed to amend his plaint and make defendant No. 1 a plaintiff. I fail to see on what ground defendant No. 1 could ask to be made a co-plaintiff. He had assigned all his rights to the plaintiff and had no longer any interest in the subject-matter of the suit. His application was rightly refused. I hold that the application of the plaintiff was also rightly refused. It has been ruled in several cases, and it is clearly good law, that a plaintiff who has no right of action when he brings his suit cannot remedy the defect and acquire the right by joining with him persons who have the right of action. In the present case, however, if the plaintiff has no right of action, defendant No. 1 has none either, for the latter has parted with all his rights, and the equity of redemption remains in the plaintiff, the grantee. The provisions of s. 27 of the Civil Procedure Code cannot possibly be applied to the case, for there has been no mistake in the matter. The

(1) 2 B. H. C. R. 225. (2) 5 B. 22. (3) 8 A. 95.
(4) 6 B. L. R., 562. (5) 11 B. H.C.R. 283. (6) P. J. (1875) p. 5.
(7) 41 Ch. Div. 126. (8) 1 Vern. p. 183.

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fact is that no joinder can help the plaintiff. As assignee of defendant No. 1 he is the only person now entitled to sue for redemption, and the sole point to be determined is whether he has a present right to redeem the two mortgages in question.

The first of these mortgages (Ex. 47) bears date the 1st October, 1877, and is for Rs. 9,999. Its material provision for redemption is contained in the 10th clause, which is as follows :—

"I am not to pay and you are not to receive the amount before the ten years' period mentioned above for the redemption of the mortgage expires. After the expiration of the ten years I will pay you what amount there may be found due to you on making an account together with interest, and redeem the mortgage."

The second (Ex. 46) bears date the 25th September, 1878, and is for Rs. 5,000. It mortgages the same property and a **[682]** little more, and its material provision for redemption is contained in the 2nd clause, which is as follows :—

"The above-mentioned inam villages and the estate are given into your possession for a further period of forty years, the same to commence immediately after the ten years' period mentioned in the mortgage-bond dated the 1st of October, 1877,—that is to say, the same are given into your possession for a period of fifty years under the two bonds together. Before the expiration of the said period I will not redeem the above-mentioned villages and estate."

It is plain that under these documents the mortgagor was restricted from paying off the mortgage-debt and redeeming the properties for a period of fifty years. It is argued that this stipulation is invalid on account of the fiduciary relations that existed between the mortgagor and the mortgagee, and *Cowdry* v. *Day* (1) is relied on in support of the argument. In that case the Vice-Chancellor observes that it is not usual to restrict by stipulation the right of the mortgagor to pay off the money for so long a period as twenty years, and he goes on to say : "The clause in question is a contract between solicitor and client. If it has an effect in any material degree prejudicial to the ordinary rights of a mortgagor, and is unusual in its terms, the solicitor must show that his client had sufficient advice and assistance to relieve him from the pressure arising from the relation of solicitor and client." I should hesitate to apply the principle enunciated in this case to the relationship of vakil and client as it exists in the Mofussil. A vakil is generally engaged for a particular case only and has not that influence over a client that a solicitor in England might be supposed to have. In the present case defendant No. 2 was employed by defendant No. 1 as his vakil for a case at the time of the first mortgage only, defendant No. 1 had a number of other vakils besides defendant No. 2—(defendant No. 2 says that he had very little work from defendant No. 1)—and defendant No. 2 acted as vakil against as well as for defendant No. 1. There is, therefore, a great distinction between the two cases. Even, however, if the principle of the case cited be applied, defendant No. 2 says that defendant No. 1 had his own vakils to **[683]** assist him in the matter of these mortgages—vakils who witnessed his signature to the second deed, and that at their suggestion and advice alterations were made distinctly in favour of defendant No. 1. Defendant No. 1 himself admits that he could have got the money by mortgaging the

(1) L.J. 29 Ch. 39.

property to any one else, that he mortgaged it to defendant No. 2 of his own free will, and that no pressure of any kind was put on him by defendant No. 2. The very matters, therefore, that according to *Cowdry* v. *Day* (1) have to be shown, seem to be shown in the present case.

The next point to be considered is the term. No doubt a term of fifty years is a long period. We have, however, the explanation of defendant No. 2 himself as to why that term was fixed. I do not think that it is altogether satisfactory, but there is the fact that it was not considered by defendant No. 1 or his legal advisers an unreasonably long term when coupled with the other provisions in the bond as to redemption. Periods restricting redemption are undoubtedly much longer in this country than in England. In this country ten years is a common term. There are cases reported in which terms of fifteen years (*Lila Morji* v. *Vasudev Moreshwar* (2)), twenty-five years (*Govindrao* v. *Annaji* (3)), twenty-nine years (*Waghela Raisangji* v. *Miya Gulam Rasul* (4)), thirty years (*Vallabh Krishna* v. *Keval Bhagvan* (5)), and thirty-five years (*Ganesh* v. *Prabhakar* (6)), have been upheld. In the case at Printed Judgments, 1875, p. 5, the Judges said: "The terms (that although the whole sum of Rs. 21,001 should be paid off before the expiration of the twenty-nine years, the mortgagee should be entitled to remain in receipt of the rents and profits until the end of those twenty-nine years) may or may not have been hard, they were agreed to by adults, and there is neither allegation in the plaint nor proof in the cause that any undue advantage was taken." These observations are very appropriate to the stipulation in question in the present case. The Limitation Act, 1877, gives sixty years as the period within which suits for redemption or foreclosure can be brought. I may add that no case has been **[684]** cited to us in which a Court in India has held any period fixed by the parties to be bad on the ground of its being unreasonably long. In the case of *Mashook Ameen Suzzada* v. *Marem Reddy* (7), the Court allowed a usufructuary mortgage for a term of fifty years to be redeemed, but it does not profess to proceed on that ground, but because it regarded the transaction as a mortgage and redeemable on the usual terms. Moreover, the decision was dissented from in *Keshava* v. *Keshava* (8).

It was then argued that the first mortgage can be redeemed at the expiration of its ten years even if the second cannot be redeemed for forty years more. The words, however, in the above quoted 2nd clause in the second mortgage are decisive on this point. The property is given into the possession of the mortgagee for a period of fifty years under the two deeds, and the mortgagor binds himself not to redeem before the expiration of that period.

Then it is contended that the stipulation is bad, because the second mortgage postpones the right of redemption only and not that of foreclosure. This contention can only be good if there is some provision in the deed enabling the mortgagee to call in his money before the expiration of the term allowed for redemption. It would not be sufficient if the deed were silent on the point. By the law as administered in these Courts the right of redemption and foreclosure is always considered to be co-extensive, and if the right of the mortgagor to redeem were postponed, the right of the mortgagee to foreclose would be held to have been equally postponed by

(1) L.J. 29 Ch. 39. (2) 11 B.H.C.R. 283. (3) P.J. (1891), p. 241.
(4) P.J. (1875), p. 5. (5) S.A. 766 of 1892, decided on 27th March, 1894.
(6) S.A. 191 of 1893, decided August 12, 1895.
(7) 8 M.H.C.R. 31. (8) 2 M. 45.

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necessary implication. As authority for this proposition it is sufficient to cite the cases of *Sakharam* v. *Vithu* (1); *Vadju* v. *Vadju* (2); *Raghubar Dayal* v. *Budhu Lal* (3); and the observations in the case of *Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (4). We have only to see whether there is in the deed any provision which expressly gives the mortgagee the power of calling in his money at any time, which would have the effect of making the stipulation for **[685]** postponement of redemption unilateral and void of consideration; for, as observed by Fisher in his work on Mortgage at p. 685, "Arrangements postponing redemption are supported on the ground that the contract is valuable to both parties, the mortgagee on the one hand being sure of a continuing security for his money, and the mortgagor being freed from the expense and trouble of seeking new lenders."

The 4th clause of the second deed allows the mortgagee to sell the property if any default is made in the payment of interest. This would not, I think, be such a provision. The 7th clause applies to the second mortgage cls. 4, 5, 6, 7, 9, 11, 12, 13 and 14 of the first mortgage. Of these, cl. 11 is the most important. It is as follows:—

"The period mentioned above for paying the amount is up to ten years, but if owing to my negligence or for some reason or other an impediment occur to your continuing in the management of the villages, and should you demand payment. I will at once pay the amount without raising any objection as to there being yet some further time for payment to elapse: but it is at your option whether to receive or not to receive the amount."

It is obvious that under this clause the mortgagor might at any time be called on to pay up the money on the allegation of an impediment for which he was in no degree responsible. This throws on him a very severe burden, and it would, I think, be unjust and inequitable to uphold the fifty years' stipulation in favour of the mortgagee when such a provision as this exists to the detriment of the mortgagor. It would be quite as unreasonable a bargain as that which was held invalid in *Talbot* v. *Braddill* (5).

One further provision remains to be discussed. Under cl. 2 of the second mortgage defendant No. 1 was allowed to redeem after fifteen years. The clause runs as follows:—

"But after you shall have enjoyed the income of the villages for ten years mentioned in the previous bond and five years under this bond, in all for fifteen years, if I myself, my son, or daughter, that is, any one of us three, pay whatever amount **[686]** may be found to be due to you together with interest, you are to receive the same and to release the villages and the estate (from the mortgage). As to that you are not to plead the excuse of the period of forty years mentioned in this bond having (yet) to run out. But as I have received the present amount on agreeing to allow you to continue in uninterrupted possession of the above-mentioned villages for forty years after the expiry of the period mentioned in the previous bond, the right of redeeming the villages on payment of the amount after the expiry of the above-mentioned period of fifteen years does not vest in the heirs of myself, my son, or my daughter. Nor shall the said right pass to the acquirer of the rights of myself, my son, or my daughter by mortgage, sale or by any other manner. After the expiration of the fifteen years, the right of redemption is the personal right of us

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(1) 2 B.H.C. R. 225 (2nd Ed.). (2) 5 B. 22. (3) 8 A. 95.
(4) 16 M. 489. (5) 1 Vern. 183.

three, that is to say, it will be dependent upon (*i.e.*, confined to, three individuals, (*i.e.*,) I myself, my son, and daughter. The same cannot be transferred to any one; nor shall it pass by inheritance."

This clause might be used to show that it was not the intention of the parties to make the fifty years' term an essential part of the contract (as to which point see *Shri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Shri Raju Vircherla Surianarayanaraju Bahadur* (1), The chief point, however, argued on behalf of the plaintiff was that the restriction of the power of alienating the right of redemption after fifteen years thus conferred on the mortgagor is invalid, and that the plaintiff as the assignee of defendant No. 1 can now redeem, the fifteen years' term having expired. The cases of *Howard* v. *Harris* (2) and *Trimbak* v. *Sakharam* (3) were cited in support of the argument. On the other hand, it was contended that the stipulation is a purely personal concession in favour of the mortgagor alone, and that there is nothing invalid or unreasonable in the parties agreeing that that concession should not be alienated or be enjoyed by any one else. That the cases cited only show that a prohibition of the alienation of the equity of redemption is bad, and do not apply to the present condition. No doubt there is some force in this contention, but it appears to **[687]** me quite plain that the prohibition is not one that the Court can maintain. The fixing a fifteen years' term in itself shows that the fifty years' term was considered to be excessively long and so oppressive to the mortgagor. The concession was intended to mitigate that severity. It is clear that defendant No. 1 would have no money of his own with which to redeem his mortgage. When, therefore, the mortgagee inserts a condition that renders redemption by the mortgagor under the concession impossible, he does away at once with all the good the concession was intended to do to the mortgagor. The conclusion is obvious, either the original term of fifty years must be set aside as unusually long and oppressive, or full effect must be given to the concession, and to give that effect the prohibition against alienation must be set aside. Whichever way the case is looked at, the result is the same. I am only surprised that the right of the plaintiff to redeem has been resisted. Putting aside the assignment, the plaintiff, as the agent of defendant No. 1, could on his behalf and with the money of defendant No. 1 now in his hands at once redeem the mortgage. He could do so to-morrow if this suit were dismissed to-day. It is, I think, much to be regretted that defendant No. 2 should have withdrawn from his letter of the 17th September, 1892, in which he expresses his willingness to allow the plaintiff to redeem, and so have caused all this litigation. The lower Court has disposed of the suit upon this preliminary point. We reverse the decree on such point, and remand the case to the lower Court to be determined on the merits.

All costs incurred to be costs in the cause to be dealt with in the final decree to be passed.

CANDY, J.—On the 1st October, 1877, Gulam Jilani passed to Govind Baba, a pleader of the Thana District Court, the mortgage-deed (Ex. 47), by which, in consideration of Rs. 9,999, bearing compound interest at 12 per cent., the mortgagor mortgaged his share in two inam villages and also in certain house property in the town of Thana. The house property

(1) 2 M. 314. (2) 1 Vern. 32. (3) 16 B. 599.

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was to remain in the mortgagor's possession, but the mortgagee was to have possession of the inam property under the following clauses of management :—

[688] 1. The 1st clause related to the existing conditions of management between the mortgagor and his co-sharer, which were to continue as between the mortgagee and the said co-sharer.

2. Rs. 100 was to be debited to the mortgagee every year on account of a karkun.

3. The mortgagee was to have possession for ten years, receiving profits and deducting expenses out of the balance, taking Rs. 1,200 every year on account of interest, and crediting what remained, if anything, towards payment of principal. Any deficiency in the sum of Rs. 1,200 was to be made good by the mortgagor, a balance was to be struck at the end of Divali, interest at 12 per cent. per annum being chargeable.

4. Every Kartik (the month after Divali) the mortgagor was at liberty to pay Rs. 700 in a lump sum, the same being credited to principal.

5. Expenses of suits against tenants for the recovery of rents were to be debited to the mortgagor.

6. The mortgagee was at liberty to grant remissions according to custom in connection with the Salt lands.

7. The mortgagor was to be debited with the expense of repairs to embankments.

8. The mortgagor was to be in possession of the house property at Thana.

9. The mortgagor was to make the necessary petitions to the Collector, in order that the mortgagee should have possession of the inam property.

10. The mortgagor was not to pay, and the mortgagee not to receive, the debt before the expiration of the ten years. On an account being made up after the ten years, should the mortgagor fail to pay what was due, the mortgagee was at liberty, after giving notice, to sell.

11. Notwithstanding the period of ten years, if owing to the mortgagor's negligence or " for some reason or other an impediment" should occur to the mortgagee remaining in possession, he was at liberty to call in his money at once.

[689] 12. The mortgagor was to give the mortgagee a power of attorney for the management for the ten years.

13. If the mortgagee owing to the mortgagor's objection should lose possession of the property, the latter was to give possession to the former for a further period in order to make up the ten years.

14. The mortgagee was to take the profits from the cucumber beds.

On the 25th September, 1878, Gulam Jilani executed a further mortgage-bond to Govind Baba, in which the mortgage of 1st October, 1877, was recited, and the mortgagor in consideration of a further sum of Rs. 5,000, to bear compound interest at 12 per cent. per annum, mortgaged with possession the following property :—the shares in the inam villages and in the house property at Thana above described and also in certain garden land (*wadi*) at the village of Kashimire. Then followed the following clauses :—

1. The bond of 1st October, 1877, was confirmed, the said transaction being kept " quite separate and independent."

2. " The above-mentioned inam villages and the estate are given into your possession for a further period of forty years, the same to commence immediately after the ten years' period mentioned in the

mortgage-bond dated the 1st of October, 1877, that is to say, the same are given into your possession for a period of fifty years under the two bonds together. Before the expiration of the said period, I will not redeem the above-mentioned villages and estate. But after you shall have enjoyed the income of the villages for ten years mentioned in the previous bond and five years under this bond, in all for fifteen years, if I myself, my son or daughter, that is, any one of us three, pay whatever amount may be found to be due to you together with interest, you are to receive the same and to release the villages and the estate (from the mortgage). As to that you are not to plead the excuse of the period of forty years mentioned in this bond having (yet) to run out. But as I have received the present amount on agreeing to allow you to continue in uninterrupted possession of the above-mentioned villages for forty years after the expiry of [690] the period mentioned in the previous bond, the right of redeeming the villages on payment of the amount after the expiry of the above-mentioned period of fifteen years does not vest in the heirs of myself, my son, or my daughter. Nor shall the said right pass to the acquirer of the rights of myself, my son, or my daughter, by mortgage, sale or by any other manner. After the expiration of the fifteen years, the right of redemption is the *personal* right of us three, that is to say, it will be dependent upon (*i.e.*, confined to) three individuals, (*i. e.*), I myself, my son, and daughter. The same cannot be transferred to any one; nor shall it pass by inheritance."

3. The third clause embodied cls. 1, 2 and 3 of the previous bond, but provided that Rs. 1,800 (*i. e.*, Rs. 1,200 under the first bond and Rs. 600 under the second bond) should be deducted on account of interest from the profits of the villages, and the mortgagor was to make good any deficiency at the end of July every year, and in default was to pay interest at 12 per cent. on the balance due.

4. "Should I fail to pay in full from the income of the villages or by private settlement, at the end of July in the succeeding year, Rs. 1,800 on account of interest and the balance of Rs. 1,800 on account of the preceding year, together with interest thereon as mentioned above, you are at liberty to sell the whole of the villages and the estate either by a private or public sale, without taking into consideration the ground of the period (for payment) not having elapsed."

5. The mortgagor was not to claim redemption after the expiration of the period without paying in the succeeding year all principal and interest that might be due, and no objection on account of limitation or *damdupat* was to be pleaded.

6. The words "at the end of July" were to be substituted for "at the end of Divali" in the previous bond. With that exception cl. 4 of the previous bond was kept intact.

7. Also cls. 4, 5, 6, 7, 9, 11, 12 and 14 of the previous bond were kept intact and made applicable. So, too, with cl. 13, "forty years" being read for "ten years."

[691] 8. The garden land at Kashimire and the house property at Thana were to be in the mortgagee's possession, who after deducting all expenses was to credit the mortgagor with the balance of the profits.

9. The mortgagee was to have full authority to make repairs to the house property at Thana or to rebuild, and the mortgagor was to pay 12 per cent. interest on the sums expended by the mortgagee, which were to

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be added to the mortgage-debt. The mortgagee was at liberty, if necessary, to sell the mortgagor's share in the house property or garden land.

10. Expenses of litigation in connection with the said property were with interest to be added to the mortgage-debt.

11. This clause repeated the conditions of management of the inam villages existing between the mortgagor and his co-sharer.

12. This clause related to petitions to the Collector, &c.

On the 19th August, 1892, Gulam Jilani executed a sale-deed to Abdul Hak, by which for the consideration of Rs. 33,791 (of which Rs. 2,101 were paid in cash and Rs. 31,690 were deposited in a Bank for the purpose of paying off Govind Baba's mortgage), Gulam Jilani's share in the inam villages and *wadi* above mentioned were sold. It was recited that the share in the house property at Thana had been sold by Govind Baba in 1890 for Rs. 4,334. The conveyance further recited that the period of fifteen years of the mortgage was to expire in September, 1892, and, therefore, Gulam Jilani executed a general power of attorney in the name of Abdul Hak, enabling the latter to file a suit for redemption, if necessary. This power of attorney is Ex. No. 4, and bears even date with the sale-deed (45). It gives power to Abdul Hak to redeem the property and to get from Govind Baba re-conveyance effected in Gulam Jilani's name according to law in respect thereof.

Accordingly on 3rd September, 1892 (see Ex. 48), Abdul Hak's solicitor wrote to Govind Baba reciting the above facts and asking for an account of the mortgage. Govind Baba's solicitor replied on 17th September, 1892: "It seems your client is not aware of the distinct clause in the Marathi mortgage-deed, dated the 25th September, 1878, executed by Mr. Gulam Jilani, [692] prohibiting and debarring the assignees of the former from redeeming the mortgaged properties for a period of fifty years from the 1st day of October, 1877, of which period fifteen years will elapse on the 30th instant, and giving power to the mortgagor, his son, or daughter only to redeem the mortgaged properties within the said period of fifteen years. Your client has, it seems, purchased the equity of redemption. Our client, however, is ready and willing, in order to avoid litigation and without prejudice to his right to rely upon the covenant or proviso above alluded to and any other objection he can legally raise in future, to allow your client to redeem the mortgaged properties, provided he pays within ten days from the receipt by you hereof the whole of the balance, *viz.*, Rs. 30,009-4-10, due under the mortgages up to the end of this month as per account in Marathi herewith sent, and further interest up till payment, and also all costs of and incidental to the approval, execution of the reconveyance and correspondence relating thereto." Abdul Hak's solicitor replied on 20th September, admitting full knowledge of the contents of the mortgage-deeds, and protesting that the accounts submitted were not proper, and that an inspection of all vouchers and accounts should be allowed. Govind Baba's solicitor replied on 21st September, saying: "Your client is certainly not entitled to any inspection of our client's account books. In making request for the same he seems to forget that he is the intending purchaser and not the mortgagor of the property mortgaged to our client. Our client is ready and willing to show the accounts to the proper party entitled to see the same. Our client will, however, have no objection to produce his account books for inspection in our office, if your client has the proper authority from the mortgagor to take such inspection and if you will give a personal undertaking to pay our costs of and

incidental to the giving of such inspection and all correspondence in reference thereto."

The solicitors, however, failed to come to terms ; and the present suit was filed on 3rd October, 1892, by Abdul Hak, who made Gulam Jilani defendant (he did not appear, and Govind Baba defendant No. 2. This last-named defendant, the mortgagee, pleaded that the right to redeem would not accrue to Abdul [693] Hak for thirty-five years ; and on the ground that no cause of action had accrued to the plaintiff, the Subordinate Judge dismissed the suit with costs.

Abdul Hak has appealed, and several points were taken by his learned counsel. I do not think it is necessary to discuss them all. But I think that the suit for redemption should be allowed to proceed on the broad and simple ground that a Court of Equity will not enforce any agreement in restraint of the right of redemption which is oppressive or unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage.

In the first place, it cannot, I think, be contended that this is a case where the continuance of the enjoyment of the mortgaged property for the prescribed period of fifty years formed a material part of the contract, and thus it would be inequitable to deprive the mortgagee of this right. The mortgagee was not, if a certain period of enjoyment was assured to him, to be content with the rents and profits in complete satisfaction of his whole claim. The mortgagee deposed that he suggested the term of fifty years, because he was to improve the property. But he was to charge all expenses to the mortgagor ; and thus it cannot be said that by reason of the very nature of the mortgage and the circumstances of the contract the mortgagee is entitled to resist redemption, on the ground that the period of fifty years must be taken to form a material part of the contract itself, and to have been named not only for the protection of the mortgagee-debtor, but also for that of the mortgage-creditor. By the 4th clause of the second mortgage, if the annual payment of Rs. 1,800 was not made good from the income of the villages and by the mortgagor personally, the mortgagee was at liberty to sell the whole of the villages and the estate, and to recover the balance, if any, from the mortgagor personally. So, too, by the 11th clause of the first bond, which was kept intact, if " for some reason or other " the mortgagee was obstructed in possession of the property, he could at once call in his money. And yet it is contended that the mortgagor's assignee cannot tender the mortgage-debt and seek redemption of the property. It seems to me that the obligations of the parties being not mutual or reciprocal, it would be inequitable to allow [694] this contention to prevail. It should be noted that the 10th clause of the first deed was not made applicable in the second deed, *i. e.*, the clause by which the mortgagor was not to pay and the mortgagee not to receive the debt before the expiration of the stipulated period. That was a clause by which the obligations of the parties were made mutual and reciprocal. But, it is said, the mortgagor with his eyes open executed the second mortgage and he had the opportunity of independent advice ; why, then, should he be relieved from the condition inserted in the second mortgage-deed that the right of redemption after fifteen years was to be *personal*, attaching only to himself or son or daughter (admittedly he had no issue then born to him), and not attaching to his assignee, who could only redeem after the expiration of the period of fifty years ? The answer is that he could not contract himself out of the right of alienation which is an essential incident of the estate which he has in the property

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by virtue of his equity of redemption. See *Trimback* v. *Sakharam* (1). In *Mainland* v. *UpJohn* (2) Mr. Justice Kay referred to "rules of equity, which in the jurisdiction which has been sometimes called the 'paternal' jurisdiction of Courts of Equity, were forced upon a mortgagee whatever contract he chose to make with the mortgagor; the Court did interfere with his contract, and so to speak, altered the contract between the mortgagor and mortgagee by disallowing these advantages for which the mortgagee had stipulated." In *Howard* v. *Harris* (3) the contract was "I myself or the heirs males of my body may redeem." It was held that the assignee would also have a right to redeem.

In the present suit the circumstances are such that it would savour of undue technicality, as much as want of equity, if the claim for redemption is dismissed. For the mortgagor is himself a party to the suit; he is desirous that the account should be taken and redemption decreed. Abdul Hak, it is true, is not merely an "intending purchaser" with a power of attorney enabling him to ask for an account from the mortgagee, but is actually the transferee of Gulam Jilani's right, title and interest in the mortgaged property. If the dismissal of the present suit **[695]** must be affirmed, then apparently all that Abdul Hak must do is to reconvey the estate to Gulam Jilani, on condition that it should be conveyed back to him after redemption in accordance with the previous agreement to sell, and the claim for redemption would commence afresh. It is said that the contract that the mortgagor himself or his son or daughter (he having no issue at the time) might redeem after fifteen years was a concession and should not be extended by the application of any rules of equity. But it is easy to see that it was a concession in word only and not in fact. If the mortgagor was not by the concession to be permitted to raise money by mortgage or sale of the property in order to effect the redemption after fifteen years, then there was no concession at all. For it is not pretended that Gulam Jilani had any other means of raising funds for the purpose.

It may be, as Lord Bramwell said in *Salt* v. *Marquess of Northampton*(4), that the equitable rules as to the right of redemption were devised by the piety or love of fees of those who administered equity. But certainly if the conclusions which I have noted above are correct, then we cannot in the present case "think the equitable rule unreasonable," nor is there cause for regret that we "have to disregard the express agreement of a man perfectly competent and advised by competent advisers." The case just quoted is instructive. All the Judges—North, J., in the Court of first instance, Cotton, Lindley and Bowen, L.JJ., in the Court of Appeal, and Lords Selborne, Bramwell, Morris and Hannen in the House of Lords—held that if the transaction in question was a mortgage, then the rule must prevail that "equity will permit of no attempt to clog, fetter or impede the borrower's right to redeem and recover what may still remain in equity his own," and so though Earl Compton deliberately, and after taking independent advice, contracted that should he die in the lifetime of his father the policies (the subject of the mortgage) should belong absolutely to the mortgagee-lenders, the Court set aside that part of the contract and allowed Earl Compton's father as the representative of his son's estate to redeem the mortgage. It is true that in the present case the language of the contract is somewhat different. Here the mortgagor said: "After the

(1) 16 B. 599 (602).
(2) 41 Ch. D. 126 (137).
(3) 1 Vern. 32 and 190.
(4) (1892) Ap. C. 1 (19).

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[696] expiration of the fifteen years, the right of redemption is the personal right of us three, *i. e.*, it will be confined to three individuals, myself, my son and daughter (the latter not being at present in existence), the same cannot be transferred to any one; nor shall it pass by inheritance." Suppose the mortgagor had died in 1879, the year following the mortgage; would the Court refuse to allow his heir to redeem on the expiration of the fifteen years? I think it would not, but the equitable rule would be applied. Why, then, should not the same rule be applied when the person interested in the equity of redemptiom is the transferee, the original mortgagor being alive and consenting to redemption? The rule is general; it is that a mortgagor cannot by any contract entered into with the mortgagee at the time of the mortgage give up his right of redemption or fetter it in any manner by confining it to a particular time or to a particular description of persons. (See the notes to *Howard* v. *Harris* in White and Tudor's Leading Cases in Equity, 6th Ed., Vol. II, p. 1183). It is true that the doctrine established by Courts of Equity in England, that the time stipulated in the mortgage-deed is not of the essence of the contract, has been held by the highest authority—*Pattabhiramier* v. *Vencatarow* (1)—to be "unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East India Company, their Lordships can find no such course of decisions. In fact, the weight of authority seems to be the other way." But the other portion of the rule has been applied to India. As shown above, this Court has refused to give effect to a proviso in a mortgage-deed which deprived the mortgagor of right of alienation which he had in the land by virtue of his equity of redemption. Once admit that by the contract a right of redemption was given to the mortgagor after fifteen years (whether as a pretended concession or otherwise), and then the application of the rule must follow. As the money was to be repaid, let the words be ever so much fettered, they all signify nothing. (See *Ord* v. *Smith* (2)).

For these reasons, I think that the decision of the Subordinate Judge dismissing the suit on the preliminary point must be reversed, and the case must go back to the lower Court.

Decree reversed.

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[697] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

RAJMAL MANICKCHAND MARWADI (*Original Plaintiff*), *Appellant v.* ANMANT ANYABA, SUPERVISOR, PUBLIC WORKS DEPARTMENT AT NASIK (*Original Defendant*), *Respondent.**

[27th August, 1895.]

Civil Procedure Code (Act XIV of 1882), s. 424—Civil Courts' Act (XIV of 1869), s. 32—Suit against an officer of Government—Suit ex contractu—Notice.

Section 424 of the Civil Procedure Code (Act XIV of 1882), which requires notice to be given to a public officer two months before the institution of a suit against him, does not apply where the suit is one *ex contractu*.

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* Appeal No. 17 of 1894.

(1) 18 M. I. A. 560 (571).

(2) Select Cases in Chancery, p. 31.

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Sahebzadee Shahunshah Begum v. *Furgusson* (1) and *Maneklal* v. *The Municipal Commissioner for the City of Bombay* (2) referred to.

[R., 16 Ind. Cas. 400=23 M.L.J. 732=12 M.L.T. 299=(1912) M.W.N. 954; 4 O. C. 133 (137); Expl., 34 B. 583=12 Bom. L.R. 615 (621)=7 Ind. Cas. 679.]

APPEAL from the decision of S. Hammick, District Judge of Ahmednagar.

On 10th February, 1890, the plaintiff brought this suit to recover from the defendant the price of certain timber supplied him by the plaintiff in 1877. The defendant had been appointed by the Executive Engineer at Nasik to supervise the building of a kacheri for the Mamlatdar of Rahuri. The plaintiff alleged that the defendant had promised to pay him for the timber from the Mamlatdar's treasury, but had failed to do so. The cause of action was stated to have arisen on 1st August, 1887.

The plaint was originally filed in the Court of the Second Class Subordinate Judge at Rahuri, but, as the defendant pleaded that he had obtained the goods as a Government servant and that, therefore, the Court had no jurisdiction (s. 32 of Civil Courts' Act XIV of 1869), the plaint was returned for presentation to the proper Court. On appeal by the plaintiff the order for the return of the plaint was confirmed by the High Court on the 28th November, 1892 (No. 87 of 1892).

The plaintiff thereupon on the 3rd January, 1893, served the defendant with notice under s. 424 of the Civil Procedure Code (Act XIV of 1882), and on the 4th January, 1893, presented the plaint in the District Court and applied that the case should stand over for two months in order to allow the defendant the **[698]** time required by s. 424 of Civil Procedure Code (Act XIV of 1882). The Court, however, refused this application on the 3rd February, 1893.

Against the order of refusal the plaintiff appealed to the High Court (Miscellaneous Appeal No. 14 of 1893), but the appeal was dismissed.

The District Court having accepted the plaint registered it as suit No. 1 of 1893. The case came on for hearing on the 27th October, 1893, when the District Judge dismissed it on the ground that notice had not been served on the defendant two months before it was filed, as required by s. 424 of the Civil Procedure Code.

The plaintiff appealed.

Branson (with *Gangaram B. Rele*) for the appellant (plaintiff).—The Judge was wrong in dismissing this suit for want of notice. No notice was necessary. This is a suit for breach of contract and to such suit s. 424 is not applicable—*Shahebzadee Shahunshah Begum* v. *Fergusson* (1); *Ranchod Varajbhai* v. *The Municipality of Dakor* (3); *Bhau Balapa* v. *Nana* (4); *Sardarsing* v. *Ganpatsingji* (5); *Nagusha* v. *The Municipality of Sholapur* (6); *Manaklal Motilal* v. *The Municipal Commissioner for the City of Bombay* (2); *William Allen* v. *Ba Shri Dariba* (7).

If, however, notice was necessary we say that the defendant had sufficient notice of the suit, which was originally filed in the Subordinate Judge's Court in 1890.

Rao Saheb *Vasudeo J. Kirtikar* (Government Pleader), for the respondent (defendant).—We rely on s. 424 of the Civil Procedure Code. The language of that section is imperative, and the notice mentioned therein would be necessary even if the present suit be considered to be one *ex contractu*. The cases relied on are distinguishable. Some of them

(1) 7 C. 499. (2) 19 B. 407. (3) 8 B. 421. (4) 13 B. 343.
(5) 14 B. 395. (6) 18 B. 19. (7) P. J. (1884), p. 361.

were under the Municipal Acts and in others the defendants were not sued in their official capacity.

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APPELLATE CIVIL.

20 B. 697.

JUDGMENT.

[699] JARDINE, J.—This is a suit which we must treat as brought under s. 32 of Act XIV of 1869 against the defendant, an officer of Government, in his official capacity. The District Judge held that the defendant was entitled to two months' notice under s. 424 of the Code of Civil Procedure; and dismissed the suit, because it had been brought before the expiry of that period. The suit is one *ex contractu*; and no case has been cited to show that s. 424 applies to such a suit, whereas *Sahebzadee Shahunshah Begum* v. *Fergusson* (1) decides to the contrary, and the opinion of Farran, J., in *Maneklal* v. *The Municipal Commissioner for the City of Bombay* (2) is in accordance with that decision.

On these authorities we must reverse the decree of the District Judge, and remand the cause for trial; the respondent to pay the costs of this appeal.

Order reversed and case remanded.

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20 B. 699.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE SHRI VISHWAMBHAR PANDIT *alias* NANA MAHARAJ.*

[28th August, 1895.]

Privy Council—Appeal to Privy Council—Civil Procedure Code (Act XIV of 1882), s. 596—Substantial question of law—Practice—Procedure.

Per JARDINE, J.—Where the High Court in appeal has confirmed the decree of the lower Court and has taken substantially the same view of the facts and where, upon the facts as found by both Courts, no question of law arises, leave to appeal to the Privy Council should be refused.

Per RANADE, J.—There is a distinction between the confirmation of a decree and the affirmation of the decision and findings of the Court of first instance by the High Court. The substantial question of law referred to in s. 596 of the Code of Civil Procedure (Act XIV of 1882) need not directly arise out of the concurrent findings of fact, but it is enough if it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument.

[R., 23 A. 94 (98) = 21 A.W.N. 8.]

APPLICATION for leave to appeal to the Privy Council from a decree of the High Court.

[700] The plaintiff Shri Baba Maharaj sued for a declaration that he was the adopted son of Shri Tatia Maharaj, deceased, and as such entitled to inherit the whole of Shri Tatia Maharaj's estate.

The defendant Shri Nana Maharaj pleaded that the plaintiff was not taken in adoption by Shri Tatia Maharaj; that at the time of the alleged adoption Shri Tatia Maharaj was incapable from illness of performing the ceremony of adoption; that the alleged adoption, even if proved, was illegal and invalid by reason of the fact that the plaintiff was given in adoption by his mother without the knowledge and consent of his father; and that the suit was barred by limitation.

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* Civil Application, No. 155 of 1895.

(1) 7 C. 499.

(2) 19 B. 407.

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The First Class Subordinate Judge of Poona, who tried the case, raised (*inter alia*) the following issues:—

(1) Whether the suit was barred by the law of limitation?

(2) Whether the plaintiff had been validly adopted? and

(3) Whether the defendant was estopped from disputing the adoption?

The Subordinate Judge held that the suit was not barred by limitation; that the plaintiff had been taken in adoption by Tatia Maharaj; that Tatia was not incapable from illness at the time of the adoption: that the plaintiff's mother gave the plaintiff in adoption with the knowledge and consent of his father; that the adoption was, therefore, valid; and that the defendant was estopped from disputing the adoption. He, therefore, passed a decree, declaring that the plaintiff was the adopted son of Tatia Maharaj and as such was entitled to inherit his estate.

Against this decree the defendant appealed to the High Court.

The appeal was heard by Jardine and Ranade, JJ., who took substantially the same view of the facts as the Subordinate Judge. Jardine, J., however, did not express any opinion either on the question of limitation or on the question of estoppel; while Ranade, J., did not agree with the lower Court in regarding some of the documents put in evidence as suspicious.

On the whole the learned Judges confirmed the decree of the Subordinate Judge with costs.

Thereupon the defendant applied for leave to appeal to the Privy Council from the decree of the High Court, on the ground, **[701]** among others, that the plaintiff's adoption was invalid under the Hindu law, his mother not having been authorized by his father to give him in adoption.

A rule *nisi* was granted calling upon the plaintiff to show cause why the defendant should not be granted leave to appeal to the Privy Council.

Macpherson, Acting Advocate General (with him *Ganpat Sadashiv Rao*), for the defendant in support of the rule.—The present case falls under the last paragraph of s. 596 of the Code of Civil Procedure (Act XIV of 1882). The appeal involves a substantial question of law, *viz.*, whether the plaintiff's adoption, assuming it to be proved in fact, was valid in law. We say it is not valid, because it is not satisfactorily proved that the plaintiff's father authorized his mother to give him in adoption. The "substantial question of law" referred to in s. 596 does not mean only a question of law arising out of the facts held to be proved and admitting them to be proved. All that the section requires is that a substantial question of law arises in the case, and that there is such a question to be argued before the Privy Council—*Moran* v. *Mittu* (1) and *Gopinath* v. *Goluck Chunder* (2). This appeal does raise questions of law as well as questions of fact. We are, therefore, entitled to appeal to the Privy Council.

Branson (with him Rao Saheb *Vasudev J. Kirtikar* and *P. P. Khare*) showed cause:—Both the Courts have found on the facts, and the Privy Council will not allow them now to be questioned. The facts being thus established, there is no question of law. It is only by disputing the facts, *viz.*, the mother's authority, that any question of law can arise—*Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (3); *Kuar Nirbhai Das* v. *Rani Kuar* (4); *Nilmoni Singh Deo Bahadur* v. *Kirti Chunder Chowdhry* (5); *Thompson* v. *Calcutta Tramways Company* (6); *Shri Dharnidhar Chintaman*

(1) 2 C. 228 (232). (2) 16 C. 292 N. (3) 9 M.I.A. 66 (87).
(4) 16 A. 274. (5) 20 C. 847. (6) 21 C. 523.

Dev v. *Chintaman Bajaji Dev* (1) ; *In the goods of Premchand Moonshee v. Gopal Chandra Ghose* (2).

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JUDGMENT.

[702] JARDINE, J.—The learned Advocate General who supports the rule admits that the judgments recorded by Mr. Justice Ranade and myself take substantially the same view of the facts as the Subordinate Judge did, and that both of us concur with him in finding that Sundra Bai, the natural mother of the plaintiff, was, to use Mr. Justice Ranade's words, fully authorized by his natural father to give him in adoption. In paragraph 28 of my judgment I adopted the very words of the Subordinate Judge in finding that the natural father "Aba Maharaj was a consenting party to the giving of the plaintiff in adoption by his wife."

It is not disputed that, on such facts as the two Courts have found, the adoption is valid at Hindu Law, nor that the facts as found are decisive of the real issue between the parties—*Raja Bardakant* v. *Babu Chundra*(3). Therefore, said the Advocate General, as the decision of the High Court concurred with the original decision, he had to show that the appeal involved a substantial question of law.

The Advocate General has urged us to adopt the interpretation of the last clause of s. 596 of the Code of Civil Procedure, which with much doubt was expressed by the learned Judges in *Moran* v. *Mittu* (4) and *Ashghar* v. *Hyder* (5). No case has been shown us in which any other High Court has considered that interpretation, nor any pronouncement of the Judicial Committee thereupon. I refrain from giving an opinion, as I think the present application should be refused, because the appeal does not "involve some substantial question of law."

We asked the Advocate General what there was in the appeal to which these words can apply, what was the substantial question of law to be debated before their Lordships of the Privy Council. The reply was that it was this—whether a Hindu wife can give her natural son in adoption without the express or implied consent of her living husband. This question is answered by the judgment of this Court in *Rangubai* v. *Bhagirthibai* (6) in the negative, following earlier cases. No authority to the contrary has been pointed out or suggested. The Advocate **[703]** General's client does not wish to question these decisions, and in fact relies upon the answer they give as unquestionable, substantially as a maxim. Even if there is a question of law, I think it is not a substantial one : and that we best give effect to the enactment which changed the earlier law—*Feda Hossein's Case* (7) by refusing leave to appeal.

RANADE, J.—In the absence of any rulings of this Court to the contrary, I think the decisions of the High Court of Calcutta on s. 596, Civil Procedure Code, should be allowed to govern a case like the present. That Court has decided that there is a distinction between the confirmation of a decree and the affirmation of the decision and findings of the Court of first instance by this Court—*Ashghar* v. *Hyder* (5), and further that the substantial question of law need not directly arise out of the concurrent findings of fact—*Moran* v. *Mittu* (4), *Munnalal* v. *Gajraj* (3), *Durga* v. *Jewahir* (9), but that is enough if

(1) P.J. (1895) p. 31.
(2) 21 C. 484.
(3) 12 M.I.A. 145 (153).
(4) 2 C. 228 (232).
(5) 16 C. 287 (292).
(6) 2 B. 877.
(7) 1 C. 431.
(8) 17 C. 246 (247).
(9) 18 C. 23.

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it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument. In the present case, though we confirmed the decree of the lower Court, one of the Judges did not decide the questions of limitation and estoppel on which findings were recorded by the Court of first instance, and the other Judge took a different view of some of the documents from that of the lower Court which had held them to be suspicious. In my opinion, the confirmation of a decree under such circumstances is not equivalent to an affirmation of the decision of the lower Court. Similarly, though the Advocate General did not lay much stress in his argument before us on any of the points of law, save the point which related to the competency of the natural mother of plaintiff to give her son in adoption in the absence of her husband, yet as the other points were raised in appeal before us, and might be argued before the Judicial Committee, I should hesitate before refusing to grant leave to the appellant to carry the case before a higher tribunal simply because, in my opinion, the evidence showed that the mother had authority from her husband to give her son in adoption, and that the [704] absence of the father at the time was, therefore, immaterial. Mr. Justice Jardine has, however, taken a different view, and I understand that this is not a matter which can properly be referred to a third Judge. The appellant, moreover, has the right to apply directly to the Judicial Committee, and obtain their special leave to appeal on good cause shown.

Under these circumstances, I feel that this is not an occasion where, in the exercise of a discretionary jurisdiction, I should press my views any further. I accordingly join with Mr. Justice Jardine in the final order of refusal.

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20 B. 704.

ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Strachey.

HIS HIGHNESS SULTAN NAWAZ JUNG (*Plaintiff*) *v.* RUSTOMJI NANABHOY BYRAMJI JIJIBHOY (*Defendant*).*

[7th and 21st February, 1896.]

Easement—Light and air—Injunction or damages—Specific Relief Act (I of 1877), s. 54, cl. (b)—Prescription—Agreement to prevent acquisition of easement—Not a document creating, &c., right in immoveable property—Chance of acquiring easement not immoveable property—Registration.

The chance of acquiring a right to light and air is not immoveable property within the meaning of the Registration Act, nor can a pecuniary value be put upon it. A document, therefore, which limits or extinguishes the chance of acquiring such an easement does not require registration.

Dhunjibhoy v. *Lisboa* (1) and *Ghanasham* v. *Moroba* (2) followed and approved as to the circumstances in which the Court will grant an injunction where a right to light and air is infringed.

[**Affirm.**, 24 B. 156 (**P.C.**); **R.**, 36 M. 11=11 Ind. Cas. 642=21 M.L.J. 742=10 M.L.T. 121=(1911) 2 M. W. N. 89; 1 Ind. Cas. 958=3 S. L. R. 30; 3 N. L. R. 114 (122).]

SUIT for injunction. The plaintiff complained that the defendant was building a new house to the south of his (the plaintiff's) house in

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* Suit No. 536 of 1894; Appeal No. 879.

(1) 13 B. 252.

(2) 18 B. 474.

Hornby Row, Bombay, which, when completed, would obstruct the light and air to the windows of the third and fourth storeys on the south side of his said house.

He alleged that the windows in question were ancient windows, and that he and his predecessor in title had enjoyed the right [705] which he claimed as an easement and as of right for upwards of twenty years.

The defendant denied that any easement existed. He alleged that the southern windows in the upper floor of the plaintiff's house had been originally opened and had since been permitted to exist not as of right but under an agreement originally made in 1865 between his predecessor in title and the plaintiff's predecessor in title, which was subsequently recognized and confirmed between the plaintiff and himself.

This agreement (he alleged) had been entered into shortly after an addition had been made to the plaintiff's house, and it was to the effect that, in case thereafter the defendant's house should be raised higher than the plaintiff's and new windows in the plaintiff's south wall should be thereby obstructed, no objection should be taken.

The defendant alleged that it was under this special arrangement that the plaintiff's windows had been opened and had ever since existed, and he contended that the plaintiff could not now object to their being obstructed by the house which he (the defendant) proposed to build.

The plaintiff purchased his house in 1867. The defendant obtained his house under the will of his grandfather Byramji Jijibhoy, C.S.I.

At the hearing, Mr. Pestonji Cawasji, who was called by the defendant, deposed that in February, 1865, he was assistant to Byramji Jijibhoy, and that in that year he went to see the adjoining house (now the plaintiff's), and after inspection made the following memorandum which was signed by him and his assistant :—

"As to the house situated at Kalekot (*i.e.*, in Hornby Row) in the neighbourhood of Seth Byramji Jijibhoy's chawl in the Fort, which was formerly called Mehta's Chawl, the third floor whereof is being taken down, we have this day gone and seen the same. And there is only one window on the said floor in the side (wall) towards the said chawl. Bombay, the 20th of February, 1865.

"(Sd.) PESTONJI CAWASJI.
"(,,) KHURSHETJI NUSSERVANJI."

On the 11th May, 1865, the following letter of that date was written by the then owner of the plaintiff's house (Rustomji [706] Jamsetji Jijibhoy) to the said Byramji Jijibhoy, the then owner of the defendant's house :—

"The reason of (this) being written is as follows : Upon the house of Bhai Pestonji Merwanji Tobak adjoining your (house) in Hornby Row purchased from the heirs of Rustomji Mancherji Bangali which I have purchased from Bhai Saheb Kharsetji Furdunji I have now raised a fourth storey and have placed windows on the south side thereof. As to these windows at the time when you shall build the neighbouring house higher (than mine) I shall not raise any objection in respect of the above-mentioned windows on the south side which may be shut up. And should I raise (any), the whole is to be considered as null and void. This is the sole request. The 11th of May in the year 1865."

The plaintiff, as above stated, purchased his house in 1867.

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On the 4th September, 1867, Byramji Jijibhoy wrote the following letter to the plaintiff's agent:—

"To HAJI ISMAIL HAJI HABIB, Esq.,

"Agent for the Jamadar of Hyderabad, Bombay.

"DEAR SIR,—Learning that you have purchased for the Jamadar the house No. 7 in Hornby Row from the trustees of the estate of Mr. Rustomji Jamsetji Jijibhoy, I take this opportunity of drawing your attention to the correspondence that has passed between myself and Mr. R. J. Jijibhoy respecting the windows and projected kanframes opening on the north of my property, No. 6. Hornby Row, wherein the said Mr. R. J. Jijibhoy has agreed to throw no obstacles or hindrances of any kind whenever I required the said windows and their projections to be blocked up; that writing is insufficient. I asked him in my letter dated 17th May, 1865, to send me a more particularised paper to the above effect, but owing to different circumstances of that gentleman's affairs the matter rests still incomplete.

"But as you are now the agent for the present proprietor of the said house I shall thank you to pass me agreement or writing binding the proprietor, his heirs, executors, administrators and assigns to block up the said windows and the projected kanframes any time I or my heirs, executors, administrators and assigns shall demand and require the same to be done without hindrance or delay on your part.

"In the absence of such an agreement or writing to the above effect forthcoming from you within a reasonable time, I shall be compelled to have these windows blocked up and the kanframes removed at once; although I have not the slightest intention of adopting this course, I should like to have the business done in a regular and straight-forward manner, preventing thereby any unpleasantness hereafter."

On the 23rd November, 1867, Byramji Jijibhoy's solicitors wrote the following letter to the plaintiff's agent, enclosing copies of the letters of the 11th May, 1865, and the 17th May, 1865:—

[707] *Bombay, November 23rd, 1867.*

To HAJI ISMAIL HAJI HABIB.

"SIR,—With reference to your letter to our client Mr. Byramji Jijibhoy of the 5th September last, asking for a copy of the correspondence that took place between Mr. Rustomji Jamsetji Jijibhoy and our client, to enable you to reply to our client's letter to you of the 4th September last, with reference to the house No. 7 and the windows and kanframes opening on the north of our client's adjoining property, No. 6, Hornby Row, we are now instructed by our said client to enclose you copies of the original Gujarati letters, and to inform you that we have had instructions to prepare an agreement for your signature to secure to our client the full enjoyment of his rights so as to avoid the necessity of his blocking up the windows and removing the kanframes, which he is unwilling to do if he is sufficiently protected by an agreement. This letter as also that of our client to you of the 4th September last are written without prejudice to our client's rights."

Byramji Jijibhoy's solicitors wrote again to the plaintiff's agent on the 26th February, 1868, as follows:—

"DEAR SIR,—Mr. Byramji Jijibhoy has instructed us to prepare the necessary agreement relating to the windows and kanframes overlooking his property at Rampart Row to carry out the arrangement come to. Kindly let us know who is the legal owner of the property and the windows and

kanframes that we may insert his name in the agreement the draft of which will be sent to you for approval."

On the 28th February, 1868, the plaintiff's agent sent the following reply through his solicitor :—

"In reply to your letter of the 26th instant to the address of our client Haji Ismail Haji Habib, we beg to inform you that the legal owner of the house referred to in your letter is Jamadar Awad bin Umar, who is now in Arabia, and our client has no power to execute any such agreement as is referred to in your letter, but our client will, if you wish it, give your client a Gujarati note, in the form your client has obtained from Rustomji Jamsetji Jijibhoy, until the return of Jamadar Awad, when the arrangement your client wishes to be made will probably be carried out."

On the 17th March, 1868, the plaintiff's agent wrote to Byramji Jijibhoy as follows :—

"TO PARSI BYRAMJI JIJIBHOY.

"Written by Haji Ismail Haji Habib. To wit. As to your one house bearing No. 6, situated in Hornby Row, which has been purchased from Parsi Dadabhoy Rustomji Nowroji Bangali, on the east side thereof is Jamadar Awad bin Umar's house, which said house the said party has purchased from Seth Rustomji Jamsetji Jijibhoy. And the windows and the kanframe (weather board) of the said house open towards your side; you have a right to shut up the said windows and kanframe (weather board). And whenever you may build your house, I am not to raise any objection whatever to your shutting up the same."

Early in 1870 Byramji Jijibhoy again wrote to the plaintiff's agent to have the agreement respecting the windows of the [708] plaintiff's house, which opened on his property, prepared and to furnish him with a draft for approval. In reply, he was informed that the agent had not authority to sign any such agreement, but that the plaintiff was expected to come to Bombay in a short time, and might then be applied to.

On the 31st March, 1870, Byramji Jijibhoy wrote the following letter to the plaintiff's agent :—

"I request your earliest attention to my letter dated 23rd instant, which remains unreplied. Please urge Jamadar Awad bin Umar to complete this long-standing matter as soon as possible. If he is to remain away longer from Bombay kindly ask him to empower you to execute the requisite writing. It is because of our personal friendship that I have allowed this matter to stand over for such a long time, or I would have otherwise blocked up the windows and removed the kanframes ere this."

In reply to this, Byramji Jijibhoy was referred to Haji Adam Isak, who had then become the plaintiff's agent.

The correspondence was then continued with him, but nothing was done. On the 2nd November, 1871, Byramji Jijibhoy wrote to him as follows :—

"*Bombay, dated 2nd November*, 1871.

"SETH HAJI ADAM ISAK.

"Jamadar Awad bin Umar's Agent, Bombay.

"To wit. In the course of nearly a year and a half that has now elapsed, I have often written to you to the effect as follows :—There is the property of the said Jamadar in the vicinity of my house situate in Hornby Row, and the windows on the south (side) thereof have been made to open projecting over my property (which was not at all the case before). I asked for a writing from you making arrangements in the

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matter, but you have not as yet sent any satisfactory answer in respect thereof, and you often wrote and you often communicated to me verbally the same answer to the effect that the Jamadar was to come and that you would settle the same when he comes, but nothing has been done in the matter. I, therefore, by this give you final notice that should you fail to come to a satisfactory arrangement as regards me (in the matter of these windows) within fifteen days from this date, I will, without delay, by legal steps, at once close your windows and 'kanframes' (3 weather boards), and as to whatever expenses may be incurred by me in the matter thereof you are responsible for the whole of the same and you are bound to be answerable for the same. I, therefore, think that now you will not make the least delay in the matter. Relying upon your word, I waited for so many months, but it cannot be done hereafter. Do you please note the same. Please reply to this letter immediately. This is the sole representation."

On the 17th July, 1872, Byramji Jijibhoy again wrote as follows :—

[709] "*Bombay, dated the* 17*th of July* 1872.

"SETH HAJI ADAM ISAK,
"Jamadar Awad bin Umar's Agent.

"To wit : I am extremely sorry to write that although you are a respectable man and merchant the promise that you very often gave to the effect that you would write to the Jamadar in the matter of the house belonging to Jamadar Awad bin Umar situate in the vicinity of my house in the Fort, and the windows and kanframes (weather boards) whereof open over my property, and get (him) to come to an arrangement with me. But as to the same you have not up to this day fulfilled your promise, and I took you to be a respectable man and put up with the same for nearly two years. But now I have at length got tired and am obliged to write this strong letter. The whole blame in respect thereof is on you. Now I have written this last letter, and hope that without the slightest further delay you will at once pass in writing and deliver (to me) the instrument which is required (to be passed) in the matter of the windows of your house, and should you perhaps fail to do so within fifteen days, I will take such steps as may be proper according to law and recover from you all the loss and costs, &c., in respect of the same.

"Even now I again request that you will surely get the work done, and I hope do it in a way which will not give rise to any lengthy dispute between you and me. Please reply to this letter immediately. This is the sole representation.

"Written by (your) servant Byramji Jijibhoy, whose salutations you will be pleased to read."

The plaintiff filed this suit on the 12th October, 1894, praying for a declaration that he was entitled to free and uninterrupted access of light and air to the windows to the south and west side of his house, save in so far as the same was obstructed by the defendant's old house, and for an injunction, &c.

The suit was heard by Farran, J., who found that the arrangement evidenced by the letter of the 11th May, 1865, and the 17th March, 1868, was a temporary arrangement which was terminated by the defendant's letters of the 2nd November, 1871, and 17th July, 1872. He, therefore, held that the plaintiff had acquired a prescriptive right to light and air through the windows in the south wall of his house.

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He, however, held that following the rule in *Lisboa's case* (1) he ought not to grant an injunction, but he awarded Rs. 4,500 as damages to the plaintiff.

The plaintiff appealed, contending that he was entitled to an injunction, or that, if not, the damages were inadequate and should be increased.

[710] The defendant filed cross-objections to the decree, contending that the plaintiff had not acquired any prescriptive right or easement to the light and air which he claimed; that the agreement of the 11th May, 1865, continued in full force, and was a good answer to the suit, and that the suit ought to have been dismissed with costs.

Lang (Advocate-General) (*Scott* with him) for appellant (plaintiff).—The Court below ought to have granted an injunction. It followed the ruling in *Dhunjibhoy* v. *Lisboa* (1). We contend that case is wrong and ought not to be followed. The law in India with reference to rights to light and air is the same as in England. We rely on *Greenwood* v. *Hornsey* (2); *Shelfer* v. *City of London Electric Lighting Company* (3); *Martin* v. *Price* (4); *Ghanasham Nilkant* v. *Moroba* (5); *Dent* v. *Auction Mart Company* (6); *Aynsley* v. *Glover* (7); Specific Relief Act (I of 1877), s. 54, cl. (*b*). The damage done to the plaintiff's building is so great as to justify an injunction.

Inverarity (with him *Macpherson* and *Lowndes*), for the respondent (defendant):—We have filed cross-objections to the lower Court's decree, for we contend that the plaintiff never acquired any right to light and air, and ought neither to get an injunction nor damages. We contend that our right to build was always reserved to us, and that the agreement to this effect was never put an end to. The plaintiff had notice of the agreement and was bound by it—*Bewley* v. *Atkinson* (8). But in any event this is no case for an injunction. The rule in *Dhunjibhoy* v. *Lisboa* (1) applies.

Lang in reply.—There was no completed agreement that the defendant should have a right to build on his land so as to block up the plaintiff's windows. If there was, the documents evidencing it are inadmissible, as they were not registered. This objection was taken in the Court below.

JUDGMENT.

PARSONS, J.—As indicated by us during the hearing of this appeal, we see no reason to differ from the ruling of this Court in [711] *Lisboa's case* (1) which was followed in the case of *Ghanasham Nilkant* v. *Moroba Ramchandra* (5). We consider that the principle enunciated in those cases, *viz.*, that an injunction will only be granted where the invasion of the right or enjoyment is such that pecuniary compensation would not afford adequate relief, is a correct interpretation of s. 54 of the Specific Relief Act (I of 1877), which lays down the law binding on the Courts in this country. To Courts subject to that Act the English decisions cited have no application. We have, therefore, only to see whether the present case is one in which adequate relief can be afforded by pecuniary compensation. On this point we agree with the learned Judge who tried the case that it is. No very serious damage has been done to the plaintiff's house. No room has been rendered uninhabitable. Two rooms have

(1) 18 B. 252.
(2) 33 Ch. D. 471.
(3) (1895) 1 Ch. 287 (322).
(4) (1894) 1 Ch. 276.
(5) 18 B. 474.
(6) L.R. 2 Eq. 246.
(7) L.R. 18 Eq. 544 (552).
(8) 13 Ch. D. 283.

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been made somewhat darker and hotter than they were. The result has been that the letting value, and, therefore, the market value of the property, has been somewhat reduced. The learned Judge has taken the loss of rent to be about Rs. 20 a month, and this seems quite correct. He has awarded damages on that footing, capitalizing the amount at twenty years' purchase. This, we think, is too little. We think the period of twenty-five years should be taken, or rather that such a sum ought to be awarded as would, if invested in Government paper, produce Rs. 240 a year. We think the damages should have been Rs. 7,000.

Turning now to the only other point at issue, we have to see whether the plaintiff has been rightly found to have gained by prescription the easement of light and air that he claims. His enjoyment is admitted. It is contended only that he enjoyed by agreement, with permission, and on sufferance.

The evidence on this point is purely documentary and must be set out at length. The first document is the Ex. 1 and is a letter written on the 11th May, 1865, by the plaintiff to the defendant (I say plaintiff and defendant for sake of brevity, the real parties to it being their predecessors in title). In it the plaintiff says that he has purchased a house next the house of the defendant, and has raised a fourth storey and placed windows on the south side of it, [712] and he promises to raise no objection to these windows being shut (blocked) up when the defendant builds his house higher. The learned Judge wrote no judgment, but we are informed that in his oral judgment he treated this as an agreement between the parties which would prevent the plaintiff acquiring any easement of light and air so long as it continued in force."

This view is not contested by the plaintiff's counsel, who, however, has argued that the document relates to the windows on the fourth storey only, and that under it there has been no bar to the acquisition of an easement in respect of the windows on the third storey. We cannot assent to this argument. There has been in the case a confusion throughout between what is a floor and what is a storey, arising from the use of these words as if they were synonymous. The house of the plaintiff consists of five floors, that is, of a ground floor and four storeys. The fourth storey mentioned in this document is really the fourth storey or the fifth floor. In future we shall use the word floor in speaking of the house.

In this document, then, the building of the fifth floor is mentioned. There was only one window on the fourth floor before the fifth floor was added. (See the memo. (1) Ex. 1 at p. 119 where floor is used for and instead of storey.) It is not shown that any easement had been acquired in respect of it. The other windows that are now on the fourth floor were added at this time, the fourth floor being practically rebuilt. As we construe the document, the words " in the south side thereof " relate to the south side of the house and not merely to the south side of the fifth floor. This is clearer in the vernacular original than in the translation. The true translation is " on it (*i.e.*, the house) I have raised a fourth storey and on the south side of it I have placed windows." Thus the document covers all the windows on the south side of the house, whether on the fourth or the fifth floor. In any case, it must be so; for as the result of blocking up the windows on the fifth floor would of necessity be

(1) 20 B. 705.

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the blocking up the windows on the fourth floor below them, the power given by this document to block up the windows on the fifth floor must include the power to block up those on the fourth floor also.

[713] So far, therefore, as this document is concerned, its meaning is obvious and the case is clear. It constitutes a contract or agreement between the parties, in pursuance of which the plaintiff is allowed to enjoy the access of light and air through the windows on the south side of his house, in return for which he promises that he will not raise any objection to those windows being blocked up when the defendant should rebuild and raise his house. So long, therefore, as that promise remained in force the plaintiff could acquire no easement in respect of these windows as against the defendant whenever the latter chose to raise his house.

The question then arises, was the promise ever put an end to, and if so, when. It is not contended that the plaintiff ever withdrew his promise. It is only argued that the defendant himself put an end to the agreement by his own conduct, and this, we are informed, was the view adopted by the learned Judge who tried the case. It is difficult to see how the defendant alone could put an end to the agreement. He could, of course, tell the plaintiff that he no longer held him bound by his promise and proceed to break his own part of the agreement, but anything short of that could hardly absolve the plaintiff from the performance of his promise at the specified time, still less convert the plaintiff's enjoyment of the light and air that he had obtained by the agreement on the strength of his promise into an enjoyment of it as an easement.

In order, however, to see what actually took place, the facts must be set out. The plaintiff bought the house in 1867. On the 4th September, 1867, the defendant writes to the plaintiff's agent the letter Ex. 11 (20 B. 706). In it he says that the writing of the 11th May, 1865, is insufficient, and asks the agent to pass "an agreement binding the proprietor, his heirs, executors, administrators and assigns to block up the said windows and the projected kanframes any time I or my heirs, executors, administrators and assigns shall demand and require the same to be done without hindrance or delay on your part." No doubt the writing of 11th May, 1865, was insufficient if the defendant was right in saying that R. J. Jijibhoy had agreed to throw no obstacle or hindrance of any kind whenever he required the windows to be [714] blocked up, because the promise of 11th May, 1865, related only to the event of the defendant's raising his house. That promise the defendant had got. By this letter he shows no intention of giving it up; on the contrary he keeps it and asks for something more. That is, we think, the effect of this letter.

In the Ex. 6, on the 5th September, plaintiff's agent asks for copies of the correspondence between the defendant and Jijibhoy. These are sent on the 23rd November, 1867 (Ex. 12). On the 26th February, 1868, defendant asks of plaintiff's agent the name of the owner of the property for insertion in the agreement he is having prepared to carry out the arrangement come to relating to the windows and kanframes overlooking his property (Ex. 13). On the 28th February plaintiff's agent informs the defendant of the name of the legal owner, says that he as agent has no power to execute such an agreement as defendant mentions, but expresses his willingness to give a Gujarati note, in the form the defendant has obtained from R. J. Jijibhoy, till the return of the plaintiff, when the arrangement defendant wishes to be made will probably be carried out (Ex. 14).

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On the 17th March, 1868, plaintiff's agent signs the Gujarati note, which is as follows :—

(His Lordship read the note which is given above (1) and continued.)

It will be observed that this agreement goes much further than the Ex. 1 ; for, in addition to the promise of not objecting to having the windows blocked up whenever defendant raises his house, it contains an admission of defendant's right to shut up the windows and frame that open towards the side of the defendant's house whenever he likes. It thus contains the original promise of 1865 and the additional promise demanded by defendant in 1867. This agreement has never been repudiated by the plaintiff, and it has not been shown that his agent had not full power to pass it.

The only contention raised in this Court in respect of it is that it was wrongly admitted in evidence, not being registered. That contention is not, in our opinion, a sound one. An easement of [716] light and air, no doubt, is immoveable property within the meaning of the Indian Registration Act, 1866, but it must be an easement, an acquired right, not the chance of acquiring one that is meant. Here no easement existed, for none had been acquired at the time. The document, therefore, does not create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in immoveable property. Its effect may be to prevent such a right being acquired, but it does not of itself limit or extinguish any such right. Neither can it be said that because the right, when acquired, was worth more than Rs. 100, the chance of acquiring that right was also worth more than Rs. 100. We are, therefore, of opinion that the document was rightly admitted in evidence.

The defendant, however, was still not satisfied, and he writes another letter to the plaintiff's agent on the 14th February, 1870. This letter is not on the record, but it is answered by the letter of the 24th February (Ex. 14) in which the plaintiff's agent says that his power is insufficient to enable him to sign the formal agreement asked for, but that he will let the defendant know when the plaintiff comes to Bombay, and that he can then arrange with him. On the 31st March the defendant writes to the plaintiff's agent again asking him to urge on the plaintiff to complete the matter. He ends his letter in these words : "It is because of our personal friendship that I have allowed this matter to stand over for such a long time, or I would have otherwise blocked up the windows and removed the kanframes ere this." (Ex. 15.) A change of agency then took place (Exs. 5, 16 and 17).

On the 16th of May, 1870, plaintiff's agent writes to the defendant as follows :—

"I have received two notes from (you), respected Sir, the first dated the 2nd of April and the second dated the 30th of April. On a perusal thereof I have noted the particulars. It was written that an agreement according to what you write should be made in respect of the Jamadar's house, bearing No. 7, which is situated in Hornby Row. But as I had no 'power' to make an agreement in accordance therewith, I wrote to Jamadar Awad at Hyderabad. He has sent a reply to me as follows :— I am to come to Bombay; when (I come), on personally seeing (the premises) 'I will make the same myself.' Jamadar Awad, the owner of the said house, has written a reply agreeably to this. And when he will come I shall let you know. Do you be pleased to make such arrangement as you may wish to make with him." (Ex. 7.)

(1) 20 B. 707.

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[716] Further correspondence ensues which need not be set out (Exs. 18, 19, 8, 20, 21, 9). On the 2nd November, 1871, the defendant writes to the plaintiff's agent as follows :—

" I, therefore, by this give you final notice that should you fail to come to a satisfactory arrangement as regards me (in the matter of these windows) within fifteen days from this date, I will, without delay, by legal steps at once close your windows and ' kanframes ' (three weather boards), and as to whatever expenses may be incurred by me in the matter thereof you are responsible for the whole of the same. I, therefore, think that now you will not make the least delay in the matter." (Ex. 22).

Nothing, however, was done on this letter. On the 17th July, 1872, the defendant writes again to plaintiff's agent in these words :—

" Now I have written this last letter and hope that without the slightest further delay you will at once pass in writing and deliver (to me) the instrument which is required (to be passed) in the matter of the windows of your house, and should you perhaps fail to do so within fifteen days I will take such steps as may be proper according to law, and recover from you all the loss and costs, &c., in respect of the same."

To this plaintiff's agent replies on the 19th July, 1872. He says, as before, that he has no authority to make the agreement himself, he explains that the plaintiff owing to business had not been able to come to Bombay as he had intended, and he suggests that the defendant should write direct to the plaintiff.

We have no more correspondence put in, so that apparently the defendant did not write to the plaintiff, but was content to leave matters where they were, and to remain satisfied with the agreement of the 11th May, 1865, and of the 17th March, 1868.

We are, however, asked to come to the conclusion that, by reason of these letters, and more especially of the threats used by the defendant in these letters, he had absolved the plaintiff from the performance of the promises that he had made, and that the agreements between the parties had come to an end; and that the plaintiff had gained the easement he claims by peaceable enjoyment of the light and air since 1872. We are of opinion that the facts do not justify such a conclusion. We consider that the promise of 1865 is as binding on the plaintiff now as it was on the day it was made. In our opinion, the defendant has never absolved the plaintiff from the performance of that promise or put an end to that agreement; on the contrary while treating it as in force he has always been demanding something more. " It **[717]** is true," he says to the plaintiff, "you have promised not to object to my blocking your windows when I raise my house, but that is not sufficient. I want you to agree to block those windows up whenever I ask you to do so." He succeeded in getting such an agreement from the plaintiff's agent, but not from the plaintiff himself. He nowhere, however, releases the plaintiff from the performance of his promise, and the plaintiff never denies his liability to perform it, or refuses to pass the agreement demanded by the defendant.

To put the plaintiff's case at its highest, if he had resisted the additional demand, he might now be entitled to keep his windows open against any other contingency than that of the defendant's raising his house, but against that contingency he would be bound by his agreement. As a matter of fact, however, the plaintiff has never resisted the demand of the defendant. Nowhere does it appear that he has ever denied

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his liability to perform his promise or asserted any right of his own in contravention of that promise. He was fully informed by his agent of all that was being done (Ex. 8). He repudiates none of his acts; on the contrary he consents, when he comes to Bombay, to make the agreement that the plaintiff asks for (Ex. 7). Of course, had there been anything for the plaintiff to do in the performance of his promise, and had he in consequence of the threats of the defendant or otherwise ceased to do that thing, the case might be different—*Bewley* v. *Atkinson* (1). But here he had nothing to do. It behoved him, therefore, if he wished to avoid the performance of his promise, to repudiate the agreement distinctly and openly. No mere lying by would under the circumstances have any such effect. His final silence to the final threat of the defendant does not show that he in any way repudiated the agreement. At the most, it shows that he would not do more than he had already promised to do, while the forbearance of the defendant to carry out his threats only shows that he was content to leave matters where they were, and that he had decided not to persist in his demand for a further and more sufficient agreement.

Upon the facts, therefore, we are of opinion that the suit of the plaintiff fails and ought to have been dismissed, and reversing the [718] decree of the lower Court we order that the plaintiff's suit be dismissed with costs throughout.

Suit dismissed with costs.

Attorneys for the plaintiff:—Messrs. *Crawford, Burder & Co.*
Attorneys for the defendant:—Messrs. *Craigie, Lynch and Owen.*

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20 B. 718.

ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Strachey.

KARAMSI MADHOWJI (*Original Defendant*), *Appellant v.*
KARSANDAS NATHA (*Original Plaintiff*), *Respondent.**
[21st February, 1896.]

Hindu law—Adoption—Adoption directed by will—Will—Bequest—Bequest to the boy named for adoption—Conditional gift on adoption—Adoption a condition precedent to such boy taking under the will.

Where a Hindu testator directed that a boy should be taken in adoption, and added "to this boy, all the things mentioned in my will having been done, I give the residue of my estate as his inheritance and I appoint him as my heir."

Held, that adoption was a condition precedent, and that the boy not having been adopted could not take under the will.

Bireswar v. *Ardhu Chunder* (2), distinguished.

Shamavahoo's case (3), followed.

[Affirmed, 23 B. 271 **(P.C.)**; **R.**, 9 C.W.N. 309 (318); **D.**, 11 C.W.N. 147 (151).**]**

APPEAL from Farran, J. (4).

Suit for the construction of a will. The testator Kessowji Jadhowji, a Hindu inhabitant of Bombay, died on the 9th February, 1886, leaving a

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* Suit No. 185 of 1887. Appeal No. 880.

(1) 13 Ch. D. 283.
(2) 19 I.A. 101.
(3) 12 B. 202.
(4) See 12 B. 185.

will, dated the 8th February, 1886, of which he appointed the plaintiff his executor. He left a daughter-in-law, named Ladkavahu, who was the widow of his predeceased son Liladhar Kessowji, and by his will he directed that she should adopt the appellant Karamsi Madhowji, who was his nephew's son, and he gave the residue of his estate "to this lad as his inheritance."

The will directed large sums to be expended in charities, and made provision for his grand-daughter Kesarbai. It will be found [719] set out at length in the report of the case (see I. L. R., 12 Bom., 185). The clause material to this report was the following:—

"28. There is my nephew, Madhowji Kachra's son, Karamsi Madhowji, now (living). He is about nine years of age. It is my wish to adopt him as my son. If I should not be able to do so in my life-time, then my son Liladhar's widow is to take the said Karamsi in adoption. His adoption ceremony (*dattvidhan*) is to be performed. My property, which may remain as a residue, after all the things mentioned in my will have been done, I give to this lad as (his) inheritance. And (I) appoint (him) as my heir. Choru Liladhar's widow Ladkavahu is to get him betrothed (the outlays being made) out of my property. For the same about Rs. 5,000 are to be spent."

The lower Court held that under the above clause Karamsi Madhowji was not entitled to any part of the testator's estate until his adoption by Liladhar's widow Ladkavahu.

At the date of the decree, Karamsi Madhowji was a minor and was represented in the suit by his father and guardian. No steps were taken by his guardian to appeal from the decree, and in 1890 Ladkavahu died, and the adoption became impossible.

On attaining majority, Karamsi Madhowji obtained leave to appeal (see I. L. R., 20 Bom., 104), and the appeal now came on for hearing.

Lang (Advocate General) *Starling* and *Scott*, for the appellant.—We contend that the appellant is entitled to the residue even though he was not adopted. The testator intended him to take in any case. He is a *persona designata*. They cited *Nidhoomoni* v. *Saroda Pershad* (1); *Bireswar* v. *Ardha Chunder* (2); *Shamavahoo's case*(3); Theobold on Wills, p. 450.

Macpherson, *Inverarity* and *Lowndes*, for the respondent, were not called upon.

JUDGMENT.

PARSONS, J.—We agree with the learned Judge in holding that, as he has not been adopted, Karamsi is not entitled to the residue of the property. Clause 28 of the will literally translated [720] is as follows:—"To this boy, all the things (*kam*, literally business, works, things to be done) mentioned in my will having been done, I give the residue of my estate as his inheritance and I appoint him as my heir." That clearly means that he is first to be adopted, adoption being one of the things mentioned in the will. The words "as his inheritance" show that the residue is left to him, because he is an heir. Clause 46 provides for the case of his dying after adoption. This was the only contingency to be provided for, since nothing was left to him if he was not adopted.

The case of *Bireswar* v. *Ardha Chunder* (2) is quite different. There was clear indication there of the testator's intention before making an

(1) 8 I. A. 258. (2) 19 I.A. 101. (3) 12 B. 202.

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adoption to give property to the boy. Here there was no such intention; on the contrary it is clear the intention was only to give it after the adoption had taken place. It was to the adopted boy, and not to the *persona designata*, Karamsi, that the bequest was made. Compare cl. 46 of the present will with cl. 11 of the will in that case, and the distinction pointed out by their Lordships of the Privy Council at p. 107 will at once appear.

This case is on all fours with *Shamavahoo's case* (1), and the decision of the Judge following that case is correct. We, therefore, confirm the decree with costs.

Decree confirmed.

Attorneys for the appellant:—Messrs. *Little & Co.*
Attorneys for the respondent:—Messrs. *Nanu and Hormasji.*

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20 B. 721 (F. B.).

[721] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Candy and Mr. Justice Fulton.

GOPAL RAMCHANDRA LIMAYE (*Original Plaintiff*), *Appellant v.* GANGARAM ANAND SHET MARVADI, DECEASED, BY HIS SONS AND HEIRS PANHA AND DEVA, OF WHOM PANHA, DECEASED, BY HIS BROTHER AND HEIR DEVA, ALSO DECEASED, BY HIS SON AND HEIR CHUNILAL, MINOR, BY HIS GUARDIAN AND ADMINISTRATRIX MOTHER NATHIBAI KOM DEVA GANGARAM (*Original Defendants*), *Respondents.**

[14th March, 1895.]

Mortgage—Redemption—Damduput—*Applicability of the law—Account current—State of account.*

The operation of the rule of *damduput* is excluded in all mortgages the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be.

Shri Ganesh Dharnidhar v. *Keshavrav Govind* (2) over-ruled.

[**R.** 15 M.C.C.R. 227; **Expl.** 22 B, 86 (87); **D**; 21 B. 38 (41); 24 B 114 (118, 119).]

APPEAL from the decision of Rao Bahadur G.A. Mankar, First Class Subordinate Judge of Thana.

This was a suit, so far as is material for the purposes of this report, for redemption and account of a mortgage made in A.D. 1844 for Rs. 250. The plaintiff became the owner of the equity of redemption by purchase on 1st October, 1883. The other facts of the case material to this report are stated in the judgment of Candy, J. The case was reported on another point in I. L. R. 14 Bom., 72,

The Subordinate Judge found that Rs. 1,821-6-10 were due on account of the mortgage.

The plaintiff appealed and the defendant filed cross-objections.

Manekshah J. Taleyarkhan, for the appellant.—The rule of *damdupat* applies to the case—*Shri Ganesh Dharnidhar* v. [722] *Keshavrav Govind* (2); *Hari Mahadji* v. *Balambhat* (3). The rule of *damdupat* is applicable even in the case of mortgages.

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* Appeal, No. 100 of 1891.

(1) 12 B. 202.
(2) 15 B. 625 (640,641).
(3) 9 B. 233.

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Mahadeo C. Apte, for the respondent.—Under Hindu law proper, the rule of *damdupat* applies only to the case of a simple money loan. Even pledges of moveable property are outside the rule; much more, therefore, is a mortgage of immoveable property. In the text books there is a distinction made between ordinary loans and pledges. In the Mayukha two separate chapters are devoted to loans. The first deals with simple loans, and therein the rule of *damdupat* is expressly mentioned. The other chapter deals with pledges. The word used is *adhi*, that is, something placed in the hands of some person (Stokes' Hindu Law Books, pp. 110-113). The rule of *damdupat* is nowhere said to apply to *adhi*, and, therefore, as mortgages of immoveable property are *adhi*, it does not apply to them.

The current of decisions of this Court is in favour of our contention—*Balkrishna Babaji* v. *Hari Govind* (1); *Rango* v. *Balaji* (2); *Sadhu* v. *Ganu* (3); *Shankara Bawa* v. *Babaji* (4); *Balambhat* v. *Sitaram* (5); *Rajaram* v. *Gopal* (6); *Bapuji* v. *Gangadhar* (7); *Narayan* v. *Gangaram* (8); *Nathubhai* v. *Mulchand* (9); *Narayan* v. *Satvaji* (10); *Ganpat* v. *Adarji* (11); *Ramchandra* v. *Bhimrav* (12); *Dhondu Jagannath* v. *Narayan* (13). *Shri Ganesh Dharnidhar* v. *Keshavrav Govind* (14) is the only dissenting decision. In the other cases the question of *damdupat* was raised and was decided according to our contention.

In Bengal the interest was governed by the Usury Laws for a long time. They were repealed by Act XXVIII of 1855, which did not affect the Hindu law as to interest, and there are cases of loans in which the rule of *damdupat* was applied—**[723]** *Ramconnoy Audicarry* v. *Johur Lall Dutt* (15). But there are no cases of mortgage. If there be any rules as to interest in the mofussil of Bengal, they cannot be rules of Hindu law, but they must be super-imposed by Reg. XV of 1793.

In Madras there is a special Reg. (XXXIV of 1802) which governs the rate of interest. The rule of *damdupat* is not known there.

The ruling in *Shri Ganesh Dharnidhar* v. *Keshavrav Govind* (14) was made without consideration of the previous authorities and was based on the decisions in *Nathubhai* v. *Mulchand* (9) and *Dhondu Jagannath* v. *Narayan* (13). But the limitation imposed on interest by those rulings is not a necessary consequence of any principle involved in them. Even if the decision in *Shri Ganesh Dharnidhar* v. *Keshavrav Govind* (14) is correct, that was a suit brought by a mortgagee out of possession, while the present is a suit against a mortgagee in possession, and, therefore, bound to keep accounts.

Manekshah J. Taleyarkhan, in reply.—The word *adhi* includes even a loan. Under the Hindu law there is no hard and fast distinction between a loan simple and a pledge. There are, no doubt, contradictory decisions of this Court on the subject. But the principle of the decision, which is that a money-lender should not exact more than is equitable from a needy debtor, holds as good in the case of a mortgage as in the case of a loan. Whether the mortgagee is or is not in possession, does not affect the question. A mortgagee's only right is to recover his money; his position does not differ from that of a person who makes a loan.

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(1) 15 B. 84. (2) P.J. (1886), p. 76. (3) P.J. (1887), p. 215.
(4) P.J. (1881), p. 291. (5) P.J. (1893), p. 312. (6) P.J. (1876), p. 229.
(7) P.J. (1877), p. 131. (8) 5 B.H.C.R. A C.J. 157. (9) 5 B.H.C.R. A.C.J. 196.
(10) 9 B.H.C.R. 83. (11) 3 B. 312. (12) 1 B. 577.
(13) 1 B.H.C.R. 47. (14) 15 B. 625. (15) 5 C. 867.

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The point was argued before a Division Bench composed of Farran and Candy, JJ., which delivered the following judgment referring the point for decision to a Full Bench :—

1894, *August* 28. CANDY, J.—This is an appeal by the assignee of the equity of redemption against the account taken by the Subordinate Judge in accordance with the directions of this Court to be found at p. 77 of I. L R. 14 Bombay.

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[724] In 1766 (A D. 1844), 60½ bighas and one pand of the Karkhoda Khar were mortgaged for Rs. 250, on condition that the debt was to bear interest at 18 per cent. per annum, and that the rents and profits should be applied towards payment of the interest and principal. This deed necessitates an account of the rents and profits on the one side, and of the principal, interest and charges on the other.

* * * *

Plaintiff in his appeal has taken several objections to this account ; but a preliminary objection must be noticed, preliminary, though it was only raised at the close of the arguments, and that is, that by the ruling in *Shri Ganesh Dharnidhar Maharajdev* v. *Keshavrav Govind Kulgavkar* (1), applying the rule of *damdupat* the mortgagee is entitled to have interest added to the principal at the rate stipulated in the mortgage-deed, and to appropriate the rents and profits received by him in or towards satisfaction of such interest; but that after such appropriation, if the amount of interest *now due* and payable on foot of the mortgage exceeds the amount of the principal, the decree on that part of the claim must be limited to double such principal amount.

In the present case, by the mortgage-bond of 1766 (A.D. 1844), the mortgagee in possession was to make up an account of the interest at the end of every twelve months, and was to pay the Government assessment from the produce, and the mortgagor was to be charged interest on the money spent by the mortgagee on repairs and on a sepoy at Rs. 3 a month, which salary was to be debited to the account, the balance of profits, after paying assessment, repairs and peon's salary as above, being taken towards the principal and interest. The account taken on those terms was to be signed by the mortgagor every year.

Applying the ruling just quoted, if the mortgagee is entitled to have interest added to the principal (Rs. 250) at 18 per cent. (compound) and to appropriate the rents and profits received by him in or towards satisfaction of assessment and other expenses noted above, and the balance in or towards satisfaction of such interest and principal, the same interest being charged on all **[725]** unsatisfied arrears of assessment and interest, and if after such appropriation the amount of interest now due exceeds the amount of principal, and if the interest now awardable by the decree must be limited to double the original principal, then it is evident that the account found by the Subordinate Judge must be materially amended.

Mr. Apte objected to the application of the rule of *damdupat*, first, because, he contended, the rule, as shown by the texts (Stokes, pp. 110 to 113) applies only to loans in general, and not to pledges, and secondly, because the ruling in *Shri Ganesh* v. *Keshavrav* was given without consideration of a long course of decisions of this Court that the rule of *damdupat* does not apply to cases of running account between mortgagor and mortgagee.

(1) 15 B. 625 (640, 641).

We are not inclined to agree with the first contention, for the rule has been continually applied to mortgage-debts, and a reference to the texts show that it is included in the section " of pledges." Thus the author of the Vyavahara Mayukha closes this section by quoting two texts of Brahaspati and Yajnavalkya. Thus " Brahaspati :—When land or other [immoveable property] has been enjoyed, and more [than the principal debt] has accrued therefrom, then the principal and interest having been realized, the debtor shall obtain his pledge. Yajnavalkya :—Whenever a debt under mortgage has become doubled by interest, then the pledge shall certainly be returned, whenever double the sum lent has been received."

As to the other contention, it certainly does appear that the ruling of the Division Bench in *Shri Ganesh* v. *Keshavrav* conflicts with previous decisions of this Court. It is unnecessary to quote at length the many decisions in which it is shown that the rule of *damdupat* does apply to all cases in which the mortgagee has had no possession of the mortgaged property, or in which being in possession he takes the rents and profits in lieu of the whole or part of the interest. In such cases no account is taken on both sides, and, therefore, the rule of *damdupat* applies. But we are dealing with a case in which there is an account on both sides. In such a case it has been held the rule of *damdupat* is not applicable:—

[726] (1) By Westropp, C. J., and West, J., in *Narayan* v. *Satvaji* (1).

(2) By Westropp, C. J., and Melvill, J., in *Rajaram* v. *Gopal* (2).

(3) By Westropp, C. J., and Kemball, J., in *Shankarabawa* v. *Babaji* (3).

(4) By West and Nanabhai, JJ., in *Balambhat* v. *Sitaram* (4).

(5) By Sargent, C. J., and Birdwood, J., in *Rango* v. *Balaji* (5).

It is noteworthy that the decisions in the cases marked above (1), (2) and (5) purport to be founded on the decision of Couch, C. J., and Newton, J., in *Nathubhai* v. *Mulchand* (6), while the decision in the case marked (3) is based on the decision in the case marked (1) which itself, as just remarked, is based on the case of *Nathubai* v. *Mulchand*. On the other hand, it is to be remarked that in the judgment in *Shri Ganesh* v. *Keshavrav* the decision in *Nathubhai* v. *Mulchand* is equally relied on. But, it is said, the ground of equity upon which the rule, laid down in that case, is rested, does not justify a decree in favour of a mortgagee for more than double the amount actually advanced ; it only prevents the rents and profits being deducted from the amount so doubled. So here, assuming that the rents and profits have paid off all charges on account of assessment and other expenses, and all arrears of the same with interest, then the amount payable on foot of the account cannot exceed Rs. 500.

As against the five cases noted above, in which it was held that the rule of *damdupat* was inapplicable, because they were cases of accounts on both sides, reference may be made to the case of *Bapuji* v. *Gangadhar* (7), in which the District Judge on the authority of the ruling in *Nathubhai* v. *Mulchand* held that the rule of *damdupat* was inapplicable to a case of running account, but on appeal to the High Court, Melvill and West, JJ., said : "Under the terms of the mortgage there was nothing to prevent the defendants from causing the mortgaged property to be applied to the liquidation of the debt whenever the amount of interest due became equal to

(1) 9 B. H. C. R. 83. (2) P. J. (1876), p. 229. (3) P. J. (1881), p. 291.
(4) P. J. (1883), p. 312. (5) P. J. (1886), p. 76. (6) 5 B. H. C. R. A. C. J. 196.
(7) P. J. (1877), p. 131.

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the amount of the principal. Under [727] these circumstances we consider that there is no injustice in following the previous rulings of the Court which make the rule of *damdupat* applicable to such cases."

Such being the various rulings on this important point, we do not think it advisable to express an opinion on the merits of the contention raised before us. We, therefore, adjourn the hearing of this appeal till November, when the Chief Justice, Sir C. Sargent, will be sitting in this Court, and when, if he so directs, the question can be considered by a Bench of three Judges.

The case was fixed for hearing before a Full Bench consisting of Sargent, C.J., and Candy and Fulton, JJ.

Manekshah, J. Taleyarkhan, for the appellant (plaintiff).

Daji Abaji Khare, for the respondent (defendant).

JUDGMENT.

The judgment of the Full Bench was delivered by

SARGENT, C.J.—The leading case as to the application of the Hindu law of *damdupat* to mortgages is that of *Nathubhai Panachand* v. *Mulchand Hirachand* (1). Sir R. Couch, in delivering the judgment of the Court, referred to several cases in which the question had arisen, and came to the conclusion that the law was applicable to mortgages "where there is no account on both sides and no charge for rents and profits, but that it would be inequitable that the interest should cease when it amounts to the same sum as the principal, if the rents and profits continue to be charged." Alluding to the circumstances of the case before him where the mortgagee had been in possession of a shop for several years, Sir R. Couch says: "As the mortgagee is to be charged with rents and profits it would not be just to stop his interest, and, consequently, the rule of Hindu law cannot be applied." The exception so enunciated to the application of the law of *damdupat* has, we cannot doubt, been always understood as excluding the law whenever an account had to be taken between the parties of interest on the one side and rents and profits on the other. This is clear from a series of cases beginning with *Narayan* v. *Satvaji* (2), where Sir Michael Westropp, referring to the remarks of Sir R. Couch in the above case, treats that case as deciding that the law is applicable to mortgages "if there was only an account to be taken of principal and interest due on the [728] mortgage and no account of rents and profits on the other side." In *Rajaram* v. *Gopal* (3), Westropp, C.J., and Melvill, J., say, referring to the above decision of Sir R. Couch in *Nathubhai Panachand* v. *Mulchand Hirachand* (1), that the rule of *damdupat* would have been applicable if the mortgagee had not been accountable for rents, and the decree passed by the Court shows that the application of the rule was treated as quite independent of the result of the account. The cases—*Narayan* v. *Satvaji* (2), *Balambhat* v. *Sitaram* (4). *Rango* v. *Balaji* (5)—are further illustrations of the application of the exception so understood to the Hindu law of *damdupat*. It is true that in the case of *Bapuji* v. *Gangadhar* (6) the law of *damdupat* was applied in the case of a running account, but the Court (the members of which had all taken part in the decisions above cited) relied in that case on a particular term in the mortgage which the Court considered would prevent any injustice in applying the rule and did not dispute the correctness of the

(1) 5 B.H.C.R. A.C.J. 196. (2) 9 B. H C. R. 83. (3) P. J. (1876), p. 229.
(4) P.J. (1883), p. 312. (5) P.J. (1886), p. 76. (6) P.J. (1877), p. 131.

previous rulings. In *Shri Ganesh Dharnidhur* v. *Keshavrav* (1) the Court for the first time treated the application of the rule enunciated in the case of *Nathubhai Panachand* v. *Mulchand Hirachand* (2) as depending on the state of the account when taken—holding that the equity upon which it was grounded did not justify its application, if after the rents and profits received by the mortgagee were appropriated to the interest there was a balance of interest still due exceeding the principal, and that the decree on that part of the claim must be limited to double the principal amount. We think that this distinction cannot be reconciled with the judgment in the case of *Nathubhai Panachand* v. *Mulchand Hirachand* (2), as it has been uniformly understood and acted upon since 1868, and that the long course of decisions requires us to hold that the exclusion of the law of *damdupat* in the case of mortgages depends on there being an account current between the parties and not upon the state of the account.

(The Full Bench having decided the point of *damdupat*, the case was sent back to the Division Bench for decision on the merits.)

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20 B 729.

[729] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

VAIDKHAN ROSHANKHAN SARGURO AND OTHERS (*Original Plaintiffs*), *Appellants v.* SAKHYA BIN DAJI GOGAWALA (*Original Defendant*), *Respondent.** [8th July, 1895.]

Khoti Act (Bombay Act I of 1880). ss. 16, 17 (3)—Entry in the survey settlement officer's record—Finality of—Land Revenue Code (Bombay Act V of 1879), s. 108—Khot Thal—Makta.

The settlement officer's record fixing the amount of rent payable to a khot in respect of lands in the khoti village, though prepared in the form of the statement published at p. 584 of the "General Rules of the Revenue Department," edition of 1893, and labelled "Bot-khat," cannot be treated either as a survey register under s. 108 of the Land Revenue Code (Bombay Act V of 1879) or a settlement register as it is called in s. 16 of Bombay (Act I of 1880) : it is one of the " other records " prepared under s. 17 of the latter Act.

SECOND appeal from the decision of Rao Bahadur K. B. Marathe, First Class Subordinate Judge, A. P., of Ratnagiri, in appeal No. 647 of 1889.

The plaintiffs as managing khots of the village of Dhamni sued to recover *thal* (rent in kind) of certain khoti lands in the village standing in the defendant's name.

Defendant (*inter alia*) contended that the special survey settlement officer having decided that the lands in dispute were chargeable with *makta* (fixed rent in cash), plaintiff was not entitled to recover *thal*.

The Subordinate Judge held, on the authority of *Gopal* v. *Sakhojirav* (4), that the decision of the survey officer was conclusive under s. 17 of

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* Second Appeal; No. 601 of 1893.

(1) 15 B. 625.

(2) 5 B.H.C.R. A.C.J. 196.

(3) Section 17 of Bombay Act I of 1880 provides as follows:—" The other records prepared under the said s. (16) shall specify the nature and amount of rent payable to the khot by each privileged occupant according to the provisions of section 88, and any entry in any record duly made under this section shall be conclusive and final evidence of the liability thereby established."

(4) 13 B. 133.

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the Khoti Act (Bombay Act I of 1880). He, therefore, passed a decree awarding *makta* to the plaintiff.

On appeal the District Judge confirmed the decree of the Subordinate Judge.

Plaintiffs thereupon preferred a second appeal to the High Court.

[730] *Ganesh Krishna Deskmukh* for the appellant:—The present case is not governed by the ruling in *Gopal* v. *Sakhojirav* (1). In this case the record in which the entry relating to the rent is made is called *bot-khat*. It is not one of the "other records" referred to in s. 17 of the Khoti Act (Bombay Act I of 1880). It is a survey register mentioned in s. 16. It is the same as the settlement register referred to in s. 108 of the Land Revenue Code (Bombay Act V of 1879). Consequently it is open to revision under s. 21 of the Khoti Act and has not the finality contemplated by s. 17. No doubt the entries referred to in the case of *Gopal* v. *Sakhojirav* (1) were the same as the entry in the survey register in this case, and were treated as if they had been made under s. 17 of the Khoti Act. But the entry is not duly made under s. 17, whereas it ought to have been made in another record, so as to come under that section. Unless the entry is made as required by s. 33, it is not final and conclusive under s. 17.

Ramdat V. Desai, for *G. M. Tripathi*, for the respondent.—Section 108 of the Land Revenue Code (Bombay Act V of 1879) contemplates the preparation, by the survey officer, (1) of a register called "the settlement register," and (2) of other records. The section lays down in clear language what the "settlement register" is to contain. It must set forth (*a*) the area and assessment of each survey number, and (*b*) the name of the registered occupant of such survey number. The nature and amount of rent are not among the items directed to be entered in the "settlement register." Turning to the Khoti Act (Bombay Act I of 1880) it will be found that s. 16 deals with the first portion of the work directed by s. 108 of the Land Revenue Code, *viz.*, the preparation of the "settlement register," whilst s. 17 deals with the second portion. An entry in such "records" is conclusive and final. The entry in the present case is an entry of this kind, and is, therefore, conclusive—*Gopal* v. *Sakhojirav* (1).

JUDGMENT.

JARDINE, J.—The record exhibit 7 in this case is what is called "statement" at p. 584 of the "General Rules of the Revenue Department," a form of 17 columns (Ed. of 1893.) Because it [731] is labelled "*Bot-khat*," Mr. Deshmukh contends that it must be treated as the "survey register" of s. 108 of the Land Revenue Code, Bombay Act V of 1879, or the "settlement register" as it is called in s. 16 of Bombay Act I of 1880. On examining the contents of exhibit 7, we find it contains more than the items of record specified in the above two sections; and that the additional items recorded are such as s. 17 of Bombay Act I of 1880 makes provision for. It appears, therefore, to come within the words "other records prepared under the said section;" and to be a record to which the decision of this Court in *Gopal* v. *Sakhojirav*(1) applies. The items are precisely similar to those in the Ex. 18 referred to in that report. The report does not show what the designation of that record was.

It is further argued, as a point not considered in that case, that the words "other records" must mean separate documents; and that the decision would not apply where the survey officer happened to record the

(1) 18 B. 133.

additional items of information in the sheet called "survey" or " settlement register." It appears to us that it would be begging the question to hold that the statement of 17 columns is a part of the register. The information it gives is special under s. 17 ; the document thus appears to be one of the " other records." It cannot reasonably be said that the survey officer who puts on record the special matter has failed in his duty under s. 108 of Bombay Act V of 1879, or s. 17 of Bombay Act I of 1880, if the "other records " he compiles are compiled as additional columns of the register or as a separate statement or schedule appended thereto. We are, therefore, unable in any way to distinguish the present from the reported case. We, therefore, confirm the decree with costs.

Decree confirmed.

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20 B. 732.

[732] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

THE MUNICIPALITY OF SHOLAPUR (*Original Plaintiffs*), *Appellants* v. THE SHOLAPUR SPINNING AND WEAVING COMPANY, LIMITED (*Original Defendant*), *Respondent.** [11th July, 1895.

Municipality—District Municipal Act (Bom. Act VI of 1873), s. 11 (1)—Bom. Act II of 1884, s. 57 (2)—Liability to pay taxes—Halalkhore tax—Water tax—Notice—Notice to municipal commissioners—Burden of proof—Presumption—Indian Evidence Act (I of 1872), s. 114, ill. (e).

A defendant who in answer to a claim for arrears of taxes by a Bombay District Municipality alleges that the taxes were illegal,

(1) because no notice had been given him under s. 57 (Bombay Act II of 1884) ;

(2) because no notice had been issued by the Municipality to the commissioners under s. 11 of Bombay Act VI of 1873;

must prove the defence and in the absence of such proof the Court will presume that the Municipality has used the regular procedure, and that the common course of business has been followed in the particular cases.

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* Second Appeal No. 862 of 1893.

(1) Section 11 of Bombay Act VI of 1873 provides as follows :—

" Every Municipality shall hold four quarterly general meetings in every year, on or about January 1st, April 10th, July 1st, and October 1st, at which the commissioners shall meet for the transaction of general business. The President, and in Town Municipalities the Vice-President also, may, whenever he thinks fit, and shall, upon a written requisition signed by not less than one-fourth of the whole body of commissioners, call a special general meeting.

" Seven clear days' notice of a quarterly general meeting and three days' clear notice of a special general meeting, specifying the time and place of such intended meeting, and the business to be transacted thereat, shall be circulated to the Commissioners, and posted up at the Municipal Office, or local kutchery, or other public place."

(2) Section 57, cl. 1, provides :—" It shall be lawful, after notice given to the occupier or occupiers of any building or land, or to the occupiers generally within the Municipal District or any recognized division thereof, for the Municipality to perform by their agents the duties usually performed by sweepers with regard to such building, land, district, or division, and to make suitable provision accordingly.

" Clause 2.—When the Municipality shall have made such provision, the occupier, or the several occupiers of the building or land so served, or all the several occupiers of buildings or lands situated within the district or division regarding which such notice may have been given, shall become liable to pay any special cess which may be levied for such purposes under the Rules contemplated in s. 14 of this Act."

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The liability to pay the halalkhore tax does not arise until after notice has been given under s. 57 of the Act (Bombay Act II of 1884).

[R., 19 A. 493 (496) ; 7 O.C. 51 (55).]

SECOND appeal from the decision of Rao Bahadur N. G. Phadke, Joint First Class Subordinate Judge, A. P., of Sholapur, in appeal No. 97 of 1892.

In 1891 the Municipality of Sholapur sued to recover from the Sholapur Spinning and Weaving Company, Limited, arrears [733] for the years 1888-89 and 1889-90 of halalkhore and water cesses imposed in the years 1878 and 1882 respectively. The defendant company pleaded (*inter alia*) that the cesses were illegal, as due notices and proclamations had not been published according to law.

The First Class Subordinate Judge at Sholapur dismissed the suit for the following reasons :—

"The defendants contend that at the meetings, where resolutions were passed to levy the bhangi and water cesses, notices were not circulated to *all* the commissioners as required by s. 11. To prove this material irregularity, they required the production of the circulars, and though time was granted again and again, they were not produced by the plaintiffs. The last time their secretary said that they were likely to be with the president (the Collector). Hence the defendants applied to him, but were told that they were not with him (Ex. 41). These papers have been unaccountably kept back, for no reason has been assigned for their non-production. There was not even an allegation of their loss. Under these circumstances, I am at liberty to presume that they have been intentionally kept back, and that the defendant's contention is sound. Thus the imposition of the two cesses becomes illegal, for the Bombay High Court has ruled under s. 11, that notices to *all* the commissioners are necessary (*Joshi Kalidas* v. *The Dakor Town Municipality* (1).

* * * * * *

"Next as regards the bhangi cess. It is also illegal. For it is not in dispute that the defendants have all along employed their own sweepers to remove the nightsoil from their buildings.

"If, therefore, the plaintiffs wished to levy any cess, they should under s. 57 of the Act have issued to the defendants a notice intimating that the duties performed by their (defendants') sweepers would be performed by their (plaintiffs') agents, and after the service of such notice should have claimed a bhangi cess. But nothing of the kind was done. No notice was at all given. * *"

This decree was confirmed, on appeal, by the Joint Subordinate Judge, A. P. His reasons were as follows :—

"A Municipality is an institution which generally entertains a large establishment, and is bound to observe official decency.

"It is simply absurd to urge, in the case of a City Municipality like that of Sholapur, that circulars issued to the commissioners to give them intimation of the intended meetings, consist of simple chits or small pieces of paper. It is no doubt natural that these and like notices and circulars should be on the record of the Municipality. The lower Court has, under the above circumstances, very properly presumed against the plaintiffs and allowed the contention of the defendants.

(1) 7 B. 399.

"The ruling of the High Court in *Joshi Kalidas Sewakram* v. *The Dakor Town Municipality* cited as an authority by the lower Court for finding on the point of legality or otherwise of the imposts in suit, is beyond all doubt in point and holds good in the present case."

From this decision the Municipality preferred a second appeal to the High Court.

[734] *Lowndes* (with Rao Saheb *Vasudev J. Kirtikar*), for the appellants.—From the mere fact that the notices issued by the Municipality ten or fourteen years ago could not be produced at the trial it is a wrong presumption to make that no such notices were given of the meetings at which the two cesses were imposed. In such cases the Court will act on the principle *omnia esse rite acta*. The burden lies on the defendants to prove the informality or irregularity on which they rely. Defendants have not discharged this burden. Nobody comes forward and says that notices were not circulated. In the absence of such evidence the presumption ought to be in favour of a public body like the Municipality—Evidence Act, s. 114, illus. (*e*).

Even supposing that any informality did occur in convening such meetings, it would be cured by s. 27, cl. 17, of Bombay Act II of 1884. section 2 of that Act provides that it should be read with the principal Act, Bombay Act VI of 1873. The amending Act is, therefore, retrospective. As to the necessity of issuing notice under s. 57 of the amending Act, it is in evidence that the Municipality did give the defendants a notice as required by law (see Ex. A). There is no statutable or prescribed form for notice.

Macpherson (with him *Narayan Ganesh Chandavarkar*), for respondents.—The plaintiffs were to prove service of notice on defendants. Exhibit A is a general notice about levying the tax under s. 21. None has been given under s. 57, though the company have employed their own sweepers for a long time. Section 27, cl. 17, of Act II of 1884 is not retrospective. The *onus* was on the plaintiff Municipality to prove beyond all doubt that their proceedings were regular and according to law. No question of presumption arises in this case.

JUDGMENT.

JARDINE, J.—The most important issue determined by Rao Bahadur N. G. Phadke, Joint Subordinate Judge with appellate powers, was, whether the halalkhore tax imposed by the Municipality of Sholapur in 1878 and the water tax imposed in 1882 were illegal and invalid. He held that the decision of this Court in 1883 in *Joshi Kalidas* v. *The Dakor Town Municipality* (1) was beyond all doubt in point, and that all the commissioners **[735]** had not received notice of the meetings to consider whether these taxes should be imposed. It is unnecessary for our decision to determine whether s. 27, cl. 17, of Bombay Act II of 1884 is retrospective, as the contest between the present parties is not as to whether there was *mere informality* in the notices to the commissioners under s. 11 of Bombay Act VI of 1873. The question at issue is, whether the two taxes were imposed without any notice at all to some of the commissioners. In the Dakor case, it was *admitted* that this irregularity had occurred in the convening of the meeting. In the present case there is no such admission;

(1) 7 B. 399.

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nor is there any evidence of such irregularity. The two Courts below have presumed this irregularity to exist merely because the municipal officers were unable to find and produce at the trial the circular or other record of intimation given to the persons who so long ago as 1877 and 1882 were municipal commissioners. We are of opinion that in drawing this presumption, and acting upon it, the lower Courts have fallen into error of law. If the Sholapur Spinning Company had any irregularity to allege, it should have done so by definite statement, *e g.*, that certain commissioners named had not received notice, and the burden of proving such a statement was on the company; as in the absence of evidence or indication to the contrary the presumptions were that the Municipality had used the regular procedure, and that the common course of business had been followed in the particular cases. We must hold, therefore, that the two taxes were legally imposed.

The other question argued was, whether in the absence of the notice to the occupiers under s. 57 of the Act of 1884, whereby the Municipality lets them know that it intends to perform by its agents the duties usually performed by sweepers, the company is liable to pay the halalkhore tax. The language of the section is clear that the liability does not arise until after the notice. On this point we agree with the Courts below.

We, therefore, declare that the Municipality is entitled to the sum levied as water tax and not entitled to that levied as halalkhore tax.

The decree to be in accordance. Each party to pay his own costs throughout.

Decree amended.

20 B. 736.

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[736] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

SHRIMANT SAGAJIRAO KHANDERAV NAIK NIMBALKAR (*Original Plaintiff*), *Appellant v.* S. SMITH, VAKIL (*Original Defendant*), *Respondent.** [12th and 15th August, 1895.]

Civil Procedure Code (Act XIV of 1882), *ss.* 102, 103, 157 *and* 158—*Court Fees Act (VII of* 1870), *s.* 7, *cl.* 4 (*c*) (1), *sch. II, art.* 17, *cl. (iii)* (2)—*Civil Courts' Act Bom. Act (XIV of* 1869), *s.* 26 (3)—*Suits' Valuation Act (VII of* 1887), *s.* 8 (4)—*Limitation Act (XV of* 1877), *ss.* 5, 5*A and* 14—*Suit for a declaration that a decree obtained by defendant against plaintiff was null and void—Valuation for the purposes of Court fees and jurisdiction—Decree for declaration without consequential relief—Adjourned hearing—Dismissal of suit for non-appearance of plaintiff or his pleader—Appeal—Jurisdiction—Delay in presenting appeal—Discretionary power of Court to excuse delay.*

A suit in which the only prayer is to have a decree set aside as null and void is a suit for a declaratory decree without consequential relief; and art. 17, cl. 3, and not s. 7, cl. 4 of the Court Fees Act VII of 1870, is applicable to it.

[737] Section 5A of the Limitation Act (XV of 1877) is, like s. 14, a mandatory section, but does not exclude the discretionary power of the Court, under s. 5, to excuse delay in presenting an appeal.

An order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader is an order under s. 157 and its consequential s. 102, and not under s. 158, of the Civil Procedure Code (Act XIV of 1882), and is appealable.

[**Diss.**, 6 Ind. Cas 233; **N.F.**, 34 M. 97=(1910) M.W.N. 213=20 M.L J. 535=8 M. L.T. 60; 2 L.B.R. 266; **F.**, 30 C. 788 (790)=34 C. 235=5 C.L.J. 260; 32 M. 241=5 Ind. Cas. 23=19 M.L J. 760=7 M.L.T. 369; 9 Ind. Cas. 673=1 P.R. 1911=47 P.L.R. 1911=22 P.W.R. 1911; **Rel.**, 6 Ind. Cas. 851=3 S.L.R. 208; **R.**, 5 O.C. 294 (297); 121 P.R. 1907=51 P.W.R. 1907; 22 T.L.R. 262; **D.**, 6 C.L J. 427=11 C.W.N. 705.]

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* Appeal No. 9 of 1895.

(1) Section 7, cl. iv (*c*) of the Court Fees Act (VII of 1870):—

7. *Computation of fees payable in certain suits.*—The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—

I. . . .
II. . . .
III. . . .
IV. In suits . . .
(*a*) . . .
(*b*) . . .

(*c*) *For a declaratory decree and consequential relief.*—To obtain a declaratory decree or order, where consequential relief is prayed.

According to the amount at which relief sought is valued in the plaint or memorandum of appeal.

(2) Article 17, cl. (iii), sch. II of the Court Fees Act (VII of 1870):—

17. Plaint or memorandum of appeal in each of the following suits:—

I. . . .
II. . . .

III. To obtain a declaratory decree where no consequential relief is prayed..... Ten rupees, (proper fee).

(3) Section 26 of the Civil Courts' Act (Bom. Act XIV of 1869):—

26. In all suits decided by a Subordinate Judge of the First Class in the exercise of his ordinary and special original jurisdiction, of which the amount or value of the subject-matter exceeds 5,000 rupees, the appeal from his decision shall be direct to the High Court.

(4) Section 8 of the Suits' Valuation Act (VII of 1887):—

8. Where in suits other than those referred to in the Court Fees Act, 1870, s. 7, paragraphs V, VI, IX, and paragraph X, cl. (*d*), Court fees are payable *ad valorem* under the Court Fees Act, 1870, the value as determinable for the computation of Court fees and the value for the purposes of jurisdiction shall be the same.

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APPEAL from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Poona.

The plaintiff sued for a declaration that a decree for Rs. 7,287-11-4 obtained against him by the defendant in a former suit in the Court of the First Class Subordinate Judge of Poona was null and void. For purposes of Court fees payable on a plaint for a declaratory decree under the Court Fees Act (VII of 1870), sch. II, art. 17, cl. (iii), the plaintiff paid a Court-fee stamp of Rs. 10 on the plaint, which, if the *ad-valorem* scale of 7½ per cent. be applied to it, would give Rs. 130 as the computed value of the claim.

On the application of the defendant during the pendency of the suit, the Court fixed the 23rd February, 1894, for the hearing and for the examination of the plaintiff and one of his witnesses in Court. On the day appointed, the plaintiff's pleader sent an intimation to the Court that he was unwell. The hearing was thereupon adjourned till the 27th February. On that day the case was postponed by consent of pleaders of both parties till the 7th March, on the understanding that the adjournment was to be final. On the 7th March the plaintiff's pleader sent a fresh note stating his inability to attend the Court on account of his illness, and the plaintiff also did not appear in Court, he too being then ill, as he subsequently informed the Court.

The Judge (Rao Bahadur Chunilal) dismissed the suit for default of plaintiff's appearance. The order of dismissal was recorded in the following terms :—

"Neither the plaintiff nor his pleaders are present. The defendant and his pleaders are present. When the case was put before the Court on the 27th February, it was distinctly told to the plaintiff's pleader that no adjournment would be granted, and yet the pleaders and the plaintiff are absent. The plaintiff had himself to be present to-day to give evidence. The plaintiff had two pleaders. One of them * * intimates that he is ill. The other pleader is not present. Suit dismissed for non-appearance of the plaintiff or his pleader. Defendant's costs on plaintiff."

[738] On the 9th April, 1894, the plaintiff applied for the restoration of the suit to the file, but the then Judge on the 27th June, 1894, rejected the application. The following is an extract from his judgment:—

"Exhibit 15 is the copy of the order of dismissal passed. The order does not state under what section of the Civil Procedure Code it was passed. I must, therefore, apply the section which is applicable.

"This application purports to have been made under ss. 157 and 103 of the Civil Procedure Code (Act XIV of 1882) and the applicant wants the suit to be restored to file. I think these sections are not applicable here. The section applicable is 158 * * * . There can be no doubt that it (suit) was dismissed under s. 158. When an order is passed under s. 158, the matter cannot be revised by such an application as the present one * * . I think that the order of dismissal passed on the 7th March, 1894, by Rao Bahadur Chunilal must be held to be a decree (I.L.R., 16 Bom. 23)."

On 23rd August, 1894, the plaintiff applied to the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling on the defendant to show cause why the order passed by the Judge should not be set aside and the suit restored to the file. The rule was argued before Sargent, C.J., and Fulton, J., who discharged it on the 15th January, 1895, holding that the Judge's order of dismissal was passed under s. 103 and

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not under s. 158, and was, therefore, under s. 588 of the Civil Procedure Code (Act XIV of 1882), appealable.

The plaintiff then applied under s. 5 of the Limitation Act (XV of 1877) for admission of the appeal notwithstanding the delay. The delay having been excused by Fulton, J., subject to any objection that might be taken by the defendant at the hearing, the appeal came up for admission before Parsons, J., who dismissed it on the ground that an appeal ought to have been preferred against the decree passed under s. 158 of the Civil Procedure Code. The plaintiff presented an appeal from that order of dismissal under the Amended Letters Patent, 1865 (24 and 25 Vict., chap. 104), and the Court (Sargent, C. J., and Bayley, J.) reversing the order passed by Parsons, J., admitted the appeal and directed notice thereof to be issued to the defendant.

At the hearing the respondent raised a preliminary objection that the High Court had no jurisdiction to entertain the appeal.

[739] *Mahadeo B. Chaubal*, for the respondent (defendant).—The amount of the decree which we obtained against the plaintiff in the former suit was more than Rs. 5,000. Hence the claim was cognizable by the Court of the First Class Subordinate Judge at Poona and an appeal against his decree lay direct to the High Court. But in the present suit the plaintiff, though he seeks to have a declaration that the decree is null and void, has valued the relief which he claims at Rs. 130 only. When a claim is for an amount which is less than Rs. 5,000, an appeal does not lie direct to the High Court according to s. 26 of the Civil Courts' Act (XIV of 1869). In such cases the appeal lies to the District Court—*Gulabsingji* v. *Lakshmansingji* (1); *Bai Varunda Lakshmi* v. *Bai Manegavri* (2); *Sangapa* v. *Shivbasava* (3); *Baji Balvant* v. *Raghunath Vitthal* (4). The High Court has, therefore, no jurisdiction to entertain the present appeal. See also s. 8 of the Suits' Valuation Act (VII of 1887), s. 39 of the Specific Relief Act (I of 1877). The plaint asks practically for cancellation of the decree, and the cancellation itself is consequential relief, which the plaintiff has in the present case valued at Rs. 130. It has been held that when a plaintiff asks for a declaration with respect to a document, the suit relates to a substantial relief—*Fukeerchand* v. *Thakoor Singh* (5); *Tacoordeen* v. *Nawab Syed Ali Hosein Khan* (6); and *Narain Putter* v. *Aya Putter* (7).

Vicaji (with *Gangaram B. Rele*), for the appellant (plaintiff).—Rs. 130 is distinctly stated in the plaint to be a mere computed value of the claim at 7½ per cent. payable on the *ad valorem* scale on plaints generally; but Rs. 7,005 is the amount which strictly determines in this case the pecuniary jurisdiction of the Court. All that we seek to obtain is a purely declaratory decree, or a decree without consequential relief of any kind, and hence we have paid a Court-fee stamp of Rs. 10 on the plaint. Article 17, cl. iii, sch. II, of the Court Fees Act has laid down that sum as a fixed Court fee for plaints or appeals in all such suits. **[740]** In reality, therefore, our claim is to have the decree declared void; and the amount of it being more than Rs. 5,000, the appeal lies direct to this Court.

[JARDINE, J., referred to s. 8 of the Suits' Valuation Act.]

We submit that that section is not applicable to the present case, but to cases in which the appeal lies to the District Court. It relates to cases

(1) 18 B. 100. (2) 18 B. 207. (3) P.J. (1889), p. 98. (4) P.J. (1876), p. 142.
(5) 15 W.R. 421. (6) 21 W.R. 340. (7) 7 M.H.C.R. 372.

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in which the Court-fee is to be paid *ad valorem* according to the Court Fees Act, while for cases like the present the Court Fees Act has laid down the fixed fee of ten rupees.

The cases cited for the respondent are not in point, as some of them are in respect of suits for accounts or other consequential relief. The other cases relate simply to the plaintiff's *status* by adoption, and are clearly distinguishable from the present case.

Section 39 of the Specific Relief Act applies to instruments other than decrees. Counsel also cited s. 42 of the Specific Relief Act; Daniell's Chancery Practice, pages 817, 818; *Nilmony Mookhopadhya* v. *Aimunissa Bibee* (1); *The Earl of Bandon* v. *Henry Becher* (2); *Dhuronidhur Sen* v. *The Agra Bank* (3); *Flower* v. *Lloyd* (4).

[JARDINE, J., referred to *Patch* v. *Ward* (5).]

Mahadeo B. Chaubal, in reply.—Even if the prayer be merely to avoid the decree, the Court will still have to take some sort of action in the matter, and any such act would itself be a consequential relief. A mere declaration would give no relief by itself. The Court would have to cancel the decree—Seton on Judgments, p. 148. In the present case the property of the defendant was actually attached under the decree, and, therefore, a suit for a mere declaration without consequential relief cannot lie.

Cur. adv. vult.

1895, *August* 12. JARDINE, J.—The plaintiff valued the relief he sought at Rs. 130. Under Act XIV of 1869, s. 26, the present appeal would lie to the District Court, and not to the **[741]** High Court, unless the value or amount of the subject-matter exceeds Rs. 5,000. The plaintiff has computed the Court fees on the amount of Rs. 130.

It is conceded that if s. 8 of Act VII of 1887 applies, the appeal lies to the District Court. Section 8 applies to suits under s. 7, cl. 4 (*c*), of the Court Fees' Act, 1870, to obtain a declaratory decree or order where consequential relief is prayed. The contention of the appellant is that no consequential relief is prayed; and so the suit is one described in art. 17, cl. 3, of the sch. II. To such a suit s. 8 of Act VII of 1887 does not apply.

Although the plaint recites that the plaintiff has come to know of the existence of the decree in the course of proceedings against him in execution, the only prayer is that the decree may be declared null and void. The suit thus differs from the second suit supposed in *Monohar* v. *Bawa Ramcharandas* (6) and from *Gulabsingji* v. *Lakshmansingji* (7) and *Ram Prasad* v. *Sukh Dai* (8), suits about accounts where consequential relief was claimed in the plaint.

It was mooted that in the present case the relief asked for was the cancelling of a fraudulent decree, and that this was consequential relief. But in *Karam Khan* v. *Daryai Singh* (9) a Full Bench held the contrary, even though cancelling of a deed was prayed for. *Sankara* v. *Vijaya* (10) is also based on the view that consequential relief is not prayed for in a suit like the present. The last case is opposed to *Narain* v. *Aya* (11) which is in accordance with the interpretation of the Privy Council decision in *Tacoordeen* v. *Nawab Syed Ali Hosein Khan* (12) stated by

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(1) 12 C. 156. (2) 3 Cl. & F. 479. (3) 5 C. 86.
(4) 10 Ch. Div. 327, (328). (5) L R. 3 Ch. 203. (6) 2 B. 219.
(7) 18 B. 100. (8) 2 A. 720. (9) 5 A. 331.
(10) 7 M. 134. (11) 7 M.H.C. R. 372. (12) 21 W.R. 340.

Couch, C.J., in *Joy Narain* v. *Grish Chunder* (1) that "where a plaintiff asks to have a deed or will set aside, there is a prayer for substantial relief." This view is stated as to the particular suit in *Ahmed* v. *Thomas* (2), where, however, there was a general prayer. The Allahabad Full Bench in *Karam Khan* v. *Daryai Singh* notice that the **[742]** Privy Council judgment was passed before s. 39 of the Specific Relief Act was passed. In *Ahmed* v. *Thomas* the question was not about any deed or decree, but the suit was to have it declared that the property attached by a creditor belonged not to the judgment-debtor, but to the plaintiff. The Judges there differ from *Dhondo* v. *Govind* (3), which follows *Parvati* v. *Kisan Singh* (4), and not *Ganpatgir* v. *Ganpatgir* (5). *Parvati* v. *Kisan Singh* is based on *Dayachand* v. *Hemchand* (6), a Full Bench case. These cases, however, deal more with the effect of the proviso in s. 42 of the Specific Relief Act, and with the mode of interpreting a fiscal enactment, than with the point before us.

Having reviewed the decisions we would observe that some of them are based upon ascertained facts, the learned Judges being in a position to say what the real claim was. In the present case the Court knows nothing except what the plaint says. The suit is analogous to one under s. 39 of the Specific Relief Act (I of 1877) merely to have the decree adjudged void; leaving it to the Subordinate Judge to do what he likes with his decree if he so adjudges it void. The Court has not such knowledge of the facts as to enable it at this stage to say whether there is a case to which the proviso in s. 42 of the Act applies or whether the case is like *Ganpatgir* v. *Ganpatgir* or the cases about rescission of deeds. There have been cases like *Patch* v. *Ward* (7), where the bill was filed to set aside a deed of foreclosure and also to redeem the mortgage, or where other relief may have been prayed, for the relief may be very various. It may be that a mere declaration will effect all that the plaintiff wants; and that this will lead to the execution-proceedings against him being dropped. The Court cannot assume that he is out of possession.

We hold, therefore, that the case is not one coming within the words of s. 7, cl. 4 (*c*).

The appeal then came on for further hearing.

Mahadeo B. Chaubal.—We contend that the appeal is time-barred. The application for the restoration of the suit to the file was rejected on the 27th June, 1894. The usual time to file an **[743]** appeal under the High Court rules is ninety days. Therefore the time to file the appeal expired somewhere in September or October, 1894, after deducting the time spent in obtaining copies. But the appeal was presented on the 16th January, 1895. It is, therefore, time-barred. It may be contended that under the provisions of the Limitation Act the time spent in the matter of the application under the extraordinary jurisdiction should also be deducted in computing the period of limitation. But s. 5-A of the Limitation Act extends the time only when the appellant or applicant is misled by any order or practice or judgment of the High Court of the presidency, province or district. In the present case the order which misled the plaintiff was the order of the First Class Subordinate Judge and not of the High Court. Therefore, under s. 5-A the time cannot be extended. The section is mandatory.

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(1) 22 W.R. 438. (2) 13 C. 162. (3) 9 B. 20. (4) P.J. (1881), p. 121
(5) 3 B. 230. (6) 4 B. 515. (7) L. R. 3 Ch. D. 203.

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Vicaji (with *Gangaram B. Rele*).—If the interpretation sought to be put on s. 5-A of the Limitation Act was correct, then it would become almost inoperative. That section must be read with s. 5 in order to give effect to the intention which the Act contemplates—*Balwant* v. *Gumani* (1).

We submit that we have been prejudiced by the order of the Judge refusing to consider our application on the merits. If the application had been entertained, we would have shown sufficient grounds for the restoration of the suit to the file.

JUDGMENT.

1895, *August* 15. JARDINE, J.—Section 5-A is mandatory like s. 14. But it does not exclude the discretionary power of the Court under s. 5. We adopt the reasoning of the learned Judges in *Balwant* v. *Gumani* (1). The facts of the present are also on all fours with those in that case. We think the delay was rightly excused.

We are in accord with the Bench—Sargent, C.J., and Bayley, J., —who decided the appeal No. 12 of 1895, under the Letters Patent, that the order of the 7th March, 1894, which purports to dismiss the suit for non-appearance, was an order made under s. 157. The case had been adjourned till the 7th March, 1894, at the motion of the plaintiff and with the consent of the defendant, **[744]** in order that the plaintiff should tender some evidence. If he had put in any appearance in person or by pleader, his default in producing the evidence might have been a reason for a decision under s. 158. But as he did not appear, we think the most appropriate section to which the order must be referred is s. 157, and its consequential s. 102. The Court below is, therefore, wrong in treating the order as made under s. 158 and in refusing to consider on its merits the application made by the plaintiff under s. 103.

We, therefore, set aside the order of the Subordinate Judge of the First Class, and direct him to hear the application. The respondent to pay the costs of this appeal.

Order set aside.

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20 B. 744.

APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

CHATURBHAI KARSAN AND OTHERS, MANAGERS OF THE SHOP OF KARSAN NAGJI (*Original Plaintiffs*), *Appellants v.* HARBHAMJI HARISANGJI (*Original Defendant*) *Respondent.** [19th August, 1895.]

Mortgage—Suit by mortgagee on mortgage—Interest allowed at mortgage rate up to decree—Transfer of Property Act (IV of 1882), ss. 86 and 88.

In a suit by a mortgagee to recover the money due on his mortgage, the plaintiff is entitled to interest at the rate specified in the mortgage-deed up to date of decree, and a Civil Court has no discretion to refuse to award such interest.

[R., 22 B. 107 (109).**]**

APPEAL from the decision of Rao Bahadur Lalshankar Umiashankar, First Class Subordinate Judge of Ahmedabad.

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* Appeal No. 71 of 1894.

(1) 5 A. 591.

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The plaintiffs sued to recover the amount due on a mortgage executed by the defendant on the 23rd July, 1883.

The Subordinate Judge passed a decree for the plaintiff for Rs. 10,223, but allowed interest only up to the date of filing the suit.

The plaintiffs appealed.

Govardhanram M. Tripathi, for the appellants (plaintiffs).—We are entitled to interest at the mortgage rate up to the date **[745]** of the decree—Transfer of Property Act (IV of 1882), ss. 86 and 88; *Surya Narayan Singh* v. *Jogendra Narain Roy* (1); *Bikramjit Tewari* v. *Durga Dyal Tewari* (2).

There was no appearance for the respondent (defendant).

JUDGMENT.

FARRAN, C. J.—The general rule is that a plaintiff is entitled to interest in accordance with the terms of the mortgage bond up to date of decree, and that a Civil Court has not a discretion vested in it to refuse to award such interest. That rule appears to be recognized in the Transfer of Property Act, ss. 86 and 88. We must, therefore, vary the decree of the lower Court by directing interest to be awarded up to date of decree. That will make the total sum payable Rs. 10,717-10-0, instead of Rs. 10,223-8-0, which was the sum awarded by the lower Court. The appellants must have their costs of appeal. The six months' time for payment will run from the date of this decree.

Decree varied.

20 B. 745.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

MOTIRAM RAGHUNATH, DECEASED, BY HIS HEIRS AND SONS GULAB-CHAND AND OTHERS (*Plaintiffs and Decree-holders*) v. BHIVRAJ VALAD KHEVRAJ (*Defendant and Judgment-debtor*).*

[15th August, 1895.]

Civil Procedure Code (Act XIV of 1882), s. 307—Vacation—Holiday—Days on which the office is open—Office day—Payment of purchase-money for property bought at Court-sale.

The time during which a Court is closed for the vacation is not a holiday within the meaning of s. 307 (3) of the Civil Procedure Code (Act XIV of 1882). Days on which the office is open and the purchase-money for property brought at a Court sale could have been paid are office days.

[R. 2 Bom. L.R. 1901 (1904).]

[746] REFERENCE by Rao Saheb V. D. Joglekar, Subordinate Judge of Kade in the Ahmednagar District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

* Civil Reference No. 13 of 1895.

(1) 20 C. 360 (366.)

(2) 21 C. 274.

(3) Section 307.—The full amount of purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day; or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

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The reference was made in the following terms :—

"Certain immoveable property was set up for sale in darkhast No. 386 of 1894. One Ratanchand valad Javanmal Marwadi purchased it on 19th April, 1895, for Rs. 107 and paid duly a deposit of Rs. 26-12-0 as required by s. 306 of the Code of Civil Procedure. The full amount of the purchase-money was paid on 3rd June, 1895, instead of on the fifteenth day after the date of the sale as required by s. 307. The Courts in the district were closed for annual vacation from 23rd April to 2nd June, both days inclusive. The purchaser contends that the Court was closed when the money became payable, and so he paid on the first day when the Court was opened.

"Now the question to be determined in the case is whether the annual vacation to the Court can be considered as a *holiday* under s. 307 of the Code of Civil Procedure."

The opinion of the Judge was in the negative.

OPINION.

PARSONS, J.—We agree with the Subordinate Judge that the time during which a Court is closed for the vacation is not a hoilday within the meaning of s. 307, Code of Civil Procedure. Days on which the office is open and the purchase-money could have been paid are office days.

Order accordingly.

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20 B. 747.

[747] APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

BHAU BIN BALI PATIL (*Original Plaintiff*), *Appellant v.* HARI BIN VITHU, DECEASED, BY HIS SON AND HEIR NARAYAN (*Original Defendant*), *Respondent.** [20th August, 1895.]

Land Revenue Code (Bom. Act V of 1879), ss. 81 and 153 (1)—Default in paying assessment—Payment of assessment by another—Order of Collector transferring lands into name of person paying assessment—Forfeiture—Subsequent suit by defaulter to recover the land—Jurisdiction of Civil Court—Act X of 1876, ss. 4 (c) and 5 (b).

An order made by a Collector removing A.'s lands from his khata and transferring them to B.'s khata, on the ground that A. had allowed the assessment thereof to fall into arrears and that B. had paid the assessment, does not by itself amount to forfeiture of A.'s interest in the lands.

* Second Appeal No. 225 of 1894.

(1) 81. If it shall appear to the Collector that a registered occupant has failed to pay land revenue, and has thus incurred forfeiture with a view to injure or defraud his co-occupants or other persons interested in the continuation of the occupancy, or that a sale of the occupancy will operate unfairly to the prejudice of such co occupants or other persons, it shall be lawful for him, instead of selling the occupancy, to forfeit only the said registered occupant's interest in the same and substitute the name of any such co-occupant or other person as registered occupant thereof in the revenue records, on his payment of all sums due on account of the land revenue for the occupancy; and such person so becoming the registered occupant shall have the rights and remedies with respect to all other persons in occupation provided for by s. 86.

153. The Collector may declare the occupancy or alienated holding in respect of which an arrear of land revenue is due, to be forfeited to Government, and sell or otherwise dispose of the same under the provisions of ss. 56 and 57, and credit the proceeds, if any, to the defaulter's accounts.

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A suit by A. to recover such land from B. being simply a suit between private parties for the purpose of establishing a private right, s. 4 (*c*) of Act X of 1876 does not bar the jurisdiction of the Civil Court.

[R., 24 B. 34 (36, 37).]

SECOND APPEAL from the decision of T. Hamilton, District Judge of Sholapur, reversing the decree of Rao Babadur K. N. Kher, First Class Subordinate Judge.

The plaintiff sued in the year 1891 to recover from the defendant certain lands, alleging that they formed part of his *patelki vatan*, and that in 1882-83, while he was a minor, the defendant had wrongfully taken possession of them, as the plaintiff's mother was unable to cultivate them and pay the assessment, and that the defendant had ever since remained in wrongful possession.

The defendant alleged that the assessment of the lands having fallen into arrear, the Collector sold them by auction; that [748] his (the defendant's) father paid the arrears of assessment, and the Collector in 1876-77 had made over the lands to him as owner, and that he had ever since then been in possession. He contended that the claim was barred by limitation.

The Subordinate Judge found that the lands had not been purchased by the defendant at a revenue sale as alleged by him, that the assessment of the lands having fallen into arrears in 1881-82, the defendant agreed to pay it and the lands were transferred to his name; that as there was no declaration by the Collector as required by s. 153 of the Land Revenue Code (Bom. Act V of 1879), there was no forfeiture of the lands to Government, and that the plaintiff consequently had not lost his rights unless time-barred. He held that the claim was within time, the suit being within twelve years of the defendant's adverse possession. He, therefore, allowed the claim.

On appeal by the defendant, the Judge reversed the decree, holding that the Collector must have taken action under s. 81 of the Land Revenue Code, and that the transfer of the land to the defendant's name was proof that the Collector had forfeited the lands.

The plaintiff preferred a second appeal.

Gangaram B. Rele, for the appellant (plaintiff).—Section 80 of the Land Revenue Code is applicable to the case. Section 81 is not applicable. It refers to injury to other co-occupants. There is neither allegation nor evidence of any such injury in the case. Further, s. 81 contemplates forfeiture, and there is no evidence of forfeiture. Mere transfer of the khata to the defendant's name cannot operate as forfeiture, because forfeiture must precede all other proceedings—*Dasharatha* v. *Nyahalchand* (1).

Mahadeo B. Chaubal, for the respondent (defendant).—Section 4 (*c*) of the Revenue Jurisdiction Act (X of 1876) is a bar to the present suit. Civil Courts are debarred from exercising jurisdiction in matters relating to the realization of land revenue.

[PARSONS, J.—But the present suit is not one for the realization of land revenue. It is a suit between private persons to [749] recover possession of lands. Therefore, s. 4 (*c*) of the Revenue Jurisdiction Act is not applicable.]

(1) 16 B. 134 (136).

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Next we contend that the plaintiff is not entitled to succeed, because his case was that we had wrongfully dispossessed him, but no wrongful dispossession is proved. The Judge found that we got possession, because the Collector gave it to us. The case of the plaintiff has, therefore, failed.

Section 80 of the Land Revenue Code is not applicable, because it does not empower the Collector to transfer the lands. The Collector must have acted under ss. 56 and 57 of the Land Revenue Code. We submit that s. 81 is applicable, because it provides for the substitution of the name of any other co-occupant. The defendant is a co-occupant with the plaintiff. The Judge has found that he is a *bhauband* of the plaintiff. The plaintiff ought to have sought redress under s. 214 (*c*) of the Land Revenue Code.

JUDGMENT.

CANDY, J.—The plaintiff Bhau bin Bali stated in his plaint that during his minority in 1882-83 the deceased defendant Hari had wrongfully taken possession of his lands, portion of the *patelki* inam land, his mother being at that time unable to cultivate them and pay the *judi*.

Defendant, Hari's son, replied that as the *judi* was in arrear, the lands were sold by auction in 1876-77, and Hari purchased and took possession of the same. Both parties overstated their case. Defendant, called as a witness by plaintiff, admitted that the lands were never sold by the revenue authorities. Plaintiff, called as a witness by defendant, admitted that the lands had been taken over by Hari, who paid the *judi* which was in arrear.

Extracts from the revenue records, which were put in evidence in the Subordinate Court and in the District Court on appeal, show that this took place in 1882. No section of the Land Revenue Code was apparently quoted in the orders then given, but it was simply directed that as Bhau had not paid the *judi*, but the Bhauband Hari was willing to pay the same, there was no objection to transfer the khata to Hari's name.

The Subordinate Judge held that as there was no declaration by the Collector, as required by s. 153 of the Land Revenue [750] Code, of the forfeiture of the lands to Government, there was no forfeiture—*Dasharatha* v. *Nyahalchand* (1)—and thus plaintiff's suit being brought within twelve years from the commencement of Hari's possession the claim was not time-barred.

The District Judge held, in appeal, that the Collector must have taken action under s. 81 of the Land Revenue Code, and that in that case the rights of the defaulter were extinguished, and so Hari became owner of the lands in 1882.

Plaintiff has now made a second appeal to this Court, urging that there was no forfeiture or extinguishment of his rights in 1882.

Mr. Chaubal for respondent has raised the preliminary objection that the jurisdiction of the Civil Court is barred under s. 4 (*c*) of Act X of 1876, which provides that no Civil Court shall exercise jurisdiction as to "claims connected with or arising out of any proceedings for the realization of land revenue or the rendering of assistance by Government or any officer duly authorized in that behalf, to superior holders or occupants for the recovery of their dues from inferior holders or tenants; claims to set aside on account of irregularity, mistake or any other ground except fraud, sales for arrears of land revenue."

(1) 16 B. 134 (136).

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We are of opinion that this objection is not good. This is simply a suit between private parties for the purpose of establishing a private right (s. 5 (*b*) of Act X of 1876). As will be presently shown, no proceedings were taken for the realization of the land revenue. Further, it is evident that no proceedings could have been taken by the Collector under s. 81 of the Land Revenue Code, for that section is part of chap. VI of the Land Revenue Code, which treats "of the occupation of unalienated lands and the rights of occupants" (*viz.*, holders of unalienated land). The land in suit in 1882 was *patelki* inam paying *judi* to Government, that is, the rights of Government to payment of the rent or land-revenue were transferred partially to the ownership of the watandar. Section 81 relates to "registered occupants" and "occupancies" which do not include holders of alienated lands. It is thus clear that the Collector [751] could not have taken action under s. 81 of the Land Revenue Code; and it is unnecessary to determine the question whether action taken under that section entirely extinguishes the rights of the previous registered occupant

Section 56 relates to arrears of land revenue due on account of land by any land-holder, failure in payment of which shall make the occupancy *or alienated holding* liable to forfeiture, whereupon the Collector may levy all sums in arrear by sale of the occupancy or alienated holding free from all incumbrances or may otherwise dispose of such occupancy or alienated holding under rules or orders under s. 214, and by s. 57 in the event of such forfeiture the Collector can take immediate possession of the land and dispose of the same by placing it in the possession of the purchaser, or other person entitled to hold it. In the present case there is nothing to show that the Collector declared any forfeiture or took possession of the land. All that appears is that the plaintiff's mother and guardian failed to pay the *judi* or cultivate the land. Hari thereupon took possession and paid the arrears of *judi*. The Collector directed that there was no objection to take the *judi* from Hari and enter the land in Hari's khata. If it were necessary to determine the section or sections of the Land Revenue Code (Bombay Act V of 1879) under which the Collector must be taken to have acted, then a reference might be made to s. 137, which provides that land revenue may be recovered from the co-sharer of alienated land, and to s. 37 which empowers the Collector to dispose of lands subject to the rights of individuals legally subsisting. It is not clear under which (if any) of the rules under ss. 56 and 214 the action of the revenue authorities may be said to have been taken. These rules are Nos. 58—64, pp. 30 to 33, in the General Rules of the Revenue Department. Rule 59 relates to forfeited alienated holdings, and provides that the Collector *shall* cause the land comprised in any forfeited alienated holding to be entered in the records as unoccupied unalienated land, and may dispose of it in accordance with the rules and orders in force relating to land of that description. It is evident, from the facts in this case, that no action was taken under that rule. It is not pretended that the land was entered in the records as [752] unoccupied unalienated land. All that was apparently done was to take the arrear of land revenue from a co-sharer (bhauband) of the holder, and to enter the lands in the khata of the said co-sharer. We can find no authority for holding that in such a case the previous holder's rights are extinguished.

We, therefore, reverse the decree of the District Judge and restore that of the Subordinate Judge, but vary it to this extent that plaintiff is bound in equity before he can recover possession to repay defendant the Rs. 12 which Hari paid for *judi* on the land. Parties to bear their own costs in

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the Subordinate Court. All the rest of the costs to be borne by defendant.

PARSONS, J.—I concur. The evidence on the record does not show under what provision of law the revenue authorities professed to act when they transferred the land to the defendant's name in 1832, neither does it show that the land or the plaintiff's interest in it was ever forfeited. Had there been a suggestion that any evidence was forthcoming to prove a forfeiture, I should have been inclined to remand the case, seeing that no issues were framed by the District Judge. The defendant, however, was allowed to produce evidence in the lower appellate Court, and I presume that he produced all that was available. Whether the revenue authorities acted under s. 81 of the Bombay Land Revenue Code, as the District Judge thinks they did, or whether, as is more probable, they did what they thought just and right in the circumstances of the case so that the land should not be entirely lost to the plaintiff, the result is the same; the plaintiff's interest in the land has never been forfeited, and, therefore, still subsists. The defendant, in my opinion, holds a somewhat analogous position to that of a sharer who has redeemed a mortgage and thus obtained possession. See *Ramchandra* v. *Sadashiv*(1); *Faki Abas* v. *Faki Nurudin* (2). On repaying the money the defendant has paid for him, the plaintiff can, I think, be allowed to recover the possession of what is still his own land.

Decree reversed.

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20 B. 753.

[753] APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

GOVIND VALAD LAKSHMAN LOHAR (*Original Plaintiff*), *Appellant v.* VITHAL VALAD DADA SUTAR AND ANOTHER (*Original Defendants*), *Respondents.** [26th August, 1895.]

Second appeal—Finding of fact—Finding of lower Court based on misconception of evidence—Practice—Procedure—Suit for possession—Issues to be raised.

The finding on an issue of a lower appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it.

In a suit to recover possession based on a deed of sale,

Held, that the Court should have raised issues as to ownership and possession, as even if the sale-deed were not proved, the plaintiff might have been able to substantiate a title independently of it.

[R., 13 Ind. Cas. 629; 4 N.L.R. 20 (25); D., 4 C.L.J. 198 (202).]

SECOND APPEAL from the decision of A. H. Unwin, District Judge of Nasik.

The plaintiff sued to recover possession of a piece of ground alleging that it was his ancestral property, having been purchased by his father from one Malhari Narayan Kulkarni under a deed of sale in the year 1856, and that the defendants took wrongful possession thereof in August, 1891.

The defendants denied that the land was the plaintiff's, and pleaded that in the year 1891 the plaintiff had sued the first defendant for possession in the Court of the Mamlatdar of Malegaon, and that the Mamlatdar

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* Second Appeal No. 83 of 1894.

(1) 11 B. 422 (424). (2) 16 B. 191.

had dismissed the suit and allowed the first defendant to remain in possession.

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One of the reasons assigned by the Mamlatdar for dismissing the plaintiff's claim was that the deed of sale to his father being unstamped was inadmissible in evidence.

At the hearing of the present suit the Subordinate Judge sent for the proceedings before the Mamlatdar and found that the deed of sale (Ex. 34) set up by the plaintiff did not need to be stamped ; that it was satisfactorily proved by witnesses; and that the plaintiff's exclusive title to the land was established. He, therefore, allowed the plaintiff's claim.

On appeal by the defendants the Judge reversed the decree. The following is an extract from his judgment :—

[754] " Has the document (Ex. 34) been rightly held proved ?

" I find in the negative.

" The plaint was filed on the 12th February, 1892, but is wholly silent about this or any other muniment of title. The document was not produced in Court till the 1st June following, and never before does it appear to have seen the light of day in any Court, or to have been inspected by any public functionary. After some personal experience of ancient records, I do not hesitate to say that this document is a clumsy, impudent forgery."

The plaintiff preferred a second appeal.

Shamrao Vithal, for the appellant (plaintiff).—The finding of the lower Court on the issue raised cannot be accepted. The Judge has fallen into an error in supposing that the sale-deed was first produced by us in June, 1892. It was produced by us in the possessory suit before the Mamlatdar, who refused to allow it in evidence, because it was not stamped. In his judgment the Judge has remarked that the deed had never seen the light. This is wrong. Witness No. 22 has attested the deed. The vendor's nephew was examined and he proved the vendor's signature. The Judge has misconceived the evidence in the case, and a finding based on a misconception of evidence cannot be accepted as a legal finding.

Daji A. Khare, for the respondents (defendants).—The Judge has found the deed to be a clumsy forgery. This is a finding of fact. It does not appear from the sale-deed that it was produced before the Mamlatdar. We are in possession, and before the plaintiff can eject us, he must prove his title, which according to the finding of the Judge he has failed to do.

JUDGMENT.

FARRAN, C.J.—The Judge raised only one issue and decided the appeal upon it. His finding on the issue is objected to on the ground that he is wrong in saying that the deed of sale relied on by the plaintiff had never seen the light of day in any Court before the 1st of June, 1892, and that no living being speaks for it. The objection seems well-founded, because the Subordinate Judge says that the deed was produced before the Mamlatdar in 1891, and we find that a witness (Ex. 22) swears to execution of the deed by Malhar and to his having attested it. This misconception of the evidence prevents our accepting the Judge's finding as a legal finding on the issue raised.

[755] We think also that the Judge should have raised issues as to the ownership and possession both of the plaintiff's vendor and the plaintiff, since even if the deed were not proved, the plaintiff might

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be able to substantiate a title independently of it, and, on the other hand, if the deed were proved, it would not necessarily establish the title either of his vendor or of himself.

We reverse the decree and remand the appeal for a fresh decision on the merits. Costs to be costs in the cause.

Decree reversed and case sent back.

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20 B. 755.

APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

SINDHA SHRI GANPATSINGJI HIMATSINGJI (*Original Defendant*), *Appellant v.* ABRAHAM *alias* VAJIR MAHOMED AKUJI (*Original Plaintiff*), *Respondent.** [2nd September, 1895.]

Contract Act (IX of 1872), ss. 2 (d), 25—Services rendered during the defendant's minority at his desire and continued at his request after his majority—Agreement to compensate for services—Consideration—Annuity.

Services rendered at the desire of the minor expressed during his minority and continued at the same request after his majority form a good consideration for a subsequent express promise by him in favour of the person who rendered the services. By s. 2 (*d*) of the Contract Act, services already rendered at the desire of the promisor are placed on the same footing with such services to be rendered, and constitute a good consideration for a definite agreement.

Cases where a person without the knowledge of the promisor or otherwise than at his request does the latter some service and the promisor undertakes to compensate him for it, are covered by s. 25 of the Contract Act (IX of 1872); in them the promise does not need a consideration to support it.

[F., 25 Ind. Cas. 726=27 M.L.J. 249=16 M.L.T. 194=(1914) M.W.N. 706; R., 33 M. 312=4 Ind. Cas. 383=19 M.L.J. 752=7 M.L.T. 233; 11 Ind. Cas. 321=31 P.R. 1911=192 P.L.R. 1911.]

SECOND appeal from the decision of R. S. Tipnis, Assistant Judge, F. P., of Surat at Broach, confirming the decree of Rao Saheb Karpurram M., Subordinate Judge of Jambusar.

The plaintiff sued to recover Rs. 625, being the amount of five years' (1882 to 1886) arrears due on a deed, dated the 5th June, 1875, by which the defendant agreed to pay him Rs. 125 per annum in consideration of the services rendered by him to the defendant in connection with a suit which the defendant had **[756]** filed against his father to establish his legitimacy, and in which he, the defendant, got a decree for maintenance. The litigation lasted in all for five years, and during its continuance the defendant attained his majority.

The following is the translation of a portion of the deed in suit:—

"Since the commencement of this dispute and up to its end, with great care and properly you (plaintiff) have rendered me much assistance by living with me (though) it is difficult for me to give (due) return for the assistance thus rendered by living beside me in times of such distress of mine; yet in order that you may have recompense for your trouble, and that you may remember me for ever (may have something to remember me for), do I pass you this deed (to wit) when (it will please) God to make me the owner of the *gadi* of Sarod, *i.e.*, when God will instal me in

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* Second Appeal, No. 143 of 1894.

the *gadi* of Sarod from that year will I continue paying Rs. 125, in words one hundred and twenty-five. a year as long as there are your and my issues (during the lifetime of my issues and yours)."

The defendant replied that the agreement was void on the ground of fraud, undue influence and misrepresentation; that it was without consideration and opposed to public policy; that the right to sue had not yet accrued, because his estate was in the hands of the talukdari settlement officer, and that the agreement was oppressive.

The Subordinate Judge had at first dismissed the suit on the ground that it was premature, because the defendant's estate was in the management of the talukdari settlement officer, but on remand on appeal he allowed the claim.

On appeal by the defendant the District Judge confirmed the decree.

The defendant preferred a second appeal.

Inverarity (with *Kalabhai Lallubhai*) appeared for the appellant (defendant).—We contend that the agreement is not binding on us. It has no consideration. The document purports to have been executed for past services which, we submit, do not form a valid consideration—Pollock on Contracts, pp. 168, 169.

Motilal M. Munshi appeared for the respondent (plaintiff).—Under the Contract Act past services form a good consideration—s. 2, cl. (*d*) of the Contract Act. Even supposing that past services do not form a good consideration, still our claim can be supported under s. 25 of the Contract Act.

JUDGMENT.

[757] FARRAN, C.J.—The history of this case is fully set out in the judgments of the lower Courts, which have concurred in awarding the claim. The point argued before us for the appellant is that there was no legal consideration for the agreement sued on. By it the defendant promises to give the plaintiff an allowance of Rs. 125 a year, because during the whole of the five years' litigation, which went on between his father and himself, and in which his legitimacy was questioned, plaintiff rendered him great assistance and remained with him in times of distress. It was thus distinctly an agreement to compensate for past services. These services were rendered to the defendant at first while he was a minor, and were subsequently continued after he had attained his majority. There is no finding by the lower Courts whether they were rendered at the desire of the defendant, but it is plain, from the judgment of the District Judge, that he was of opinion that it was not intended by the parties that the plaintiff's services should be rendered gratuitously. They were intended to be recompensed, though the nature and extent of the proposed recompense were not fixed until the agreement now sued on was executed by the defendant. Hence we have not to consider whether a past action upon request which the parties did not intend to create a contractual jural relation between them is a consideration within the meaning of the Contract Act. It may be open to question whether an act done at another's desire, which is not intended by either party to create a contractual relation between them, such as joining a friend in a walk or on an excursion at his request, can be considered a consideration for a binding promise. Mr. Anson thinks that it could not. "Unless" (he says) "the request is virtually an offer of a promise, the precise extent of which is hereafter to be ascertained, or is so clearly made in contemplation of a promise to be given by the maker of the

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request that a subsequent promise may be regarded as part of the same transaction, the rule in *Lampleigh* v. *Braithwait* has no application"—Anson, Principles of the English Law of Contract, p. 89. But the point does not arise in this case.

Mr. Inverarity, for the appellant, cited Pollock on Contracts, p. 169, (5th Ed.), as expressing the law founded upon decisions in the English Courts which ought to govern us in the present [758] case, but we are unable to accept that contention. The Contract Act, though in the main founded on English case-law, does not follow, as pointed out by Mr. Cunningham in his Work on the Act, the present English law on the subject of consideration. We must turn to the Act itself. If the services of the plaintiff were rendered at the desire of the defendant, expressed during the defendant's infancy and continued at the same request after his majority, we do not doubt that they form a good consideration for the defendant's subsequent express promise to pay the annuity secured by the agreement. Services at the desire of the promisor already rendered and such services to be rendered are placed in s. 2 (*d*) upon the same footing. Either will constitute a good consideration for a definite agreement. If the services were rendered without the desire of the defendant (and it is, we think, difficult to conceive in the present case that they were rendered otherwise than at his express or implied request or desire) the case falls within s. 25 of the Act. The services will have been voluntarily rendered for the defendant. The section appears to cover cases where a person without the knowledge of the promisor or otherwise than at his request does the latter some service and the promisor undertakes to recompense him for it. In such cases the promise does not need a consideration to support it. A rather extreme application of the section will be found in *Dhiraj Kuar* v. *Bikramajit Singh* (1).

The other grounds taken in the memo. of appeal have not been pressed upon us.

We confirm the decree with costs.

Decree confirmed.

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20 B. 759.

[759] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

AMBABAI (*Original Plaintiff*), *Appellant v.* BHAU BIN RAJARAM (*Original Defendant*), *Respondent.** [2nd September, 1895.]

Landlord and tenant—Yearly tenant—Notice to quit—Disclaimer of landlord's title in the course of pleadings—Transfer of Property Act (IV of 1382), ss. 111 (b) and 116—Not retrospective.

The sections of the Transfer of Property Act (IV of 1882) relating to notice do not apply to suits instituted before that Act came into operation. Before that Act came into operation a tenant other than a monthly tenant, holding over on the terms of his lease, was entitled to reasonable—that is to say, in the case of lands and in the absence of usage or stipulation to the contrary—to six months' notice to quit.

Disclaimer of a landlord's title after suit brought in the pleadings does not of itself determine the tenancy and render notice to quit unnecessary.

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* Second Appeal, No. 65 of 1894.

(1) 3 A. 787.

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SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, in appeal No. 97 of 1893.

In 1892 the plaintiff sued to eject the defendant from a house, alleging that the house had belonged to her husband's brother Tribhovan Jotiram, and had been leased by him to defendant under two rent-notes dated 19th May, 1867, and 28th June, 1871, respectively; that after Tribhovan's death in 1882 defendant orally agreed with the plaintiff to hold over the premises on the same terms as before, and to vacate the house on demand; that the defendant refused to deliver up possession and pay rent from 19th May, 1889.

Defendant pleaded that the house belonged to him, and not to the plaintiff or Tribhovan; that he had not executed the rent-notes referred to in the plaint, and had not rented the premises from plaintiff or Tribhovan.

The Court of first instance held that the house had belonged to Tribhovan; that plaintiff was the heir of Tribhovan; that the defendant occupied the house first as Tribhovan's tenant and after Tribhovan's death as plaintiff's tenant; and that as he refused to pay rent or quit the premises, he was liable to be ejected. A decree was accordingly passed awarding possession of the house to **[760]** the plaintiff. On appeal, this decree was reversed by the District Judge for the following reasons:—

"By s. 111, cl. (*b*), coupled with s. 116 of Act IV of 1882 a notice to quit is necessary to determine the tenancy. Section 116 describes the effect of holding over. It is contended that the objection was not raised in the lower Court nor in the memorandum of appeal; but that point has been decided in *Vithu* v. *Dhondi* (1), where it was held that it was open to defendant to take the objection of want of proper notice even in second appeal. I find that in the absence of such notice no decree for ejectment can be passed."

Against this decision the plaintiff appealed to the High Court.

Ganpat Sadashiv Rao, for appellant.—Sections 111, cl. (*b*), and 116 of the Transfer of Property Act (IV of 1882) have no application to the present case. The present suit was filed in 1892, *i.e.*, before the Act came into force in this Presidency on the 1st January, 1893. Section 2 of the Act expressly declares that it does not affect any right or liability arising out of any legal relation constituted before the Act comes into force. The lower Court was, therefore, wrong in giving the Act a retrospective effect. Apart from the Act, the law is clear that a tenant who repudiates the title of his landlord is not entitled to a notice to quit. The disclaimer of the landlord's title works a forfeiture of the tenancy, and renders a notice to quit unnecessary—*Baba* v. *Vishvanath* (2): *Lalu* v. *Bai Motan Bibi* (3). In the present case there is an additional reason why a notice to quit is not necessary. It is found as a fact that defendant occupied the house as a tenant of Tribhovan. On Tribhovan's death the tenancy became a tenancy-at-will. The defendant was only a tenant on sufferance. He was, therefore, liable to be ejected at any time without any notice to quit —*Krishnaji* v. *Antaji* (4). The suit, therefore, is not bad for want of notice to quit.

Mahadev B. Chaubal, for respondent.—The provisions of the Transfer of Property Act, relating to notice to quit, regulate procedure, and are, therefore, retrospective. They govern pending suits. Section 111 (*b*) of the Act is, therefore, applicable to the present case. As to the alleged disclaimer of the landlord's title, **[761]** it is not shown to have occurred before the

(1) 15 B. 407. (2) 8 B. 228. (3) 17 B. 631. (4) 18 B. 256.

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institution of the suit. The landlord's title was repudiated for the first time in our written statement in the present suit. Such a disclaimer does not dispense with proof of a notice to quit—*Vithu* v. *Dhondi* (1); *Abu Bakar* v. *Venkatramana* (2); *Dodhu* v. *Madhavrao* (3); *Baba* v. *Vishvanath* (4) is practically overruled.

JUDGMENT.

JARDINE, J.—The objection that notice to quit was necessary before suit, was taken on appeal in the District Court, and may be heard here—*Dodhu* v. *Madhavrao* (3) The right of a yearly tenant to a reasonable notice to quit is a substantial right (Cole on Ejectment, Chap. 3) just as the right to determine such a tenancy by notice is a necessary incident. The suit having begun before the Transfer of Property Act, 1882, came into force in this Presidency, it is unaffected thereby, as provided in s. 2, cl. 3. The disclaimer of the landlord's title made in the written statement would not operate by itself as a forfeiture so as to render notice to quit unnecessary—*Vithu* v. *Dhondi* (1); *Dodhu* v. *Madhavrao* (3). The Court confirms the decree with costs.

RANADE, J.—The first contention raised in this appeal has reference to the question whether the District Judge was in error in applying s. 111, cl. (*b*), and s. 116 of the Transfer of Property Act to the present case.

It was contended on appellant's behalf that as the original suit in the Baramati Court was instituted in 1892, long before the notification extending the Act to this Presidency was issued in January, 1893, the provisions of that Act were not applicable to the present case. Mr. Chaubal, for the respondents, however, urged that the Transfer of Property Act in this connection only regulated procedure, and came into immediate operation. We are of opinion that this contention is not valid, and that the District Judge was in error in giving a retrospective operation to the provisions of Act IV of 1882 regarding notice. Section 2 of the Act expressly provides that nothing herein contained shall be deemed to affect any right or liability arising out of a legal relationship [762] constituted before the Act came into force, which, in this Presidency, means before 1st January, 1893. Section 6 of the General Clauses Act I of 1868 also contains the same reservation The power to eject is a vested right whenever it is allowed by law or valid usage, and cannot be said to be a mere matter of procedure, or a portion of adjective law (*In the matter of the Petition of Ratansi Kalianji* (5)). In Bengal, this point was expressly considered in reference to mortgage suits brought before Act IV of 1882 came into force in that Presidency, and it was held that such suits could not be treated as being instituted under the provisions of the Act—*Baij Nath Pershad* v. *Moheswari Pershad* (6) and *Mohabir Pershad* v. *Gungadhar Pershad* (7). The point was decided similarly by the Allahabad High Court in *Sitla Bakhsh* v. *Lalta Prasad* (8). The Madras High Court took a similar view of ss. 111 and 112 of the Act in a case where a question of forfeiture for non-payment of rent arose on a lease of 1849—*Narayana* v. *Narayana* (9). Following these authorities we hold that s. 111 (*b*) and s. 116 did not apply to the present suit.

This makes it necessary to inquire whether, under the law as it stood before 1st January, 1893, a notice to quit was necessary in the circumstances of his case. Plaintiff brought this suit, as heir of one Tribhovan,

(1) 15 B. 407. (2) 18 B 107. (3) 18 B. 110.
(4) 8 B. 228. (5) 2 B 148. (6) 14 C. 451.
(7) 14 C. 599 (604). (8) 8 A. 388. (9) 6 M. 327 (330).

to eject defendant from a house which was leased to defendant by Tribhovan in 1867 and 1871 under two rent-notes. The periods provided for in these leases expired long ago, and plaintiff contended that defendant continued in possession under an oral contract by which he agreed to vacate the house on demand, and meanwhile pay the old rent of Rs. 15 per annum for 5 khans. Defendant denied the execution of the rent-notes, and also disowned the tenancy, and claimed that he, and not Tribhovan, was owner of the house. The Court of first instance held that the rent-notes were proved, and that defendant was a tenant of the plaintiff holding over on the old terms. The question for consideration is thus whether, in this state of the pleadings, defendant was entitled to a notice before plaintiff **[763]** could bring the ejectment-suit against him. As the rent, according to plaintiff, was Rs. 15 per annum, it is clear that the tenancy was not from month to month, in which latter case the Calcutta High Court has held that a month's notice was reasonable notice—*Nocoordass Mullick* v. *Jewraj Baboo* (1). The case clearly falls within the principle of the rule laid down in *Chaturi Sing* v. *Makund Lall* (2), where it was held that there was no difference between the position of a ryot holding without a patta and that of one holding over after the term covered by a patta with the consent of the owner, and that such a tenant could not be evicted without a reasonable notice to quit. What is a reasonable notice is always a question of fact dependent on custom and contract—*Jagut Chunder Roy* v. *Rup Chand* (3), but in the absence of an express stipulation or local usage to the contrary, it has been held that six months' notice is reasonable in the case of lands—*Pandurang* v. *Yedneshwar* (4).

It is, however, contended that as defendant in this case denied plaintiff's right, that disclaimer was sufficient by itself to terminate the tenancy, and no notice was necessary. This doctrine of disclaimer was at one time carried very far, but the first case on the subject represented by the ruling in *Baba* v. *Vishvanath* (5) was questioned in *Purshotam* v. *Dattatraya* (6) and expressly dissented from in *Vithu* v. *Dhondi* (7). This latter case was distinguished in a later ruling—*Lalu* v. *Bai Motan Bibi* (8), but the suit in this last case was brought by the purchaser of the tenant's rights against the landlord, and it is not, therefore, much to the point here. The distinction between a disclaimer prior to suit and a disclaimer in the course of pleadings, was first noticed in *Vithu* v. *Dhondi*(7) and was affirmed in *Abu Bakar* v. *Venkatramana* (9) and *Dodhu* v. *Madhavrao*(10). On behalf of the appellant, some stress was laid upon the words "permissive possession" used in *Krishnaji* v. *Antaji* (11), and an inference was **[764]** drawn therefrom that defendant was only a tenant on sufferance. The word 'permissive' used in that judgment appears to us only to be used to distinguish such possession from adverse possession, and it had reference chiefly to the question of limitation. The point about notice was not touched upon in that case. In the present case, plaintiff stated that the defendant had orally agreed to vacate on demand, but there was no evidence given on this point. There was no disclaimer of plaintiff's ownership prior to the institution of the suit, and the denial in the written statement had not the effect of dispensing with the obligation of

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(1) 12 B.L.R. 263. (2) 7 C. 710. (3) 9 C. 48.
(4) 6 B. 70. (5) 8 B. 228. (6) 10 B. 669.
(7) 15 B. 407. (8) 17 B. 631. (9) 18 B. 107.
(10) 18 B. 110. (11) 18 B. 256.

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giving reasonable notice. The appellant's suit was, therefore, rightly rejected by the lower Court of appeal, though the ground assigned by it for dismissing the claim was plainly untenable.

We accordingly dismiss the appeal and confirm the decree with costs on appellant.

Decree confirmed.

20 B. 764.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

HARIBHAI GANDABHAI (*Original Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Respondent.**

[2nd September, 1895.]

Bombay Revenue Jurisdiction Act (X of 1876), ss. 3 and 11—Bar of jurisdiction—Forest officer not a revenue officer—Forest Act, VII of 1878, s. 81.

The bar of jurisdiction contained in s. 11 (1), of Act X of 1876 does not apply to cases in which a Collector moves under s. 81 of Act VII of 1878 to recover, at the request of a forest officer, the price of cut timber sold by the latter under s. 81 of Act VII of 1878.

APPEAL from the decision of T. Hamilton, District Judge of Surat, in suit No. 1 of 1893.

One Gulabkhan Ahmadkhan purchased certain wood cut in the Government forest of Nawapura in Khandesh, but as he [765] failed to pay the money for it, the timber was resold by auction. The Mamlatdar of Chikhli called upon the plaintiff, as surety of Gulabkhan, to pay the deficiency, Rs. 1,368-1-6, arising out of the re-sale, and intimated to him that in default of payment his property would be attached.

Plaintiff thereupon brought this suit against the Secretary of State for India in Council for a declaration that he was not liable to pay the amount of deficiency as demanded by the Mamlatdar and also for a perpetual injunction restraining the defendant from recovering the said amount.

Among other defences it was pleaded that under s. 11 of the Bombay Revenue Jurisdiction Act (X of 1876) the suit could not lie, unless and until the plaintiff had exhausted his remedy by appealing to the revenue authorities from the Mamlatdar's order.

The District Judge dismissed the suit on the following grounds:—

"Admittedly plaintiff has not made any appeal to the revenue authorities against the Mamlatdar's order. His pleader, who has filed a written statement of his argument, contends that no appeal lies, as the money demanded was an item of forest revenue, not of land revenue, and was, therefore, to be levied under s. 81 of the Forest Act, and that the Act provides for no appeal against orders passed under that section.

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* Appeal, No. 169 of 1894.

(1) Section 11, Bombay Revenue Jurisdiction Act (X of 1876):—

No Civil Court shall entertain any suit against Government on account of any act or omission of any revenue officer unless the plaintiff first proves that, previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force as, within the period of limitation allowed for bringing such suit, it was possible to present.

"But the act of the Mamlatdar of Chikhli was the act of a revenue officer, whether it was legal or illegal and whether the arrear was one of forest revenue or of land revenue, and consequently the suit is barred by s. 11 of Act X of 1876 until plaintiff has exhausted the appeals provided by the Land Revenue Code against the acts of revenue officers."

Against this order of dismissal plaintiff appealed to the High Court.

Chimanlal Harilal Setalvad, for the appellant:—The plaintiff's claim in this suit is not against the Collector, who is merely a ministerial officer in this respect, but against the forest officer who moved him to take steps against the plaintiff. The Mamlatdar, who was the forest officer concerned, is not a "revenue officer" as defined in s. 3 of Act X of 1876 or in the Land Revenue Code. The sum sought to be recovered as the price of timber is not "land revenue" within the meaning of the said Acts. **[766]** The provisions as to appeal under the Bombay Land Revenue Code are inapplicable to the present case—*Narayan* v. *Sakharam* (1) and *Narayan* v. *Sakharam* (2).

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the respondent:—This suit is, on plaintiff's own showing, in respect of an order issued by the Mamlatdar calling on him to pay the deficiency arising out of a re-sale of certain timber which had been purchased by him at a public auction. Plaintiff's liability was determined by forest officers under the Forest Act; and forest officers being revenue officers, s. 11 of Act X of 1876 would bar the claim. Forest administration is a branch of land-revenue administration; it is so treated by Government; see *Bombay Government Gazette* of 8th September, 1892, p. 909, containing rules under the Forest Act VII of 1878, which under s. 77 of that Act have the force of law. Forest officers are Assistant Collectors and subject to the control of the Revenue Commissioner. They are, therefore, revenue officers under the Bombay Land Revenue Code also, and their proceedings are subject to appeal under s. 203 of that Code. This section stands in the place of s. 9 of the Bombay Revenue Jurisdiction Act (X of 1876) which is repealed by it. The present suit being in respect of moneys claimable for timber belonging to Government forest, and the forest officers being employed to recover the moneys so claimable, plaintiff ought to have first appealed from the decision of the forest officer. Section 11 of the Act is, therefore, a bar to the present suit.

Again, the immediate cause of action is the Mamlatdar's order; and the Mamlatdar is undoubtedly a revenue officer acting under the Land Revenue Code. In this view of the case, also, s. 11 would bar the present suit.

JUDGMENT.

JARDINE, J.—What the forest officer sold was cut timber, which is not "land" as that term is defined in s. 3 of Act X of 1876. Nor is the price thereof "land revenue," nor the officer who sold the timber a "revenue officer" within the definitions. The forest officer wishing to collect the price from the plaintiff moved the Collector to recover it, as s. 81 of Act **[767]** VII of 1878 allows this as if the debt "were an arrear of land revenue." In the opinion of the District Judge, the effect of s. 81 designating the revenue officers as those who may collect debts due for timber, is to bring in the bar of jurisdiction contained in s. 11 of Act X of 1876. We are of opinion, in the absence of authority and looking

(1) 9 B. 462.

(2) 11 B. 519 (522).

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at the object of Act X of 1876 to hold the contrary, as the officer who uses the machinery by which Government revenue is collected is for the purposes of the Forest Act only like a *persona designata*: if the machinery designated had been regulated by the Code of Civil or Criminal Procedure, the Judge or Magistrate or Police officer would not have come under the bar of s. 11; and there is no reason for placing a Collector or his subordinate the Mamlatdar in a different position. This view is supported by Birdwood, J.'s remarks in *Narayan* v. *Sakharam* (1) and by West, J.'s comparison of the Collector to a bailiff or agent in the case of the same name, *Narayan* v. *Sakharam* (2). The fact that the officer passing an order is a Mamlatdar does not necessarily bar the jurisdiction of a Civil Court—*Ganesh* v. *Mehta Vyankatram* (3). The Court, therefore, reverses the decree of the District Judge and remands the suit to his Court for trial. Costs of this appeal on respondent.

Case remanded.

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20 B. 767.

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Before Mr. Justice Candy.

RAMPARTAB SAMRATHRAI AND ANOTHER (*Plaintiffs*) *v.* FOOLIBAI AND GOOLIBAI, (*Defendants*).* [13th and 14th March, 1896.]

Practice—Jurisdiction—Cause of action arising out of jurisdiction—Addition of a defendant residing out of jurisdiction in a suit brought against other defendant under cl. 12 of Letters Patent, 1865—Fresh leave to sue such new defendant necessary—Hindu law—Minor—Liability of minor for debt—Ancestral trade carried for benefit of minor by the minor's natural guardian—Minor bound by the acts of the guardian.

[768] Where a defendant is added who does not reside within the jurisdiction of the High Court and against whom the cause of action has not arisen wholly within that jurisdiction, leave must be obtained under cl. 12 of the Letters Patent, 1865, even if leave was obtained when the suit was originally filed.

Under Hindu law where an ancestral trade descends upon a minor as the sole member of the family, and the ancestral trade is carried on under the superintendence of the minor's natural guardian, for the benefit of herself (she having a claim for maintenance) and the said minor, the minor will be bound by all acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade.

[R., 26 B. 206=3 Bom. L.R. 738; 34 B. 72=11 Bom. L R. 255=2 Ind. Cas. 173]

SUIT to recover Rs. 53,883-4-9 alleged to be due to the plaintiff in Bombay by the defendants' firm of Balaram Punamchand at Sihore in the territory of Bhopal.

The plaintiffs' firm in Bombay had acted as the commission agents of the firm of Balaram Punamchand of Sihore. That firm was a family firm of long standing at Sihore and had formerly been carried on under the name of Chhotamal Balaram. The last male owner was one Punamchand, who died in 1943 (1886-87), leaving an infant daughter named Goolibai (the second defendant). Subsequently to his death the firm was carried on by a munim under the directions (as the plaintiffs alleged) of his (Punamchand's) mother Foolibai (defendant No. 1). The plaintiffs now sued for money due in respect of transactions since Punamchand's death.

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* Suit No. 76 of 1892.

(1) 9 B. 462. (2) 11 B. 522. (3) 8 B. 188.

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The suit in the first instance was brought against Foolibai alone, the plaint alleging that she was the owner of the firm. In her written statement she denied that she was the owner or was responsible for any of the firm's transactions. She stated that the firm had belonged to her son Punamchand, who was then dead, and who had left an infant daughter Goolibai, who was alive.

In consequence of these allegations the plaintiff added Goolibai as a party defendant to the suit (see I.L R., 17 Bom., 466). Leave under cl. 12 of the Letters Patent, 1865, had been duly obtained when the plaint was originally filed, but no fresh leave was got when Goolibai was added as a party.

The case now came on for hearing against both the defendants Foolibai and Goolibai.

[769] The issues raised for the first defendant (Foolibai) were whether she carried on business at Sihore, and whether she was liable to the plaintiff's claim.

For the second defendant (Goolibai), the following issues (*inter alia*) were raised :—

(3) Whether this Court has jurisdiction to try this suit as against the second defendant?

(4) Whether the plaintiffs' claim is not barred by limitation?

(5) Whether the second defendant was capable of being a debtor to plaintiffs in respect of the transaction in the plaint mentioned?

Scott (with *Lang*, Advocate General) for Foolibai (defendant No. 1):—Foolibai is clearly not liable to the plaintiffs' claim. She is not and never was the owner of the firm. As the widow of a former owner she is, by Hindu law, only entitled to maintenance out of his property. So far no doubt she is interested in the firm, but that does not make her liable. He cited Lindley on Partnership (5th Ed.), pp. 110-112; *Lukmidas* v. *Purshotam* (1).

Davar (with *Inverarity*), for Goolibai (defendant No. 2):—As against this defendant, this Court has no jurisdiction to try this suit. The whole cause of action did not arise in Bombay, and leave to sue under cl. 12 of the Letters Patent, 1865, was, therefore, necessary. That leave was, no doubt, obtained for the suit when first filed. But it was then a suit against the first defendant Foolibai only. The Judge's order making the second defendant party was not obtained until the 13th August, 1892. It was a new suit against her. (See s. 22 of Limitation Act, (XV of 1877). Fresh leave should have been obtained—*Rampurtab Samruthrai* v. *Premsukh Chandamal* (2).

Next we say as against us the suit is barred by limitation. The last item of the account was in 1889, and the suit as against us was not instituted until the 13th August, 1892.

Further, the second defendant Goolibai is a minor and cannot be liable. The firm is her property. The munim was not her agent, for a minor cannot appoint an agent—s. 183 of the Contract Act (IX of 1872). The plaintiffs dealt with the firm **[770]** at their own risk. This is not a case of partnership; therefore, s. 247 of the Contract Act does not apply. A minor cannot be liable—Lindley on Partnership (5th Ed.), p. 74; Addison on Contract (9th Ed.), p. 379; *Dilk* v. *Keighley* (3); *Thornton* v. *Illingworth* (4); *Lovell* v. *Beauchamp* (5).

(1) 6 B. 700.
(2) 15 B. 93.
(3) 2 Esp. 480.
(4) 2 B. and Cr. 824 (826).
(5) (1894) Ap. Ca. 607, (611).

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Kirkpatrick (with *Macpherson*), for plaintiff:—The English cases cited do not apply. The firm was a family firm. Nothing similar to a family firm under Hindu law exists in England. As to a minor's liability in such a case, Tagore Law Lectures, 1884, pp. 239-40; *Joykisto* v. *Nittyanund* (1); *Samalbhai* v. *Someshvar* (2); *Demola* v. *Mohun* (3); *Ramlal* v. *Lakhmichand* (4). No fresh leave under cl. 12 of the Letters Patent was necessary when the second defendant Goolibai was made a party. The suit was the same. It was a suit against the firm. Even for purposes of limitation, it would not, in such a case, be regarded as a new suit, notwithstanding s. 22 of the Limitation Act—*Kasturchand* v. *Sagarmal* (5). There is no similar provision with regard to jurisdiction. As to limitation, the suit is not barred. This is a mutual account and one item is within time. But in any case s. 13 of the Limitation Act applies—*Atul Kristo* v. *Lyon & Co.* (6). We contend that the first defendant Foolibai is also liable. She has been acting as manager and trustee.

JUDGMENT.

CANDY, J.—The facts of this case require to be stated with some precision. Suit No. 136 of 1889 in this Court (7) was filed on 15th March, 1889, by Rampartab Samrathrai and Harbilas Rampartab, carrying on business in Bombay under the name of Rampartab Harbilas, by their munim Beniram Motiram (I will call these parties in future "the plaintiffs"), against 1, Premsukh Chandanmal of Indore, a minor, by his mother Mathubai; 2, Ramlal of Sihore; 3, Foolibai of Sihore, widow of Balaram Bhagmal; 4, the above-named Mathubai of Indore, widow of Chandanmal. (All these defendants were stated to have carried on business until lately in partnership with Chhotamal at Indore [771] under the name of Chandanmal Chhotamal, and at Sihore under the name of Chhotamal Balaram.) 5, Goolibai, infant daughter of Balaram Bhagmal, by her mother (should be grandmother) Foolibai; she was added as a defendant in July, 1889.

The plaint recited that between the 22nd November, 1888, and 26th January 1889, the defendants from Sihore drew certain *hundis* upon plaintiffs in Bombay, which plaintiffs paid. Plaintiffs, therefore, sued to recover the amount of the said *hundis*.

The first of these defendants replied by his mother that the firm of Chandanmal Chhotamal at Indore had stopped business on 14th March, 1889, and that he was in no way interested in the firm of Chhotamal Balaram at Sihore.

The second defendant Ramlal replied that he had been merely a munim of the Sihore firm of Chhotamal Balaram.

The third defendant Foolibai replied that the Indore and Sihore firms were entirely distinct, the latter belonging to Balaram Bhagmal, who died in Samvat 1926, leaving this defendant his widow, who adopted Punamchand, who died in 1943, leaving Goolibai, a minor daughter, who was a necessary party to the suit; that on Punamchand's death, Chhotamal of the Indore firm supervised the Sihore firm for the benefit of the representatives of Punamchand; that a general account must be taken, in two separate suits, of the dealings between the plaintiffs and the said two firms; and that she was willing that the accounts of the

(1) 3 C. 738. (2) 5 B. 38. (3) 5 C. 792.
(4) 1 B. H. C. R. Appx. 51. (5) 17 B. 413.
(6) 14 C. 457. (7) See report of this case, 15 B. 93.

transactions between the plaintiffs and the Sihore firm should be taken in a properly framed suit in a Court of competent jurisdiction; but in any event she (Foolibai) could not be liable for the transactions in respect of which the suit was brought.

The fourth defendant Mathubai made a similar defence.

The fifth defendant Goolibai replied by her grandmother Foolibai, that she was not liable in respect of any of the transactions in the plaint mentioned, and that her father Punamchand had no interest in the Indore firm.

Issues were raised, and the case came on for hearing before Telang, J., whose decision is reported (see I. L. R., 15 Bom. p. 96). He found that the plaintiffs were not entitled to sue in respect of [772] the *hundis* by themselves; that the *hundis* were a few items out of a long and a general account between the plaintiffs and the Indore and Sihore firms respectively; that an amendment of the plaint could not be permitted, allowing plaintiffs to sue for a general account, because the jurisdiction conferred by leave of the Court having been granted under cl. 12 of the Letters Patent, 1865, was confined to the cause of action disclosed in the plaint as originally framed, and thus the Court could not allow an amendment which would substantially alter that cause of action. Mr. Justice Telang, therefore, dismissed the suit with costs. The plaintiff filed an appeal, which was not prosecuted to a hearing.

On 15th February, 1892, plaintiffs filed the present suit (No. 76 of 1892) against Foolibai, widow of Balaram, "carrying on business at Sihore, formerly under the name of Chhotamal Balaram, and now in that of Balaram Punamchand." The plaint states that "defendant has a firm at Sihore where she carries on business;" that the present suit was brought in respect of the plaintiffs' dealings with the said Sihore firm, and plaintiffs prayed that, if necessary, an account should be taken of the said transactions. Leave was given under cl. 12 of the Letters Patent, 1865.

Defendant Foolibai traversed these allegations of the plaint, and stated that the firm had belonged to Punamchand, who died in Samvat 1943, leaving Goolibai, a minor daughter, him surviving, and that she, Foolibai, had always denied her liability in respect of the transactions in the former suit. Plaintiffs then at once applied to the Court to allow them to amend the plaint by adding the name of Goolibai as defendant.

The Judge (Farran, J.) granted a summons, which he subsequently made absolute, as to making Goolibai a defendant, with liberty to the plaintiffs to make the necessary consequential amendments. Foolibai appealed, and the decision of Sargent, C. J., and Bayley, J., is reported (see p. 466 of I. L. R., 17 Bom.) The Appeal Court held that whatever weight there might be in the objection to Goolibai being made a party, such objection could only be taken by Goolibai and not by Foolibai. The appeal was, therefore, dismissed.

The plaint in the present suit was then amended on 19th April [773] 1893, and Goolibai's name was added as defendant. Various pleas have been raised on her behalf, which may be summarised as follows, *viz.*, (*a*) The Court has no jurisdiction to try the suit against her, no leave having been given under cl. 12 of the Letters Patent as regards herself; (*b*) limitation; (*c*) she, a minor, cannot be liable for transactions entered into by the munim of the firm.

Before discussing these points, it is necessary to dispose of the case as regards Foolibai. It is manifest she is not the owner of, or partner in, the Sihore firm. Mr. Kirkpatrick asked for a decree against her as

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"manager and trustee." But that is not the capacity in which she is sued; and apart from that, admitting that she is the only adult member of the family in Sihore who was consulted by the munim who managed the affairs of the firm, that fact would not make her liable in respect of transactions entered into with the firm, and with regard to which the supposed owner of the firm is sued. Attention has been called to her power of attorney filed in Suit No. 601 of 1889, in which it is recited that the "firm of Chhotamal Balaram has been carried on under my superintendence for the benefit of myself and the said minor Goolibai." But a reference to the plaint in that very suit (No. 601 of 1889) shows that it was brought by Goolibai, "a minor carrying on business at Sihore under the name and style of Chhotamal Balaram, by her next friend Foolibai, &c." If Foolibai had claimed to be the owner, or part owner, of the firm of Chhotamal Balaram, the plaint would not have been framed in the above terms. The power of attorney recites that the holder of it may use Foolibai's name *as the next friend of Goolibai*. No doubt Foolibai was interested in the firm: she has a charge on it for her maintenance, but in a suit for an account of the dealings with the firm she cannot be sued as the firm.

Some evidence has been produced to show that, in Marwar, till a minor comes of age, the "mother-in-law" is owner of the estate. It is unnecessary to discuss this evidence. It is quite insufficient to disprove the ordinary succession according to Hindu law, by which Goolibai must be sole owner of the firm of Chhotamal Balaram.

[774] It remains, then, to consider the questions affecting Goolibai's liability in the present suit. Why her name was not entered in the plaint as a defendant when the plaint was filed on 15th February, 1892, it is impossible to say. As shown before, her existence was perfectly well known long before. In Suit No. 136 of 1889, she had been joined as a defendant on 13th July, 1889. Why leave was not asked under cl. 12 of the Letters Patent when the summons was obtained in the present suit to make her a defendant, it is difficult to say. However that may be, the fact remains that when the suit is dismissed against Foolibai, we have a suit against Goolibai alone, who both admittedly and according to the plaint when the suit was filed, and when the plaint was amended, resided and carried on business at Sihore beyond the local limits of the ordinary original jurisdiction of this Court. To quote Mr. Justice Telang, "the only jurisdiction, therefore, which this Court can exercise over Goolibai is that given by cl. 12 of the Letters Patent." But no leave has ever been asked for or granted under that clause for the Court to exercise jurisdiction over Goolibai. Mr. Kirkpatrick, for plaintiffs, contended that Mr. Justice Farran's order making Goolibai a party must be taken as including leave under cl. 12 of the Letters Patent, 1865. But, as has been pointed out by Mr. Justice Telang, the order under that clause is not a mere formal order, or one merely regulating procedure. It is intended to be a judicial order, and cannot be presumed to have been made when there is no record thereof. According to the view which has been always accepted in this Court, the leave required by cl. 12 of the Letters Patent must be granted, if at all, at the time of the acceptance of the plaint, and cannot be granted afterwards. By s. 22 of the Limitation Act (XV of 1877) the suit as regards Goolibai must be deemed to have been instituted when she was made a party. Then was the time, if at all, to apply for leave under the clause. To use the language of the clause, the "suit" was then "received" against Goolibai. It cannot be inferred that leave was then allowed or granted. In

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Jairam Narayan v. *Atmaram* (1), Mr. Justice West was asked to draw a similar inference, because leave had [775] been granted to the plaintiff to sue as a pauper: "but such leave" (he said) "does not by any means necessarily imply that this particular question was judicially considered."

Mr. Kirkpatrick, for plaintiffs, quoted the case of *Kasturchand* v. *Sagarmal* (2); but that was the case of misdescription, not non-joinder. Here plaintiffs sued Foolibai as "carrying on business at Sihore in the name of Balaram Punamchand." The plaint stated that "the defendant has a firm at Sibore." She was sued as the owner of the firm. She is not the owner of the firm, but Goolibai is. If that be so, as Sir Charles Sargent said, it is clear that Goolibai is the person liable, and Foolibai is not liable. Foolibai is in the same position as Ramlal, who was sued in suit No. 136 of 1889 as having carried on business with other persons at Sihore in the name of a certain firm. But Ramlal pleaded that he was merely the munim of a firm, and no further attempt has been made to render him liable for all or any of the transactions between the plaintiffs' firm and the Indore Sihore firms or either of them.

Mr. Justice Telang in deciding suit No. 136 of 1889 deemed it unnecessary to consider whether the cause of action intended to be introduced into the suit by amendment would itself be one over which that Court could exercise jurisdiction without leave granted under cl. 12. But it is evident that according to the reasoning followed by Mr. Justice Telang, with which I concur, this question must be answered in the negative. Mr. Justice Telang remarked that, according to the evidence of the plaintiff Harbilas, the contract between him and Chhotamal, *in respect of the Sihore business*, took place at Indore, and the transaction in respect of which that suit (No. 136 of 1889) was brought, were entered into in pursuance of the contract. The *hundis*, which formed the subject-matter of the suit No. 136 of 1889, are part of the dealings which make up the account, the subject of the present suit. Mr. Justice Telang's judgment shows that there is abundant authority for holding that in this Court the "cause of action" in cl. 12 of the Letters Patent includes not only the breach on which the suit is brought, but the contract and other circumstances, which together with the breach go to constitute the plaintiffs' right to [776] sue. Several matters may combine to make up a cause of action: the County Courts Act in England and the Letters Patent agree in this that they both expressly treat a cause of action as consisting of parts which may have different localities.

In the present suit the account consists mainly of consignments of opium made from Sihore to plaintiffs at Bombay, who either sold the opium in Bombay and credited the Sihore firm with the amount realized, or consigned the opium to China on account of the Sihore firm and *hundis* drawn by the Sihore firm on the plaintiffs in Bombay, who paid the same and debited the Sihore firm with the amounts. It was a mutual account, sometimes being in favour of the Sihore firm, sometimes in favour of the plaintiffs' firm. On these facts I cannot hold that the cause of action arose *wholly* in Bombay, and, therefore, I must hold that before the owner of the Sihore firm can be sued in this Court, the leave of the Court must first be obtained. It has not been so obtained, and thus the suit must be dismissed.

As counsel argued the other points, I will briefly refer to them.

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(1) 4 B. 482.

(2) 17 B. 413.

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As to limitation, it was contended that the date of the last item in the account corresponds with the 16th February, 1889, and as the suit was filed on the 15th February, 1892, the suit was within time. But the suit as against Goolibai was not instituted till she was actually brought on the record in April, 1893. Why she was not brought on the record in August, 1892, it is impossible to say. But it is clear that, according to s. 22 of the Limitation Act, the suit was instituted against Goolibai when she was made a party, not when the Judge ordered her to be made a party. It is unnecessary, therefore, to consider Mr. Kirkpatrick's argument that, according to s. 25 and art. 85 of the Limitation Act, limitation did not begin to run till the close of the year 1889. But it may be remarked that by art. 85 the year is to be computed as in the account. That, of course, must be the Samvat year, which ended on a date corresponding with some day in October, 1889. Section 25 refers to "instruments," not to suits on mutual open and current accounts.

[777] But a further argument was raised, *viz.*, that by s. 13 of the Limitation Act, no bar of limitation could arise, for Goolibai has never resided in British India. Mr. Davar, for Goolibai, asked the Court to note that it was not admitted that Goolibai resides or has resided out of British India. But no evidence has been called by defendants in this suit. Up to the last moment it was apparently taken for granted that Goolibai has always lived with her grandmother at Sibore. That would be her natural place of residence; and, in the absence of any evidence on the point, I think I should be bound, if it were necessary to decide that point, to rule, on the strength of the decision in *Atul Kristo* v. *Lyon and Co.* (1), that the suit is not barred by limitation.

Lastly, with regard to Goolibai's liability. No doubt, according to English law, "there is nothing to prevent an infant trading or becoming partner with a trader, and until his contract of partnership be disaffirmed, he is a member of the trading firm. But it is equally clear that he cannot contract debts by such trading; although goods may be ordered for the firm he does not become a debtor in respect of them" (per Lord Herschell, V. C., in *Lovell* v. *Beauchamp* (2)).

But s. 247 of the Contract Act in stating the position which an infant partner occupies, does not seem to accord with the English cases. According to the section, the infant partner, while entitled to share the profits of the business is not liable for the losses, except to the extent of his own share in the partnership property. His liability is a limited one like that of a shareholder in a limited company. According to the English cases, a minor is no more bound by a contract of partnership than by any other contract. Under this section it would seem that the minor's share in the firm property is liable for its obligations, whether he has derived benefit from the business or not (see Cunningham and Shephard's Notes on the Contract Act, 5th Ed., p. 474.)

But it is said that here there is no case of partnership. Goolibai is the sole owner of the firm and s. 247 of the Contract Act is not applicable. That is so strictly speaking; but, following the analogy of the rule declared by this section, the **[778]** Calcutta High Court held in *Joykisto* v. *Nittyanund* (3), that "on principle there ought not to be any difference between the nature of the liability of an infant admitted by contract into partnership and that of one on whose behalf an ancestral trade is carried on by a manager."

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(1) 14 C. 457. (2) (1894) Ap. Ca. 607 (611). (3) 3 C. 738.

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In the case just quoted, one Anundo died leaving two infant sons and two widows. The sons and widows continued to live as members of a joint Hindu family. The ancestral trade was carried on under the management of the widows, who being *pardanashin* women employed one Haradhone for that purpose. The elder son after he came of age took part in the management with Haradhone. During the sole management of Haradhone, and also during the joint management of the elder son and Haradhone, dealings with the plaintiffs' firm continued, and in the course of these transactions the defendants (the two sons) became indebted to the plaintiffs in the sum of Rs. 4,605-11-3. This debt entirely arose out of transactions connected with the ancestral business carried on by the defendants' family after Anundo's death. The High Court decreed that the debt should be paid out of the partnership property of the two defendants. There is no trace of a suggestion that the liability of the share of the appellant defendant—the son who was still a minor when the suit was brought—in any way depended upon the fact that his elder brother when he came of age had joined in the management. The result would have been the same had the minor been the only son of Anundo. The High Court ruled, on the authority of the decided cases (one of which was *Ramlal* v. *Lakhmichand*)(1), that the guardian of a Hindu minor is competent to carry on ancestral trade on behalf of minor; consequently the contention raised that the infant appellant was not liable to any extent for the debt in question was not well founded.

So in the Bombay case just quoted, Sir M. Sausse, C.J., held that "an ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family; and we think that such a family can *by its manager* (or its adult members acting as managers) enter into co-partnership with a stranger. In carrying on such a trade, infant members of the undivided [779] family will be bound by all acts of the manager (or the adult members acting as managers) which are necessarily incidental to or flowing out of the carrying on of that trade, whether it be singly or with a co-partner." The same principle will hold good when the sole member of the Hindu family is an infant as here, and the ancestral trade is carried on under the superintendence of the natural guardian of the minor for the benefit of herself (she having a claim to maintenance) and the said minor. For these reasons I would hold, if there were no bar to the suit, that plaintiffs are entitled to have an account taken of their dealings with the Sihore firm, of which Goolibai is the owner, it being open to Goolibai, on the account being taken, to show that any items are not fairly debitable to her firm. Findings on issues Nos. 1, 2 and 3 in the negative.

Suit dismissed with costs.

Attorneys for plaintiffs :—Messrs. *Payne, Gilbert and Sayani.*
Attorneys for defendants :—Messrs. *Dikshit and Dhanjisha.*

(1) 1 B.H.C.R. (App.) 51.

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SMALL CAUSE COURT REFERENCE.

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20 B. 779 = Chitty's S. C. C. R. 508.

SMALL CAUSE COURT REFERENCE.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

ISHWARDAS TRIBHOVANDAS (*Plaintiff*) *v.* KALIDAS BHAIDAS AND OTHERS (*Defendants*).* [3rd July, 1896.]

Small Cause Courts Act (XV of 1882), s. 69—Duty of the Judge in stating a case for opinion of the High Court—Existence of a question of law, &c., a condition precedent.

Under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) the existence of such a question of law or usage or construction as therein mentioned is a condition precedent to a reference to the High Court, and if no such question arises, the Small Cause Court has no authority to refer and the High Court no jurisdiction to deal with the reference.

The duty of drawing up the case, where a reference is made, is imposed on the Court, and it is responsible for the form of the case.

CASE stated for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act (XV of 1882) by C. W. Chitty, Chief Judge :—

[780] "1. This was a suit brought by the plaintiff to recover from the fourth defendant possession of a diamond buckle said to be worth Rs. 1,500, and, in case the fourth defendant should be held entitled to retain the buckle as security for moneys advanced upon it, the plaintiff further claimed that the first, second and third defendants or some or one of them might be decreed to pay to the plaintiff, as damages for breach of duty, such sum as might be held to be due on the security of the said buckle.

"2. The facts of the case and the reasons for my decision are fully set out in my written judgment, a copy of which is hereto annexed, and to which I crave leave to refer. As therein stated, I dismissed the suit and certified Rs. 90 as the professional costs of the fourth defendant. The conduct of the second and third defendants was such as, in my opinion, to disentitle them to any award of costs. I had no doubt that the plaintiff had been unjustly deprived of the buckle, but for the reasons stated I was of opinion that he could not recover it back in this suit.

"3. At the request of the plaintiff I made my judgment contingent upon the opinion of the High Court. The questions suggested by the plaintiff's counsel are as follows :—

(i) Whether a broker to whom goods are entrusted '*jangad*' with a fixed price can, at his option and without the consent of the owner, convert the said entrustment into a sale to himself by failing to return the said goods to the owner within a reasonable time?

(ii) Whether, under the circumstances disclosed in the case and the facts as found by the Court, the fourth defendant cannot be said to be holding goods (*viz.*, the buckle) obtained from the owner by means of an offence or fraud as contemplated by s. 178 of the Indian Contract Act?

(iii) Whether under the circumstances found in the case the Court ought not to have passed a decree against the fourth defendant?

(iv) Whether, in any event, the Court ought not to have passed a decree against the first, second and third defendants or some or one of them?

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* Small Cause Court Suit No. $\frac{359}{25733}$ of 1895.

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[781] "4. With regard to the first question, I have no objection to it, except that it assumes the character of a '*jangad*' transaction to be a mere entrustment to a broker. I would add to it the following questions as stated in my judgment, *viz.*:—

(i) (*a*) Whether the plaintiff having delivered the buckle as '*jangad*' at a fixed price to the first and second defendants can in any case sue for the return of the buckle?

(i) (*b*) Whether the plaintiff's remedy would not be confined to the suit for the price?

"5. As to questions (ii) and (iii), I have nothing to say except I presume their Lordships will not regard any circumstances of the case except upon the facts found by me.

"6. As to the question (iv), I may say that I was unable to pass any decree against the defendants therein named, for the simple reason that the plaintiff did not ask for it. His counsel admitted that under the circumstances the relief which he sought against the defendants Nos. 1, 2 and 3 could not be granted. The plaintiff did not (as he might have done) sue those defendants for the price of the buckle, and I understood his counsel to say that all that the plaintiff wanted was a decree for the return of the buckle.

"7. The buckle was attached before judgment and remains in the custody of this Court pending the return of this reference. The plaintiff has desposited in Court the amount of the costs awarded and Rs. 50 to meet the costs of reference."

The facts of the case as found by the Chief Judge were as follows:—

"I think the plaintiff must be regarded as having been at one time the owner of this buckle. The buckle was in April, 1893, pledged to him by Khushalchand Ootamchand, and as mortgagee the plaintiff sold it, buying it himself, through his nominee Kubla Kika, for Rs. 1,200. However shady may have been this transaction, it is not in dispute here, and the plaintiff asserts that Khushalchand has ratified the sale. The plaintiff, therefore, must be regarded as the owner of the buckle, when on Posh Sud 2nd (9th January, 1894) he gave it '*jangad*' to the first and second [782] defendants. His transaction is admitted and is evidenced by the entry in the plaintiff's '*jangad*' *vahi*. The price of the buckle is there given at Rs. 1,500, and a hoop ring was also given '*jangad*' at Rs. 125, which was subsequently returned to the plaintiff. The first and second defendants took the buckle, alleging that they had a customer in view. The first defendant has not appeared before this Court, but it is clear that he had nothing to do with the transactions that followed. The second defendant alleges that on the 3rd Posh Sud, the day after he received the buckle, the plaintiff sold it to him out and out for Rs. 1,200, for which he passed a promissory note to the plaintiff and arranged that it should be taken into account when making up the accounts of the sale of a necklace in which he alleges he was the plaintiff's partner. His story I disbelieve and hold that no such sale as alleged by the second defendant is proved. The second defendant holding the buckle '*jangad*' from the plaintiff in his turn handed it over to the third defendant. Here again there is a conflict of evidence. The second defendant says that he gave it to the third defendant '*jangad*,' and produces an entry signed by the third defendant to that effect. The third defendant says that the buckle was pledged with him by the second defendant to secure Rs. 800, the value of a pair of earrings, and a further sum of Rs. 150 paid to Manchubhai Dayabhai on second defendant's account. The third defendant in the

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Police Court at first admitted his signature to the '*jangad*' entry, but afterwards, when he found what the entry contained, denied it. Before me his denial of the signature was unsatisfactory, and he prevaricated much when questioned about it. The pledge to him is not proved by any extraneous evidence, and I incline to the belief that he too received the buckle '*jangad*.' This was on the 27th January, 1894, eighteen days after the buckle had been received from the plaintiff. The third defendant in his turn handed over the buckle to the fourth defendant. There is no dispute that in this case it was handed over by way of pledge to receive moneys advanced by the fourth defendant to the third defendant. The date of this pledge was 4 Falgun Sud 1950. The debt now due to the fourth defendant on the security of the buckle amounts to over Rs. 1,800."

[783] *Lang* (Advocate-General), for plaintiff.

Macpherson, for defendant No. 4.

JUDGMENT.

FARRAN, C. J.—We have felt considerable difficulty in dealing with the questions submitted to us in this case owing to the form in which they are framed. After the statement of facts drawn by the Judge himself follows a series of questions suggested by the plaintiff's counsel, some of which (questions 2 and 3) virtually involve for their solution an inquiry as to whether the findings of facts by the Chief Judge are correct. Questions in such a form are inadmissible. The learned Chief Judge evidently himself felt that this was so, since he adds a para. (5) to the case to narrow their scope, but even when so narrowed it is difficult to ascertain what particular question of law they are intended to raise.

Section 69 of the Presidency Small Cause Courts Act (XV of 1882) makes it a condition precedent to the drawing up of a statement of the facts of the case by the Small Cause Court, and referring it for the opinion of the High Court, that a question of law or usage having the force of law or as to the construction of a document which may affect the merits, arises in the case. If upon the findings of the Judge no such question arises, the Small Cause Court has no authority to refer the case for the opinion of the High Court, and the High Court has no jurisdiction to deal with it. The section, moreover, imposes on the Small Cause Court the duty of drawing up the case, and though in framing it that Court may well invite the assistance of the parties and give weight to their suggestion, yet it ought not to send up questions which involve the High Court in the dilemma of either entering upon matters of fact, or refusing to answer the questions, or drawn in such a form as to involve an assumption which the facts as found by the Judge do not warrant. We would point out that the Small Cause Court is itself responsible for the form of the case which it submits for the opinion of the High Court.

The first question, involving an assumption which the facts found in the judgment of the Small Cause Court do not warrant, we leave unanswered and deal with it in the form prepared by [784] the Judge himself. In that form it involves an almost self-evident proposition.

The term "*jangad*" has several meanings. When goods are delivered "*jangad*" it is a question of fact in each case as to the terms upon which they are delivered. When, as found here, they are delivered upon the condition that if not returned within the stipulated time, whether fixed definitely or ascertained by the course of dealing between the parties, they are to be considered as sold to the person to whom they are delivered at the price fixed upon, then the person delivering the goods cannot after the

expiration of such fixed period recover the goods back, but his right is to sue for their price.

The second and third questions as narrowed by the Small Cause Court we answer in the negative, and also the fourth question, which can, however, hardly, under the circumstances stated, be said to be a question of law.

The decree of the Small Cause Court will, therefore, stand. Costs costs in the case.

Attorneys for the plaintiff :—Messrs. *Mulji and Raghowji.*

Attorneys for the fourth defendant :—Messrs. *Brown and Moir.*

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APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

DAYARAM HARGOVAN (*Original Defendant No.* 1), *Appellant v.* JETHA BHAT LAKHMIRAM AND OTHERS (*Original Plaintiffs*), *Respondents.** [3rd September, 1895.]

Jurisdiction—Caste question—Mochi caste at Surat--Auditch Brahmans of Ahmedabad—Hereditary priests—Delegates of Auditch panch at Ahmedabad—Dismissal of delegates by the caste—Suit for injunction and damages—Decision of caste—Jurisdiction of Civil Courts.

The hereditary priests of the Mochi caste deputed certain persons to perform religious ceremonies for the caste. The caste, however, dismissed these delegates, and the defendants, who were members of the caste, employed other persons to perform certain religious ceremonies for them. The plaintiffs sued for an injunction and damages, alleging that they were entitled to perform these ceremonies and to receive the fees.

[783] *Held*, that the Court had no jurisdiction. The Civil Court could not enquire into the validity or otherwise of the decision of the caste in the matter. The parties were bound by it, and the plaintiffs could not legally complain of the action of the defendant, who had done no more than obey that decision.

[F., 1 Bom. L.R. 711; R., 11 Ind. Cas 231=96 P.R. 1911=216 P.L.R. 1911=143 P.W.R. 1911; D., 22 B. 122 (125), 126).]

SECOND appeal from the decision of J. B. Alcock, District Judge of Surat, reversing the decree of Rao Saheb Madhuvachram B. Hora, First Class Subordinate Judge.

The plaintiffs, who alleged themselves to be the *kul gors* (hereditary priests) of the Mochi (shoe-maker) caste at Surat, sued the defendants for an injunction and damages, alleging that the defendants employed an outsider to perform certain religious ceremonies which the plaintiffs were entitled to perform, and thus deprived them of their fees.

The defendants answered that they were not bound to have ceremonies performed by any particular priest; that whoever performed the ceremonies was entitled to the fees; that the whole caste had forbidden the plaintiffs to perform any of the ceremonies; that the suit did not fall under s. 54 of the Specific Relief Act (I of 1877); and that the injunction asked for could not be granted.

The Subordinate Judge found that the plaintiffs were not entitled to the right claimed; that they were forbidden by the Mochi caste at Surat to perform any of the ceremonies; that they were not hereditary

* Second Appeal. No. 207 of 1894.

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20 B. 784.

priests, and were liable to be dismissed; that the defendants were not bound to employ them; and that the plaintiffs were not entitled to an injunction. He, therefore, dismissed the claim.

On appeal by the defendants, the Judge reversed the decree. The following is an extract from his judgment:—

"There is no dispute about the facts of this case. It appears that the Auditch Brahmans of Ahmedabad are the *kul gors* or hereditary priests of the Surat Mochis, and that certain persons are deputed by the panch of these Brahmans to perform religious ceremonies for the Mochis. As these unfortunate persons lose caste by performing ceremonies for low caste people, they have to pay a fine to the Brahman panch. They are then authorized to act on behalf of the panch as priests. Their position, in fact, is analogous to that of one member of an undivided family of priests officiating alone on some particular occasion. They are not in the position of a priest appointed by a man himself, but they are delegates of the Ahmedabad Brahmans. **[786]** That being so, they are not liable to dismissal at will. All the plaintiffs are authorized delegates.

"The reason why the Mochis dismissed the plaintiffs is that on one night, when a large number of marriage ceremonies had to be performed, they could not get through with them before day-break. This does not seem to be a fault of the kind which would warrant dismissal. Only crime or immorality or wilful neglect of duty would warrant that. There is nothing in s. 54 of the Specific Relief Act to prevent the injunction asked for from being granted."

Defendant No. 1 preferred a second appeal.

Perozeshah M. Mehta (with *Motilal M. Munshi*), for the appellant.—The custom in the Mochi caste at Surat is that marriages must be performed before day-break. On a particular day a large nnmber of marriages had to be performed, and the plaintiffs, who were the delegates of the Auditch Brahmans at Ahmedabad, the hereditary priests of the Mochi caste at Surat, did not bring with them a sufficient number of persons to assist them to perform the ceremonies before day-break. The caste, therefore, resolved to exclude them from performing ceremonies. The plaintiffs are not hereditary priests in the sense of the office devolving from father to son. Any member of the community set apart at Ahmedabad for performing ceremonies in the Mochi caste at Surat can come down and perform the ceremonies on receipt of proper fees. The defendants are not bound to have the ceremonies performed by plaintiffs only. In a case of this kind, the caste has power to pass a resolution excluding the plaintiffs from officiating, and a claim either for damages or injunction is not sustainable in a Civil Court—*Raja* v. *Krishnabhat* (1).

Shivram V. Bhandarkar, for the respondents (plaintiffs).—The Judge has found that we are the delegates of the Auditch Brahmans, who are the hereditary priests of the Mochi caste at Surat. The finding is a finding of fact, and, therefore, binding in second appeal. The Auditch Brahmans do not oppose our claim, and, therefore, the defendants cannot do so. We contend that we are the hereditary priests through the Auditch Brahmans, and the Mochi caste has no power to discontinue our services. We are entitled to recover damages—*Sitarambhat* v. *Sitaram Ganesh* (2); **[787]** *Vithal* v. *Anant* (3); *Waman Jagannath* v. *Balaji Kusaji* (4); West and Bühler, p. 398.

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(1) 3 B. 232.
(2) 6 B. H.C.R.A.C.J. 250.
(3) 11 B. H. C. R. 6.
(4) 14 B.167.

JUDGMENT.

FARRAN, C. J.—Plaintiffs have brought this suit for an injunction and damages on the ground that although they are the hereditary priests of the Mochi caste, the defendant employed another Brahman to perform certain ceremonies for him. The Subordinate Judge dismissed the claim, holding that the plaintiffs were not the hereditary priests of the Mochi caste, but only the delegates of the Auditch panch at Ahmedabad, and that the Mochi caste had passed a resolution to the effect that no work should be taken at the hands of the plaintiffs. The District Judge reversed that decree. He found that the Auditch Brahmans of Ahmedabad were the hereditary priests of the Surat Mochis, and that the plaintiffs were deputed by the panch of those Brahmans to perform religious ceremonies for the Mochis, and were thus authorized to act as priests on behalf of the panch. He also found that the Mochis dismissed the plaintiffs, but he says that it was not for a fault which would warrant dismissal; "only crime or immorality or wilful neglect of duty would warrant that," and, therefore, he awarded the claim.

The grant of an injunction is clearly wrong (see *Raja* v. *Krishnabhat* (1)). We are of opinion that the award of damages is also under the circumstances unsustainable. Assuming that the Auditch Brahmans are the hereditary priest of the Mochi caste at Surat, and that they have the power of deputing priests to officiate at Surat, there is nothing in the case which shows that the Mochi caste is bound to accept, as their priest, any one so sent. The Subordinate Judge says it would be extremely difficult to determine this point, and there is no determination of it in the case. Both the Courts admit the power of the Mochi caste to dispense with the services of the delegated priest. It seems to us that some such power as this must rest with the caste, and the evidence of the principal plaintiff himself shows that he does not dispute this power; for, after dismissal, he applied to the caste and was re-admitted as their priest. We can find no authority for the proposition laid down by the Judge [788] that only crime, immorality or wilful neglect of duty would warrant dismissal. The cause given in Colebrooke's Digest Vol. I, p. 377, is only a fault.

It is not, however, necessary for us to discuss this point, because we are of opinion that it is not open to a Civil Court, in the circumstances of the present case, to enquire into the validity or otherwise of the decision of the caste in this matter, and that the parties are bound by it, and that the plaintiffs cannot legally complain of the action of the defendant, who has done no more than obey that decision. We, therefore, reverse the decree of the District Judge and restore that of the Subordinate Judge, with costs on plaintiffs in this and the lower appellate Court.

Decree reversed.

(1) 3 B. 232.

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20 B. 788.

20 B. 788.

APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

BALA BIN KESHAV BAVA AND ANOTHER (*Original Defendants Nos.* 1 *and* 2), *Appellants v.* MAHARU VALAD NAGU PATIL AND OTHERS (*Original Plaintiff and Defendants Nos.* 3 *and* 4), *Respondents.**

[5th September, 1895.]

Easement—Right to light and air—Right to have water carried off over neighbour's land—Limit of—Order directing demolition of new building when Court will grant—Sufficient light, right to access of—Light at angle of 45°.

A right to have water carried away over the adjoining land does not give its owner any power to prevent the erection of buildings on the adjoining ground so long as the arrangements necessary to the preservation of his right are made.

An easement of light to a window only gives a right to have buildings that obstruct it removed so as to allow the access of sufficient light to the window.

[F., 12 A.L.J. 685 ; **R.,** 7 Bom. L.R. 352 ; 8 Ind. Cas. 939=4 S.L.R. 180.**]**

SECOND appeal from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Dhulia with appellate powers, confirming the decree of Rao Saheb G. B. Koparkar, Subordinate Judge of Nandurbar.

Suit for an injunction. The plaintiff prayed for an order directing the defendants to remove a building recently erected to the south of his house, alleging that the said building obstructed his light and air and the passage of water from his roof and from a drain (*mori*) situate in the south corner of the terrace (*sajja*) of his house.

[789] The Subordinate Judge found that there had been vacant ground measuring six feet and five inches north to south and sixteen feet and four inches east to west to the south of the plaintiff's house ; that the *mori* (drain) in the eastern part of plaintiff's *sajja* was more than twenty years old ; that the plaintiff was entitled to discharge the waste water from his *mori* and rain water from the roof of his *sajja* over the vacant ground to the south of his house ; that there were two windows in the plaintiff's house and he was entitled to receive light and air through them ; that the defendants' house had obstructed and was likely to continue to obstruct the passage of light and air through the windows of the plaintiff's *sajja* ; that the plaintiff was entitled to the removal of the defendants' house from the above-mentioned area, and that the perpetual injunction prayed for should be granted to the plaintiff.

On appeal by the defendants the Judge confirmed the decree.

The defendants preferred a second appeal.

Sitanath G. Ajinkya, for the appellants (defendants).—We admit that some portion of the light and air enjoyed by the plaintiff is obstructed by our new building. The present case is governed by s. 15 of the Easements Act (V of 1882). The lower Courts have not found the enjoyment of light and air by the plaintiff as of right. It was wrong to direct us to demolish the whole of that portion of our new house which obstructed the free passage of light and air to the plaintiff's house. We are entitled to build on our land in such a way as will not interfere with plaintiff's rights. The plaintiff did not give us notice while the work of our new building was

* Second Appeal No. 277 of 1894.

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20 B. 788.

in progress. He allowed the whole work to be finished and then brought the present suit. Under these circumstances it was wrong to grant to the plaintiff a mandatory injunction. At the most, damages should have been awarded—*Benode Coomaree Dossee* v. *Soudaminey Dossee* (1); *Dhunjibhoy* v. *Lisboa* (2); *Ghanasham Nilkanth* v. *Moroba Ramchandra* (3).

Daji Abaji Khare, for the respondent (plaintiff).—There is a concurrent finding of the two Courts that we have established [790] our right to a free passage of light and air and to discharge our drain water over the ground in dispute. It is a finding based on evidence and cannot be interfered with. The question of damages and notice was not raised below, and no issue on the point was raised. The question is started for the first time in second appeal.

JUDGMENT.

PARSONS, J.—The decree in the present case cannot be sustained. The lower appellate Court has ordered the defendants to remove the whole of their new building from the ground over a space of six feet five inches in breadth and sixteen feet four inches in length, in order to allow the water from plaintiff's *mori* and roof to fall on that ground, having held that plaintiff had acquired an easement to have that water carried off over defendants' land. But the plaintiff has no right to demand that the land shall be kept open and unbuilt on. Defendants can build on their land, provided only that they make the necessary arrangements to receive the water from the plaintiff's *mori* and roof and carry it away. They can, for instance, allow the water from the roof to fall on their own roof, and the water from the *mori* to run into their own drain. For the purposes of these easements the lower Courts should not have ordered any demolition whatever, but only enjoined defendants to receive and carry off the water from the *mori* and roof.

Again, the Court has ordered the lowering of the whole of the new portion of defendants' house, so that no part of it shall ever be higher than the sills of the two windows to which it has found that the plaintiff has acquired an easement of light and air. But this is far too large an order. The Court could legally have ordered the lowering of so much only as prevents the access of sufficient light to the plaintiff's rooms through the windows in question. This is usually considered to be light at an angle of 45°. The Court below should have found what alteration, if any, in defendants' new building was necessary to ensure plaintiff's getting sufficient light. As it has not done so, we must leave it to be determined in execution.

We vary the decree by reversing so much of it as orders the demolition of any part of the defendants' building and by [791] substituting for the other reliefs granted a declaration that the plaintiff has the right to discharge on to the defendants' premises the water from his *mori* and from the roof of his *sajja*, and an injunction that the defendants do not obstruct him in the use and enjoyment of that right, and a further declaration that the plaintiff has a right to an easement of free and uninterrupted light over the defendants' land to the two windows in the south wall of his *sajja*, and an injunction that the defendants be restrained from erecting or continuing any building on their land in such manner as to materially hinder or obstruct the access of light to these windows.

(1) 16 C. 252. (2) 13 B. 252. (3) 18 B 474.

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When the plaintiff applies to enforce the decree the Court will determine what alterations, if any, should be made in the new building of the defendants. Each party to bear his own costs in this and the lower appellate Court.

Decree varied.

20 B. 791.

APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

LAKSHMANDAS RAGHUNATHDAS (*Original Plaintiff*), *Appellant v.* RAMBHAU MANSARAM (*Original Defendant*), *Respondent.**

[5th September, 1895.]

Bond—Hundi—*Dishonour*—*Stamp*—*Penalty*—*Offer to pay stamp duty and penalty in second appeal not allowed*—*Practice*—*Procedure.*

An instrument, which is in the nature of a bond, is not the less a bond because it does not come into operation unless and until the *hundi* with respect to which it is passed has been dishonoured.

An instrument which is not duly stamped will not be admitted, on second appeal, on payment of stamp and penalty when there is no evidence that the stamp and penalty were tendered and refused on the hearing of the first appeal.

Ramkrishna v. *Vithu* (1) referred to.

SECOND APPEAL from the decision of W.H. Crowe, District Judge of Poona, confirming the decree of Rao Saheb R. G. Bakhle, Joint Subordinate Judge.

The plaintiff sued for Rs. 1,300 due on account of two *hundis* with interest at the rate of Re. 1-8-3 per cent. per month, alleging [792] that defendant had agreed to pay interest at that rate in case the *hundis* were dishonoured by the drawee. At the trial he produced, in support of his allegation, a document (Ex. 16) which bore an adhesive stamp of one anna and which he stated to be a receipt passed to him by the defendant and containing an agreement on his part to pay interest at the above-mentioned rate.

The following is the translation of the document :—

Receipt of payment. Shak year 1811, cyclical year called Virodhi, month Chaitra, Shudh 11th. On that day receipt of payment is passed in writing to Lakshmandas Raghunathdas Gujerathi, inhabitant of Peth Budhvar, by Ramchandra Mansaram Naik, inhabitant of Peth Shukravar, as follows:—Yesterday we gave you in writing two *hundis* (to be presented) at Bombay, containing a period for payment for rupees two thousand. After deducting (from the said amount) Rs. 287-15-6 on account of interest during the period, you gave us to-day the balance of Rs. 1,712-0-6 in cash. We have received the same. Therefore there is now no dispute whatever with respect to the consideration of the two *hundis* which were given yesterday. The whole amount is received by us. The said *hundis* are given on the address of Balvantrav Vaman Godbole. We shall get them cashed within the stipulated time, and in default we shall pay you interest at the rate of Re. 1-8-3, according to which it was deducted to-day, without any objection after making accounts. We three brothers live in union and we deal in contracts. This receipt of payment is given in writing after we received the money as mentioned above.

12*th April* 1889. (Sd.) RAMCHANDRA MANSARAM.

Stamp one anna.

Attestation. his own handwriting. A receipt stamp of one anna is affixed.

* Second Appeal, No. 227 of 1894.

(1) P.J., (1873), p. 108 ; 10 B.H.C.R. 441.

The Subordinate Judge held that the above document was a bond and required to be stamped as such. He, therefore, called on the plaintiff to pay the proper stamp duty and penalty, and on the plaintiff's failure to do so, refused to admit the document in evidence, and calculated interest at 6 per cent. per annum, and gave the plaintiff a decree accordingly.

The plaintiff appealed, stating that he was ready to pay the stamp duty on the document in case the Court held that it required a stamp. The Judge held that the Subordinate Judge was right in refusing to admit the document in evidence, the plaintiff having declined to pay the stamp duty and penalty. He, therefore, confirmed the decree.

The plaintiff preferred a second appeal.

[793] *Nagindas T. Marphatia*, for the appellant (plaintiff).—The dispute relates to the rate of interest. Though the *hundis* do not mention interest, the defendant, in the receipt (Ex. 16) agreed to pay us interest at a particular rate. It stipulates that interest at the rate of Re. 1-8-3 per month shall be paid in case the *hundi* was dishonoured. The Judge held the receipt to be a bond and, therefore, inadmissible in evidence for want of proper stamp. We submit that the receipt is not a bond, as it did not by itself create an obligation. It, therefore, does not fall under the definition of bond given in the Stamp Act (I of 1879), s. 3, cl. 4. We contend that s. 23 of the Stamp Act applies to the document, and, therefore, the one-anna stamp, which it bears, is quite sufficient—*Narain Coomary* v. *Ramkrishna Das* (1). At the most, the document might be considered to be an agreement, and as such would require a stamp of eight annas only—*Gisborne* v. *Subal Bowri* (2); *Motilal* v. *Munshook Kuramchand* (3). If our contention be untenable, then we are ready and willing to pay the requisite stamp and the penalty. We have tendered the amount in Court along with the memorandum of the second appeal Even before the Judge we had expressed our willingness to pay the stamp duty. The amount which is lying in Court should be accepted, and the document admitted in evidence.

Narayan G. Chandavarkar, for the respondent (defendant). —The view taken by the lower Courts is correct. The document is a bond and must be stamped as such—*Reference from the Board of Revenue under s. 46 of the Stamp Act, 1879* (4) ; *Reference under Stamp Act, s. 49* (5). The Subordinate Judge called on the plaintiff to pay the stamp and penalty, but he declined to do so. He merely stated in his memorandum of appeal to the District Judge that he was ready to pay the stamp in case the document was considered to be a bond. But an appellate Court has no authority to take stamp duty—*Champabaty* v. *Bibi Jibun* (6). This Court has also declined to take stamp duty in **[794]** second appeal—*Ramkrishna Gopal* v. *Vithu Shivaji* (7); see also Second Appeal No. 753 of 1893 decided on the 22nd July, 1895.

JUDGMENT.

FARRAN, C.J.—We are of opinion that the instrument in question is a bond. It is not, we think, the less a bond because it does not come into operation unless and until the *hundi* has been dishonoured.

(1) 5 C. 864. (2) 8 C. 284. (3) 4 B. 328.
(4) 7 M. 350. (5) 10 M. 158. (6) 4 C. 213.
(7) P.J. (1873), p. 198 ; 10 B.H.C.R. 441.

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20 B. 791.

There is no evidence that the stamp and penalty were tendered and refused in the District Court. We cannot, therefore interfere, in second appeal, and now admit the instrument on payment of stamp duty and penalty—*Ramkrishna* v. *Vithu* (1). Decree confirmed with costs.

Decree confirmed.

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20 B. 794.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS *v.* DADA HANMANT DANI.* [5th September, 1895.]

Penal Code (*Act XLV of* 1860), *ss.* 503, 506.—*Criminal intimidation.*

A threat of getting a police constable dismissed from the police service is not such a threat of injury as is punishable under s. 506 of the Indian Penal Code (XLV of 1860).

THIS was an application for the exercise of the High Court's criminal revisional jurisdiction under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged, under ss. 504 and 506 of the Indian Penal Code (XLV of 1860), (1) with having insulted the complainant, a second class head constable of police, and (2) with having intimidated him by holding out a threat of getting him dismissed from service.

The accused was tried summarily on these charges before L. M. Deshpande, First Class Magistrate of Poona, who acquitted him on the first charge, but convicted him on the second, and sentenced him to pay a fine of Rs. 10, or in default to undergo two days' [795] simple imprisonment. The reasons given by the trying Magistrate for the conviction were as follows:—

"There are two counts against the accused,—one that he abused and insulted the complainant, the other that he intimidated him. The abuses are said to be foul abuses and the intimidation was a threat by the accused to get the complainant dismissed. I think the first count has not been proved, but the second count has been. The intimidation has been clearly borne out by the evidence of Baloba and Bala Dangi. There may have been hot words between the complainant and the accused as regards the making of the panchnama. Still the accused has no business to intimidate the complainant in the manner alleged. The defence is not reliable, as the witnesses are almost all the tenants of the accused. Regarding abuses, I think the evidence is discrepant and it is fair to acquit the accused. Regarding intimidation, I convict the accused."

Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction.

Narayan Vishnu Gokhale, for the accused, referred to *Reg* v. *Moroba Bhaskarji*(2) and *Reg* v. *Alya Dhurma* (3).

There was no appearance for the Crown.

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* Criminal Revision, No. 194 of 1895.

(1) P. J. (1873). p. 108; 10 B.H.C.R. 441. (2) 8 B.H.C.R. Cr. Ca. 101.
(3) Cr. Rul. of 17th August 1870.

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JUDGMENT.

PER CURIAM.—Following *Reg* v. *Moroba*(1) and *Reg* v. *Alya Dhurma*(2) the Court sets aside the conviction recorded against, and the sentence passed upon, Dada Hanmant Dani, and directs the return of the fine.

Conviction and sentence reversed.

20 B. 794.

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20 B. 795.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

QUEEN-EMPRESS v. TATYA BIN APPAJI.* [4th September, 1895.]

Evidence Act (I of 1872), s. 26—Confession—Police custody—Jailor in a Native State.

The custody of the keeper of a jail in a Native State, who is not a police officer, does not become that of a police officer, merely because his subordinates, the warders of the jail, are members of the police force of that State. In the absence of any suggestion of a close custody inside the jail, such as may possibly occur when an accused person is watched and guarded by a police officer investigating an offence, s. 26 of the Indian Evidence Act (I of 1872) does not exclude such a jailor from giving evidence of what the accused told him while in jail.

[F., 15 Cr.L.J. 480=24 Ind. Cas. 568=8 P.R. 1914=214 P.L.R. 1914; R., 2 C.W.N. 71 (74).]

[796] THIS was a case submitted to the High Court by C. G. W. Macpherson, Sessions Judge of Belgaum, for confirmation of the sentence of death passed upon the accused Tatya bin Appaji.

The accused was convicted of murdering one Babaji Guzar at Benadi, in the district of Belgaum, on the 28th July, 1894. After the murder he absconded and was not found for some time. On the 24th February, 1895, he was arrested and confined in Kurandvad, which is a small Native State near Belgaum. While in jail at that place awaiting extradition he made two confessions to the jailor. At his trial in the Sessions Court at Belgaum the prosecution proposed to put in these confessions as evidence against the accused. For this purpose the jailor was called as a witness, and he gave the following evidence:—

"He (accused) twice made a statement to me in regard to this offence. He was on each occasion in my custody. I am a jailor and also jail jamadar. I am not a policeman. The warders are police constables. They keep watch, accompany the prisoners when they go to stables, answer calls of nature, and supervise them when they are at work. They also lock them up at night, I superintending the work. There are generally from eighteen to twenty prisoners in the jail, and there are eight of these constables. They are under me and not under the chief constable when they are serving in the jail. I get my pay from the Mulki Department. The constables officiating under me do not perform ordinary police duties. I feed the prisoners and assign to them their task work. The police constables assigned to me as warders may remain with me a month or fifteen days or any longer or shorter period. There is no fixed time."

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* Confirmation Case, No. 21 of 1895.

(1) 8 B.H.C.R. Cr. Ca. 101.

(2) Cr. Rul. of 17th August, 1870.

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20 B. 795.

Upon this evidence the Sessions Judge ruled that the confessions were not admissible. His reasons were as follows :—

"I am of opinion that the confession made to this witness, and which it is proposed to put in, is inadmissible under s. 26 of the Evidence Act. The witness, who is the Kurundvad Jailor, is not a police officer, but his eight warders are police constables, though while serving under him they are, it is said, relieved of police duties. They are not, however, relegated to jail work for any specific time, and a man may apparently be a warder one day and a police constable the next and *vice versa*. I think, therefore, that these warders must for the purposes of s. 26 be regarded as police constables. It follows that the accused was in custody, $\frac{8}{9}$ths of which was police custody, and I think that for the purposes of s. 26 of the Evidence Act he must be regarded as having been in police custody. *The Queen* v. *Hurribole Chunder Ghose* (1) is in point. If the arrangement in question were in British territory, I should hold this view, and I think it must be held *a fortiori* in the case of a small Native State."

On the other evidence, however, in the case the jury found him guilty of murder, and the Sessions Judge sentenced him to death.

[797] On the case coming on to the High Court for confirmation of the sentence of death.

P. M. Mehta (with *Wasudeo Gopal Bhandarkar*) appeared for the prisoner.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.

Branson, with him *Dhondu Pandurang Kirloskar*, for the complainant.—The prisoner was not in police custody when he made the statement to the police, and the statement is, therefore, admissible in evidence. The Sessions Judge held that the jailor is not a police officer and yet excludes the statement. The warders, who are police constables, were not present at the time the statement was made, the prisoner being in the custody of the jailor himself. It is like a statement made to the superintendent of a jail in British India. A police officer means a police officer of British India.

P. M. Mehta in reply :—The custody was that of the police superintended by the jailor. Section 26 of the Evidence Act applies: see *The Queen* v. *Hurriboie Chunder Ghose* (1).

JUDGMENT.

JARDINE, J.—Upon the evidence before us, *viz.*, that of the keeper of the foreign jail, we must hold that he is not a police officer, and assuming that the prisoner, when in that jail at Kurandvad, was in his custody as he says, we are of opinion that the custody of the jailor did not become the custody of a police officer, merely because his subordinates, the warders of the jail, were members of the police force of the Kurandvad State. There is no suggestion of a close custody of the prisoner inside the jail, such as may possibly occur when a prisoner is watched and guarded there by the police officer investigating the offence. We are, therefore, of opinion that, on the materials before him, the Sessions Judge was wrong in holding that s. 26 of the Indian Evidence Act I of 1872 excluded the jailor from giving evidence of what the prisoner told him. Unless there be other material or other objection to admissibility, such evidence should be taken, and inquiry made into all the circumstances

(1) 1 C. 207.

concerning the making of the statements, who were present, and what the [798] contents were, and of course the date. The Sessions Judge should take the evidence of the jailor, and any other person present, and the prisoner should be allowed to question the witnesses, and to call any witness whose evidence can be procured without unreasonable delay or expense, and who can testify as to what occurred at the time. The evidence should be certified to this Court as soon as possible, and within three weeks.

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20 B. 798.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

GANGARAM CHIMNA PATEL (*Original Plaintiff*) *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Respondent.** [9th September, 1895.]

Possession—Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Evidence—Failure of plaintiff to prove title—No evidence of defendant's title—Effect of plaintiff's possession—Plaint—Prayer for general relief—Practice—Specific Relief Act (I of 1877), s. 42.

The plaintiff who was in possession of certain land sued for a declaration that the defendant had no title to it and that it belonged to him. The plaint also contained a prayer for general relief. At the trial both plaintiff and defendant failed to prove any title to the land, but the plaintiff proved that he had been for ten years in possession and had built a shed on it.

Held, that no declaration of this plaintiff's title could be made; but,

Held, on the authority of *Ismail Ariff* v. *Mahomed Ghouse* (1), that the plaintiff was lawfully entitled to the land and to the shed thereon.

[F., 25 B. 287 (293); R., 33 M. 173 (175, 176)=5 Ind. Cas. 121=20 M.L.J. 71=6. M. L.T. 306; 9 Bom. L.R. 1301 (1304); 10 Bom. L.R. 571 (573); 21 T.L.R. 67.]

APPEAL from the decision of A. Steward, District Judge of Khandesh, in suit No. 1 of 1893.

Suit for declaration of title. The plaintiff sued the Secretary of State for India in Council for a declaration of his title to a piece of ground with a cattle-shed on it situate in the village of Juwardi, taluka Pachora, in the Khandesh District, which plaintiff alleged to be his ancestral property and also to have been given to him by his uncle Fulji. The plaint stated that the patel and the kulkarni of the village had submitted a report to Government stating that the said piece of ground [799] belonged to Government; that the plaintiff thereupon received a notice from the Assistant Collector calling on him to vacate the ground, and that he had appealed to the Collector and then to the Revenue Commissioner, but obtained no redress. The plaint concluded with the following prayers:—

"(*a*) That the said piece of ground be declared to belong to the plaintiff.

"(*b*) That he be awarded any other relief to which he might be entitled."

The defendant replied that the ground was not plaintiff's property but belonged to Government, and that assuming that plaintiff had possession of it for some time, such possession could confer no ownership on him.

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* Appeal, No. 139 of 1894.

(1) 20 I.A. 99.

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The District Judge found that plaintiff had built a cattle-shed on the plot of ground at least ten years before suit, but that it was not proved that the site ever belonged to plaintiff's uncle Fulji or that he had any power to dispose of it in gift as alleged by the plaintiff. He then proceeded to say :—

"It is now to be seen what use was made of the site prior to the plaintiff erecting a cattle-shed ten or fifteeen years ago. There were apparently old walls on the site in dispute, and plaintiff asserts that before he built the cattle-shed, he erected sheds on the site each year and that he kept his fodder, grain and earth on the site. He had no hedge, but he put up thorns in places where the wall had fallen down. He might have tied up his cattle there occasionally, but it is not probable that he would have kept his fodder and grain in a place which was practically open and which he could not see from the house in which he lived with his family. I do not believe the statement about the sheds being built on the site each year, and mere tying up of cattle does not constitute ownership.

* * * * *

"Holding, then, that the alleged gift is not proved, and that it is not proved that the site in dispute is the ancestral property of Fulji or of * * or plaintiff Gangaram, and that the documentary evidence is altogether unreliable, the conclusion is inevitable that Gangaram valad Chimna seized this land about 1883 and built a cattle-shed on it, making use, in doing so, of the old broken down walls which he found there. He has proved no ownership in the site; it was a mere unlawful usurpation of it, which Ganpat Patel reported to the proper authorities in 1886."

On these grounds the District Judge dismissed the plaintiff's suit and ordered him to remove the materials of the shed built on the site within three months of the date of the decree.

Against this decision plaintiff appealed to the High Court.

[800] *Ganesh Krishna Deshmukh*, for the appellant.—Plaintiff has been in possession for more than twelve years. Defendant requires him to vacate land. The *onus* is obviously on the defendant to prove his title. This he has not done. Plaintiff is, therefore, entitled to be retained in pcssession. Possession gives him a title against all except the rightful owner—*In re Antaji Keshav Tambe* (1); *Ismail Ariff* v. *Mahomed Ghouse* (2).

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the respondent.—Plaintiff sues for a declaratory decree. He comes into Court to establish his title. He is, therefore, bound to prove it. In such cases the *onus* is always on plaintiff—*Luis Manoel Pedro Antonio* v. *Jalbhai Ardesir Shett* (3); *Kisandas* v. *Kashiram* (4); *Krishna Churn* v. *Protab Chunder Surma* (5); Field on Evidence, s. 102; s. 202 of the Land Revenue Code, (Bom. Act V of 1879); *Swarnamayi Raur* v. *Srinibash Koyal* (6); *Baboo Purseedh Narain* v. *Bissessur Dyal Singh* (7); *Royes* v. *Mudhoo Soodun* (8); *Muddun Mohun* v. *Bharut Chunder Roy* (9); *Panduranga* v. *Nagappa* (10); *Raja Lelanund Singh* v. *Maharajah Moheshur* (11).

JUDGMENT.

JARDINE, J.—The plaint prayed that the Court would declare that the defendant had no title, and that the plaintiff had title to the property in dispute. The learned Judge found, on the evidence, that the plaintiff had not proved his title; and this finding has not been contested here.

(1) 18 B. 670 (674).
(2) 20 I.A. 99.
(3) P.J. (1890) p. 215.
(4) P.J. (1892) p. 411.
(5) 7 C. 560.
(6) 6 B.L.R. 144.
(7) 7 W.R. 148.
(8) 9 W R. 154.
(9) 11 W.R. 249.
(10) 12 M. 366.
(11) 10 M.I.A. 81.

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We are of opinion that the Judge was right in refusing the declaration of title—*Royes* v. *Mudhoo* (1); *Rassonada* v. *Sitharama* (2); *Sheik Torab Ally* v. *Sheik Mahomed Tukkee* (3); *Ismail Ariff* v. *Mahomed Ghouse* (4).

The plaint, however, contained a prayer that the plaintiff might be awarded any other relief to which he might be entitled. If he had made reference to s. 42, illustration (*g*), of the Specific Relief Act, or if the Court had noticed that illustration which refers to suits brought for confirmation of possession, it [801] is probable that an issue would have been raised as to whether the plaintiff was entitled as against the defendant to be retained in possession. There is no evidence, on the record, of the defendant's title; and it is found by the Judge that the plaintiff has held possession for at least ten years and has built a shed on the land. These facts appear to us to bring the case within the ruling of their Lordships of the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse* (4).

We, therefore, modify the decree of the District Judge and further declare that the plaintiff is lawfully entitled to possession of the land in suit and the shed thereon; the defendant to bear the costs in both Courts.

Decree amended.

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20 B. 801.

APPELLATE CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Parsons.

TAI AND ANOTHER (*Original Plaintiffs*), *Appellants v.* LADU AND OTHERS (*Original Defendants*), *Respondents.**

[9th September, 1895]

Reversioner—Widow—Suit by reversioner for possession—Death of the widow—Accrual of right to sue—Unsuccessful application in execution proceedings against widow—Limitation Act (XV of 1877), sch. II, art. 141—Civil Procedure Code (Act XIV of 1882), s. 283.

Under art. 141, sch. II, of the Limitation Act (XV of 1877) a reversioner's right to sue accrues on the death of the widow. The fact that the reversioner has made an unsuccessful application for possession in execution proceedings against the widow, and has not sued under s. 283 of the Civil Procedure Code (Act XIV of 1882), does not debar him from filing a regular suit.

[R., 20 M. 493=7 M.L.J. 204.]

SECOND appeal from the decision of Arthur H. Unwin, District Judge of Nasik, confirming the decree of Rao Saheb L. K. Nulkar, Subordinate Judge of Sinnar.

The plaintiffs, as the daughters and sole heirs of one Malji valad Anaji, sued in the year 1891 to recover possession of certain lands and mesne profits. They alleged that their father died about thirteen years before the institution of the suit; that [802] after his death his widow Rakhmi got into possession; that she died on the 6th September, 1888, and that after her death the defendants took wrongful possession.

The defendants pleaded that the lands were sold to them by Rakhmi in the year 1880 under a registered deed to satisfy her husband's debts.

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* Second Appeal, No. 326 of 1894.

(1) 9 W.R. 154.
(2) 2 M.H.C.R. 171.
(3) 19 W.R. 1.
(4) 20 I.A. 99.

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and that they were, therefore, the owners of the property. They further stated that they had obtained a decree against Rakhmi, and recovered possession through the Court in 1883, and submitted that the claim was time-barred.

The Subordinate Judge found that the plaintiff's claim was time-barred under art. 91, sch. II, of the Limitation Act (XV of 1877), because the plaintiffs had by an application to the Court resisted the delivery of the lands to the defendants, and the suit was not brought within three years from the date of their dispossession in 1883.

On appeal by the plaintiffs, the Judge confirmed the decree on the ground that the plaintiffs ought to have brought a suit under s. 283 of the Civil Procedure Code (Act XIV of 1882) to set aside the defendants' sale-deed within one year (art. 11, sch. II of the Limitation Act, XV of 1877) from the time their application was rejected.

The plaintiffs preferred a second appeal.

Gangaram B. Rele, for the appellants (plaintiffs).—Both the lower Courts have taken a wrong view of our claim. While Rakhmi was alive it was not necessary for us to bring a suit for possession. Our cause of action arose on her death. There was no order passed by the Court on our application. Our object was to prevent delivery of possession to the defendants. It was not necessary for us even to present an application, because Rakhmi was then alive and we could do nothing with respect to the property during her life-time. Article 141, sch. II, of the Limitation Act (XV of 1877) is applicable,

Daji A. Khare, for the respondents (defendants).

JUDGMENT.

FARRAN, C.J.—Plaintiffs' right to sue accrued on the death of the widow under art. 141 of sch. II to the Limitation Act. During her life-time they had no right to make any application for possession, and such an application when made must [803] of necessity have failed, as it did. Their having then made it unsuccessfully, and not having sued under s. 283, Civil Procedure Code, does not now debar them from filing the present suit. The District Judge must find on the validity and binding nature on the plaintiffs of the widow's disposition of the property. We reverse the decree and remand the appeal for re-trial on the merits. Costs to abide the result.

Decree reversed and case sent back.

20 B. 803.

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20 B. 803.

Before Mr. Justice Jardine and Mr. Justice Ranade.

NARAYAN BALLAL PARADKAR (*Original Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Original Defendant*), *Respondent.** [10th September, 1895.]

Revenue Jurisdiction Act (*X of* 1876), *ss.* 3, 11—*Civil Court's jurisdiction—Forest Act* (VII *of* 1878), *ss.* 2, 16, 81—*Forest officer—Revenue officer—Land Revenue Code* (*Bombay Act V of* 1879), *ss.* 3, 203†—*Forest officer not a revenue officer—Appeal—Right of appeal—Construction.*

A forest officer is not a revenue officer within the definition in s. 3 of the Land Revenue Code (Bombay Act V of 1879), and does not become one merely by being placed under a revenue officer for purposes of control.

Section 11 of Act X of 1876 only applies to an act or omission of a revenue officer, and only in cases where the law allows an appeal.

Act X of 1876 must be construed strictly. No right of appeal can be given except by express words.

[R., 28 A.W.N. 211 = 4 M.L.T. 172 ; 6 S.L.R. 241.]

APPEAL from the decision of T. Walker, District Judge of Thana in suit No. 3 of 1893.

The plaintiff purchased at an auction sale the right of gathering myrabolams in the forests of all the talukas of the Kolaba District and paid to the divisional forest officer one-fourth of the purchase-money and an additional amount as deposit. He then applied to the divisional forest officer several times for **[804]** permission to gather the fruit. No permission was, however, granted to him except as to three talukas, until the season for collecting the fruit had expired. On this the plaintiff wrote to that officer informing him that the contract had become null and void and asking a refund of the amount paid by him to Government. No reply was sent to this letter. Plaintiff thereupon filed this suit to recover the one-fourth of the purchase-money, the amount of deposit, damages, and interest.

The District Judge recorded the following judgment :—

"Plaintiff's pleader urges (1) that the forest officer, whose act or negligence has caused this suit, is not a revenue officer, and (2) that no appeal against his order lay to anybody ; consequently plaintiff was entitled at once to seek his legal remedy.

"It is well known that Government treat forest administration as a branch of land revenue administration : see, *e.g.*, the long notification published at p. 909 of the *Government Gazette*, dated 8th September, 1892. As pointed out in that resolution, forest administration is subject to the control of the Commissioner of the Division, and the forest officers are made assistants to the Collector for forest purposes in each district. Under Chap. XIII of the Land Revenue Code an appeal, therefore, lay to one or other of these officers or to the Conservator of Forests, or to all three possibly. As plaintiff fails to show that he has appealed to any of them,

* Appeal, No. 165 of 1894.

† Section 203 of the Land Revenue Code (Bombay Act V of 1879) provides as follows :—"In the absence of any express provision of this Act, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a revenue officer under this Act, or any other law for the time being in force, to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not."

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I think he must be non-suited under s. 11 of the Revenue Jurisdiction Act (X of 1876)."

He accordingly rejected the claim with costs.

Plaintiff thereupon appealed to the High Court.

Narayan Ganesh Chandavarkar, for the appellant.—The District Judge was wrong in holding that s. 11 of the Act X of 1876 operated as a bar to the present suit. The application of that section to any given case turns on the right meaning of the term "revenue officer." A "forest officer" is not a "revenue officer." A great deal also depends on the question whether there is any right of appeal in this case. A forest officer has no right to hear an appeal. In the present case there is no right of appeal given to the party injured by a decision of the forest officer. The right of appeal must be expressly given and cannot be inferred—*Attorney-General* v. *Sillem* (1). Section 16 of Act VII of 1878 provides for appeals only in certain cases. The only other law on the subject is the Land Revenue Code (Bombay Act V of 1879). Section 203 of that Code applies to orders passed (1) by revenue officers, (2) under the Land Revenue Code or (3) other law. The revenue officer referred **[805]** to in that Code must be one appointed under the Code alone, and so an order passed by a forest officer does not fall under s. 203. The Forest Act, which is an Act of the Imperial Legislature, cannot be modified by an Act of the Bombay Legislature.

The lower Court has not been able to indicate the proper authority to which appeals can lie.

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the respondent.—This suit is in respect of *hardas* in a Government forest. Fruit of trees are "land" within the meaning of cl. 1 of s. 3 of the Revenue Jurisdiction Act, X of 1876. Money payable to Government in respect of that fruit is "land revenue" within the meaning of cl. 2 of that section.

Forest administration is a branch of land-revenue administration; it is so treated by Government; see, for instance, *Bombay Government Gazette* of 8th September, 1892, p. 909, containing rules under the Forest Act, VII of 1878, which under s. 77 of that Act have the force of law. Forest officers are Assistant Collectors and subject to the control of the Revenue Commissioner. They are, therefore, revenue officers under the Land Revenue Code also, and their proceedings are subject to appeal under s. 203, Land Revenue Code. This section stands in the place of s. 9 of the Revenue Jurisdiction Act, which is replaced by it. The present suit being in respect of moneys claimable for the fruit of Government trees vested in the contractor by the terms of the sale, and forest officers being employed in or about the business of the moneys so claimable, plaintiff ought to have first appealed from the decision of the forest officer, which is the basis of the present suit, and s. 11 of the Revenue Jurisdiction Act is a bar.

JUDGMENT.

JARDINE, J.—The District Judge held this suit barred by s. 11 of Act X of 1876. His reasons were that a resolution of the Governor of Bombay in Council, published in the *Government Gazette*, p. 909, and dated the 8th September, 1892, treats the administration of the forests as a branch of land-revenue administration, and places the former administration and its officers under the control of the revenue officers. Therefore he

(1) 10 H.L. Cases, 704 (710).

[806] held as follows:—"Under Ch. 13 of the Land Revenue Code an appeal, therefore, lay to one or other of these officers (the Commissioner or the Collector) or to the Conservator of Forests, or to all three possibly." The language used by the District Judge shows that it was not made clear to him where the appeal lay, as he cannot say to which of the three officers it lies.

It is settled by a series of decisions that Act X of 1876 must be construed strictly. We must, therefore, see whether the suit is barred by that Act or any other Statute.

Section 11 only applies to an act or omission of a revenue officer, and to these only where the law allows appeal. "Revenue officer" is defined in s. 3 as connoting a connection with "land revenue," which connotes the word "land," and "land" includes trees and fruit. We do not think this mere inclusion can be stretched so as to make a servant of Government in some different department altogether an officer of land revenue merely because, *e.g.*, he sells for Government the produce of trees in a compound belonging to Government. The Forest Act VII of 1878 treats forest officers as a class defined off from other officers. In s. 16 it makes a clear distinction between them and officers of the Revenue Department; and if the price of forest produce were in itself "land revenue" there would be no occasion in s. 81 to say that it may be recovered "as if it were an arrear of land revenue." See *Narayan* v. *Sakharam*(1). By parity of reasoning, we hold that a forest officer is not a revenue officer within the definition in s. 3 of the Land Revenue Code (Bombay Act V of 1879). The Government Pleader went on to argue that he was made such by being placed under a revenue officer for purposes of control. This involves the absurdity of holding that, if he had been put under the control of a judicial or military officer, he would become a judicial or military servant.

Turning to the second circumstance essential to create the bar under s. 11 of Act X of 1876, we have to see if there was any appeal which the plaintiff had of right. No right of appeal can be given except by express words—*The Attorney General* v. [807] *Sillem* (2). Such appeals as the superior Legislature intended to give are so given in the Forest Act of 1878: and it is admitted that those provisions do not give any appeal to the plaintiff in regard to the matter now in suit. Even if we had held that the forrest officer is a revenue officer under the Bombay Land Revenue Code, we would have serious doubts whether the general words used in s. 203 thereof by the inferior Legislature were intended in any way to affect the complete legislation about forest officers of the superior Legislature. The Land Revenue Code is evidently intended to deal only with what is usually known as land revenue, and things that by law or custom have been dealt with by officers of that department. It has not been suggested that the acts or omissions of the forest officer, about which this suit is brought, were done in any matter to which that code relates.

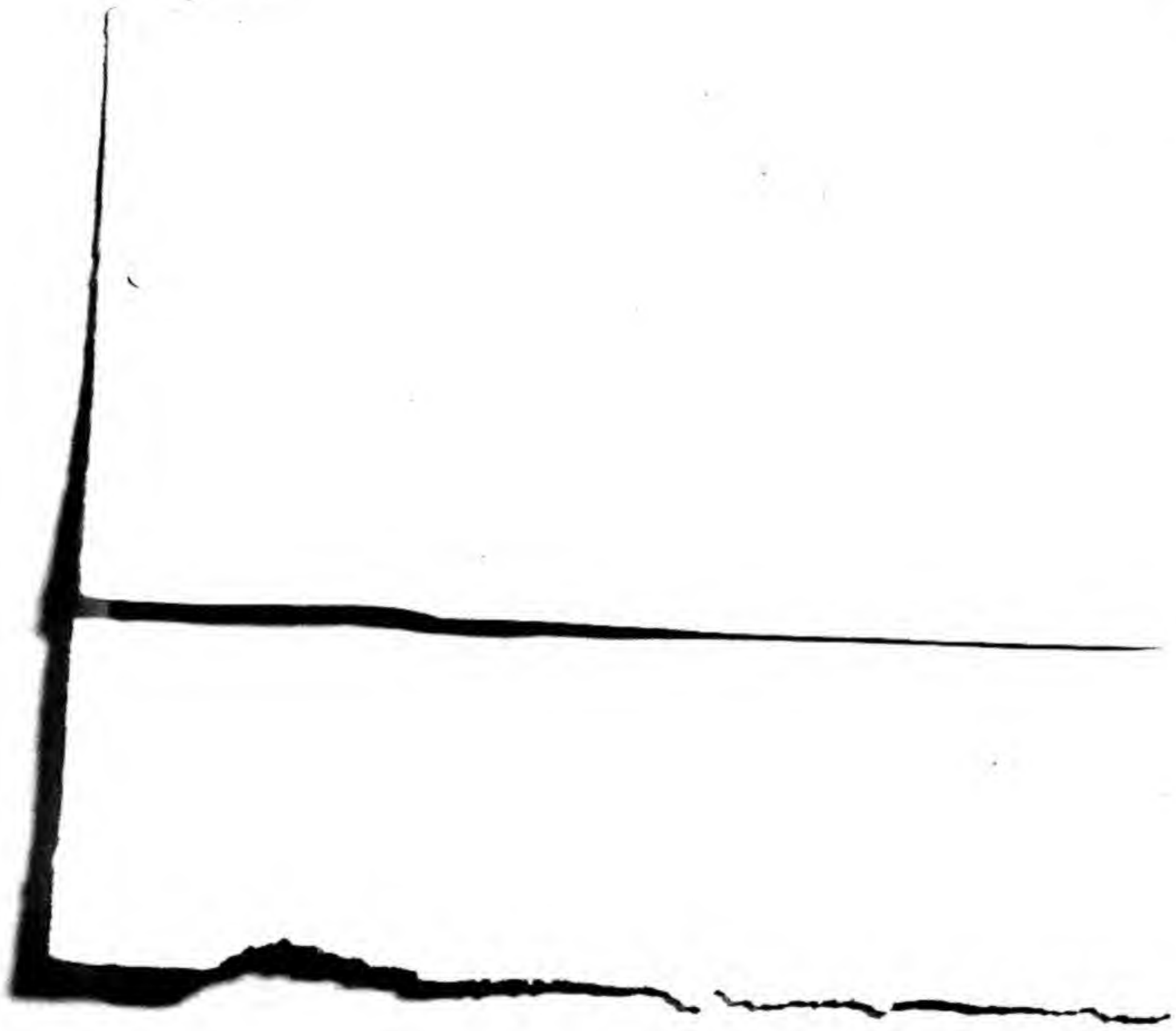
The District Judge, therefore, was in error in declining jurisdiction.

The Court sets aside his decree, and remands the suit to the District Court for disposal: the respondent to pay the costs of this appeal.

Case remanded.

(1) 9 B. 462; 11 B. 519 (522).

(2) 10 H. L. Cases 704 (710).



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Held, reversing the decree, that the agreement not being permitted by the rules framed under the Opium Act (I of 1878) was forbidden by s. 4 of the Act, and was void as having in view an object forbidden by law.

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Held, reversing the decree of the lower Court, that, in the absence of any evidence to prove the Talukdar's right to treasure trove either by a grant or prescription, the property belonged to Government, the Indian Treasure Trove Act (VI of 1878) being inapplicable, as no notice was given by the finder, nor were any proceedings taken under it. SECRETARY OF STATE FOR INDIA IN COUNCIL v. VAKKATSANGJI MEGHRAJJI, 19 B. 668 ... 447

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Held, that although his income from the inam villages and from other sources not agricultural might together be sufficient for his maintenance, nevertheless the construction of the definition of agriculturist given in the Act which is quite independent of any such question, could not be affected thereby, and that he must be deemed to "earn the means of livelihood" principally from agriculture, and to be an agriculturist within the meaning of Act XVII of 1879. DWARKOJIRAV BABURAV v. BALKRISHNA BHALCHANDRA, 19 B. 255 ... 173

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Held, that the requirements of s. 4 of Act XVII of 1879 were sufficiently complied with by the suit having been *filed* in the Court of the Subordinate Judge of the First Class. He was competent under s. 23 of Act XIV of 1869 to transfer the suit to the Joint Subordinate Judge of the Second Class who was deputed to assist him. MANAJI v. NARAYANRAO, 19 B. 46 ... 31

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second appeal, the mortgagor after the expiration of the time for redemption specified in the decree applied to the High Court for an order for the payment of the amount by instalments under s. 15 B of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

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Held, that although there is no provision in the Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879) empowering a conciliator to enter the name of the heir of a party, and Government have not apparently under s. 49 (*a*) of the Act made any rules regulating the procedure before conciliators in this respect, yet when a Subordinate Judge is seized of a conciliation agreement, there is a proceeding before him under the Act. He should, therefore, under s. 74 of the Act follow the provisions of the Civ. Pro. Code (Act XIV of 1882) in regard to placing on the record the heirs of the deceased parties. NARAYANDAS SAKHARAM v. KONDI, 19 B. 202 ... 136

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Held, that as s. 74 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) only makes the Civ. Pro. Code (Act XIV of 1882) applicable to suits before the Subordinate Judge, the conduct of proceedings before a District or Assistant Judge when sitting in revision under s. 53 of Act XVII of 1879 is within his own discretion, and the granting of a review on the ground of mistake as to the nature of a defendant's income is a reasonable exercise of such discretion. BADARICHARYA v. RAMCHANDRA GOPAL SAVANT, 19 B. 113... 76

(13) *S.* 74—*Special Judge—Review—Power of Special Judge to review his own decree—Application of Civ. Pro. Code* (XIV *of* 1882) *to proceedings of Special Judge—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 622.—The Special Judge appointed under the Dekkhan Agriculturists' Relief Act (XVII of 1879) (the defendants not appearing) reversed, in revision under s. 53 of the Act, the decree of a Subordinate Judge and passed a decree for the plaintiff. One of the defendants, who, it appeared had not been served with notice of the previous application for review, subsequently applied to the Special Judge to review his decree, and that application was granted on the ground that the applicant had not had notice of the former review. On this subsequent review the special Judge discovered that he had made a mistake with reference to the date of certain documents, and that this mistake had led him to a wrong conclusion upon the merits of the case. He consequently reversed his former order and dismissed the suit, confirming the original decree of the Subordinate Judge. The plaintiff then applied to the High Court, under its extraordinary jurisdiction (s. 622 of the Civ. Pro. Code) Act XIV of 1882).

Held, that in granting a rehearing the Special Judge had exercised a reasonable discretion with which the High Court could not interfere in its extraordinary jurisdiction.

The Civ. Pro. Code (Act XIV of 1882) is not applicable to proceedings before the Special Judge, and the conduct of such proceedings rests within his discretion.

PARSONS, J.—The Special Judge cannot under the Dekkhan Agriculturists' Relief Act (XVII of 1879) review his decree and order a new trial on the ground of discovery of fresh evidence, but he has discretional power to review his decree in order to correct a mistake into which he has fallen. RAMSING v. BABU KISANSING, 19 B. 116 (F. B.) ... 78

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law, and possessed of no separate property. A guardian of the person of such a minor may be appointed under the Act. VIRUPAKSHAPPA v. NILGANGAVA, 19 B. 309 (F. B.) ... 209

(3) See GUARDIAN AND WARD, 19 B. 96.

(4) *Ss.* 47 (*g*) *and* 48—*Guardian—Order refusing to remove a guardian—Not appealable—Appeal—Practice.*—The effect of ss. 47 (*g*) and 48 of Guardian and Wards Act (VIII of 1890) is to allow no appeal from an order refusing to remove a guardian. *In re* BAI HARKHA, 20 B. 667 ... 1013

Act IX of 1890 (Railways).

S. 75—See RAILWAY COMPANY, 19 B. 159.

Act VI of 1892 (The Indian Limitation Act and Civil Procedure Code Amendment Act).

(1) S. 4—See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 198.

(2) S. 647—See PRACTICE, 19 B. 276.

II.—Bombay Acts.

Act II of 1863 (Bombay Exemptions from Land Revenue in Territories subject to Act XI of 1852).

(1) See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 20 B. 423.

(2) See ESTOPPEL, 19 B. 374.

Act I of 1865 (Bombay Survey and Settlement).

S 43—See LANDLORD AND TENANT, 20 B. 354.

Act VIII of 1867 (Bombay Village Police).

(1) See EVIDENCE, 19 B. 728.

(2) *Ss.* 10, 11, 12—*Duties of the police patel in cases of unnatural or sudden death—Ancient village system of police not affectedby the Code of Criminal Procedure* (*Act* X *of* 1882).—The ancient village system of police, as regulated by Bombay Act VIII of 1867, remains unaffected by the Code of Criminal Procedure (X of 1882) except where the Code contains a specific provision.

Under Bombay Act VIII of 1867, the police patel has to do much more than merely inform the district police. He has himself to investigate the matter of a crime and obtain all procurable evidence. Under s. 11 of the Act, if an unnatural or sudden death occur, or any corpse be found, he must *forthwith* hold an inquest and investigate with the panch the causes of death and all the circumstances of the case, and make a written report of the same. If it appears that the death was unlawfully caused, he must immediately give notice to the police station, and if the state of the corpse permits, he shall *at once* forward it to the Civil Surgeon or other appointed medical officer. These provisions of the law are likely to be defeated if the police patel refrains from the proper action until the district police officers arrive on the spot. QUEEN-EMPRESS v. RAGHO MAHADU, 19 B. 612 ... 408

Act III of 1872 (Bombay Municipal).

S. 289—See MUNICIPALITY, 19 B. 407.

Act VI of 1873 (Bombay District Municipal).

(1) S. 11—See MUNICIPALITY, 20 B. 732

(2) S. 17—See MUNICIPALITY, 20 B. 146.

(3) S. 33, cl. 1—See MUNICIPALITY, 19 B. 27.

(4) Ss. 42, cl. (1), 48 and 75—See MUNICIPALITY, 19 B. 212.

(5) S. 54—See MUNICIPALITY, 20 B. 83.

Act III of 1874 (Bombay Hereditary Offices).

(1) *Ss.* 5, 10 *and* 15, *cl.* (2)—*Amending Act* V *of* 1886, *s.* 1—Deshamukhi *vatan—Commutation of service—Gordon Settlement.*—S. 10 of the Vatan Act (Bom. Act III of 1874) applies to *deshamukhi* service

Act III of 1874 (Bombay Hereditary Offices)—(*Concluded*). PAGE

vatan with respect to which the liability to serve has been commuted under the Gordon Settlement. BHAU v. RAMCHANDRARAO, 20 B. 423 (F. B.) ... 845

(2) S. 13—*Hereditary service vatan* Kazi—Kazi's *office*—Rozina *allowance*—*Its liability to attachment and sale in execution of a decree*—*Pensions Act* (XXIII *of* 1871), s. 4.—The office of *kazi* is not a hereditary service vatan under Bombay Act III of 1874.

Plaintiff obtained a money decree against Hafasji and in execution sought to attach and sell a decree obtained by Hafasji against Mohiyodin which entitled Hafasji to receive annually a certain portion of the *rozina* allowance paid by Government to Mohiyodin as *kazi*. Hafasji contended that the *rozina* allowance was paid to Mohiyodin and his family for service as *kazi*, and that, therefore, it was not liable to the process of a Civil Court under s. 13 of Bombay Act III of 1874. This contention was upheld by both the lower Courts.

Held, that as the *kazi's* office was not a hereditary service vatan, plaintiff's right to attach the decree obtained by Hafasji against Mohiyodin was not barred by s. 13 of Bombay Act III of 1874.

Held, also, that as Hafasji was not liable to serve as *kazi*, it was not open to him to urge that the allowance in question was appropriated as service remuneration, and was not, therefore, transferable.

Held, also, that as the decree sought to be attached was passed before the Pensions Act (XXIII of 1871) came into force, plaintiff's *darkhast* was not barred for want of a certificate under s. 4 of the Act. DHARAMDAS SAMBHUDAS v. HAFASJI, 19 B. 250 ... 170

(3) S. 17—See WATAN, 19 B. 581.

Act III of 1875 (Bombay Tolls on Roads and Bridges).

S. 7—*Tolls*—*Lease to levy tolls*—*Lessee, right of, to admit partners*—*Accounts, two sets of*—*False accounts kept to deceive Government.*—A lessee from Government of the right to levy tolls admitted into partnership with him the plaintiff and two others. One of the conditions attached to the lease prohibited sub-letting.

The plaintiff having brought a suit for his share of the profits realized in the transaction, the Judge dismissed the suit on the ground that the partnership was illegal, being of opinion that sub-letting and admitting a partner were identical.

Held, reversing the decree, that the partnership was not illegal.

Where in such a partnership two sets of accounts were kept, one true and the other false,

Held that such practice, however reprehensible, was not illegal under s. 7 of the Tolls Act (Bombay Act III of 1875), and did not disentitle the plaintiff to show as between himself and his partners what was the actual profit of the concern. GANESH VITHAL v. SHRIPAD DATTOBA, 20 B. 668 ... 1014

Act III of 1876 (Bombay Mamlatdars' Courts).

(1) *Delivery of possession in execution of a decree of a Civil Court*—*Subsequent lease to the judgment-debtor*—*Refusal of the Mamlatdar to restore possession after the expiration of the lease.*—Vinayak obtained possession of land from Balu in execution of a decree of a Civil Court. After obtaining possession, Vinayak leased the land to Balu. On Balu's refusal to vacate the land on the expiration of the lease, Vinayak brought a possessory suit in the Mamlatdar's Court. The Mamlatdar rejected the plaint, holding that he ought not to order restoration of possession of the land again and again.

Held, that a fresh cause of action accrued to Vinayak on the refusal of Balu to give possession on the expiry of the lease, and that the Mamlatdar was wrong in declining to accept the plaint. VINAYAK v. BALU, 20 B. 491 ... 891

(2) See EXECUTION OF DECREE, 20 B. 351.

(3) See MAMLATDAR, 20 B. 630.

Act III of 1876 (Bombay Mamlatdars' Courts)—*(Concluded).* PAGE

(4) *Ss.* 4, 15, *cl.* (*a*) *and* 18—*Landlord and tenant—Dispossession of tenant—Possessory suit by landlord—Possession on behalf of landlord—Mamlatdar.*—A landlord who has let out his land to tenants cannot, on the tenants being dispossessed, bring a possessory suit in the Mamlatdars' Court under the provisions of the Mamlatdars' Act (Bombay Act III of 1876). The tenants cannot be said to be in possession "on behalf" of the landlord under s. 15, cl. (*a*) of the Act. GOMA v. NARSINGRAO, 20 B. 260 (F.B.) ... 731

(5) *S.* 15—*Possessory suit—Mortgagee's possession not on behalf of the mortgagor—Jurisdiction.*—The possession by a mortgagee is not possession on behalf of his mortgagor within the meaning of s. 15 of the Mamlatdars' Act (Bombay Act III of 1876) so as to give the Mamlatdars jurisdiction under that section. KHANDERAO v. NARSINGRAO, 19 B. 289 ... 195

(6) S. 17—See MAMLATDAR, 19 B. 675.

(7) S. 18—See SUCCESSION ACT (X OF 1865), 19 B. 828.

Act V of 1879 (Bombay Land Revenue Code).

(1) Ss. 3 and 203—See ACT X OF 1876 (BOMBAY REVENUE JURISDICTION), 20 B. 803.

(2) *Ss.* 81 *and* 153—*Default in paying assessment—Payment of assessment by another—Order of Collector transferring lands into name of person paying assessment—Forfeiture—Subsequent suit by defaulter to recover the land—Jurisdiction of Civil Court—Act* X *of* 1876, *ss.* 4 (*c*) *and* 5 (*b*)—*Land Revenue.*—An order made by a Collector removing A's lands from his khata and transferring them to B's khata, on the ground that A. had allowed the assessment thereof to fall into arrears, and that B had paid the assessment, does not by itself amount to forfeiture of A's interest in the lands.

A suit by A to recover such land from B being simply a suit between private parties for the purpose of establishing a private right, s. 4 (*c*) of Act X of 1876 does not bar the jurisdiction of the Civil Court. BHAU v HARI, 20 B. 747 ... 1068

(3) S. 64—See LANDLORD AND TENANT, 19 B. 150 ; 20 B. 354.

(4) S. 108—See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 729.

(5) *S.* 108—*Khoti Act* (*Bombay Act* I *of* 1880), *s.* 17—*Evidence Act*, I *of* 1872, *s* 40—Res judicata—Dhara *land*—Khoti *land.*—An entry of a record prepared under s. 108 of the Land Revenue Code, Bombay Act V of 1879, by the survey officer, describing certain lands as *khoti* is by force of s. 17 of the Khoti Act, Bombay Act 1 of 1880, conclusive and final evidence of the liability thereby established, and shuts out the evidence of a prior decision otherwise relevant under s. 40 of the Evidence Act as proof of *res judicata* whereby a Civil Court adjudged the land to be *dhara*. RAMCHANDRA v. RAGHUNATH, 20 B. 475 ... 881

Act I of 1880 (The Bombay Khoti Settlement).

(1) *Khot—Landlord and tenant—Tenancy—Presumption as to nature of tenancy in absence of evidence—Payment of rent—Mortgage by tenant—Sale of tenant's interest—Rights of purchaser—Heirs of tenant cannot surrender tenancy, or affect purchaser's title—Transfer of tenancy in khoti village—Ordinary tenancy—Occupancy tenancy.*—One Atmaram, who held certain land as tenant, mortgaged it to Hirshet, and shortly afterwards died. There was no evidence to show the term of Atmaram's tenancy. After his death the plaintiff Vishnu, who was his brother, became tenant of the land and paid rent to the khots. Some years subsequently Hirshet (the mortgagee) sued to enforce his mortgage and made the plaintiff Vishnu and his two sisters parties. He obtained a decree and sold the mortgaged land in execution. Sonshet bought it and now claimed possession. Vishnu contended that Atmaram's interest terminated at his death, and that Sonshet was, therefore, not entitled to possession.

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Held, that Sonsbet was entitled to possession. The fact that Atmaram had paid rent to the khots showed that he was their tenant. In the absence of all evidence on the subject, the presumption was that tenancy was an ordinary tenancy from year to year continuable until legally terminated. There was nothing to show that the khots had ever terminated it. Atmaram's heir could not surrender it to the prejudice of the mortgagee. Sonshet, therefore, had purchased a tenancy which had never been legally put an end to, and was entitled to possession.

Under the Khoti Settlement Act (Bom. Act I of 1880) occupancy tenancies are not transferable except under certain circumstances, but there is no prohibition to the transfer of an ordinary tenancy. SONSHET ANTUSHET TELI v. VISHNU BABAJI JOHARI, 20 B. 78. 611

(2) *Ss.* 16, 17—*Khot—Entry in the Survey Settlement Officer's record—Finality of—Land Revenue Code (Bombay Act* V *of* 1879), *s.* 108—*Thal—Makta.*—The Settlement Officer's record fixing the amount of rent payable to a khot in respect of lands in the khoti village, though prepared in the form of the statement published at page 584 of the "General Rules of the Revenue Department," edition of 1893, and labelled "*Bot-khat*," cannot be treated either as a survey register under s. 108 of the Land Revenue Code (Bombay Act V of 1879) or a settlement register as it is called in s. 16 of Bombay Act I of 1880; it is one of the "other records" prepared under s. 17 of the latter Act. VAIDKHAN v. SAKHYA, 20 B. 729 ... 1055

(3) S. 17—See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 475.

Act II of 1884 (Bombay District Municipal Act Amendment Act).

(1) See MUNICIPALITY, 20 B. 83.

(2) S. 57—See MUNICIPALITY, 20 B. 732.

Act V of 1886 (Bombay Hereditary Offices (Amending Bombay Act III of 1874)).

(1) S. 1—See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 20 B. 423.

(2) S. 2—Watan property—Remote reversioners—Adoption—Right of suit—See HINDU LAW (ADOPTION), 19 B. 614.

Act III of 1888 (Bombay City of Bombay Municipal).

(1) S. 3—See MUNICIPALITY, 20 B. 146.

(2) S. 232—See MALICIOUS PROSECUTION, 19 B. 485.

(3) S. 248—See FAZENDAR, 20 B. 617.

(4) Ss. 298, 299, 301, 504, 527—See MUNICIPALITY, 19 B. 407.

(5) S. 353—See MUNICIPALITY, 19 B. 372.

Act VI of 1888 (Bombay Gujrat Taluqdars).

(1) S. 31—See TALUKDAR, 20 B. 565.

(2) S. 31—*Sale in execution of a decree upon a mortgage before the Act—Necessity of sanction of the Governor in Council to the sale—Execution of decree—Sale.*—Certain *talukdari* estate was mortgaged under a *sankhat* executed before the Gujarat Talukdars' Act (Bom. Act VI of 1888) came into force. On the 22nd August 1889 (*i.e.*, subsequent to the Act coming into force), a decree was passed for sale of the mortgaged property. The decree was transferred for execution to the Collector, who refused to put up the property to sale without the previous sanction of Government as required by s. 31 of the Talukdari Act.

Held, that s. 31 of the Act had no application to the present case. The *san* mortgage having been executed before the Act came into force, and left with its validity untouched by cl. 1 of s. 31, the ordinary remedy of the mortgagee to bring the property to sale was not taken away by that section. The sanction of the Governor in Council was, therefore, not necessary to the sale in execution of the decree on the mortgage. NAGAR PRAGJI v. JIVABHAI, 19 B. 80 ... 54

Act IV of 1890 (Bombay District Police). PAGE

(1) *S* 48, *cl.* (*b*)—(*Bombay Act* IV *of* 1890), *s.* 48, *cl.* (*b*)—"*Near a street*" *meaning of the words—Power of the police to regulate the playing of music in private houses—Construction—Nuisance—Noise—Music in a neighbouring house.*

S. 48, cl. (*b*) of Bombay Act IV of 1890 does not empower the District Superintendent or Assistant Superintendent of Police to stop music in private houses.

The words in the clause " near a street " are intended to mean open spaces by the sides or at the ends of streets. *In re* JAMNADAS BHUKHANDAS, 19 B. 737 ... 494

(2) Ss. 51 and 52—See PENAL CODE (ACT XLV OF 1860), 20 B. 394.

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See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 B. 290.

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(1) See COMPANY, 19 B. 1.

(2) See HINDU LAW (WILL), 19 B. 647.

(3) See PARTNERSHIP, 20 B. 15.

Administration Suit.

Receiver appointed where executor is in possession—Suit against executor where will not proved—Will of Mahomedan testator—Parties—Civ. Pro. Code (XIV of 1882), s. 438—Receiver—See RECEIVER, 19 B. 83.

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See MINOR, 20 B. 61.

Adverse Possession.

(1) Limitation Act (XV of 1877), art. 144—Adverse possession—Symbolical possession—Effect of symbolical possession against third parties—Auction-purchaser—His right to tack on his own possession to that of judgment-debtor—See LIMITATION ACT (XV OF 1877), 19 B. 620.

(2) See LIMITATION ACT (XV OF 1877), 19 B. 809.

(3) See MORTGAGE (REDEMPTION), 20 B. 557.

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See PRACTICE, 19 B. 350.

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(1) Construction—Limitation Act (XV of 1877), sch. II, art. 115—See LIMITATION ACT (XV OF 1877), 20 B. 8.

(2) See ARBITRATION, 20 B. 232.

(3) See CASTE QUESTION, 20 B. 190.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 304.

(5) See CONTRACT ACT (IX OF 1872), 20 B. 755.

(6) See EASEMENT, 20 B. 704.

(7) See HINDU LAW (JOINT FAMILY), 20 B. 316.

(8) See INSOLVENT, 20 B. 636.

(9) See KHOTI LAND, 19 B. 528.

(10) See MORTGAGE (REDEMPTION), 20 B. 346.

(11) See SPECIFIC PERFORMANCE, 19 B. 764.

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See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 255.

Alternative Reliefs.

See PRACTICE, 19 B. 323.

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(1) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 303.
(2) See PRACTICE, 20 B. 675.
(3) See WILL, 19 B. 320.

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(1) Joint family—Ancestral property—Self-acquired property made ancestral by agreement—Operation of such agreement—Effect of such agreement on accumulations and accretions of the property—Election—Estoppel—Minor members of undivided family—Interest of minors in property made ancestral by agreement—Minor bound by acts of his father as to such property—Hindu law—See HINDU LAW (JOINT FAMILY), 20 B. 316.
(2) See HINDU LAW (JOINT FAMILY), 20 B. 385.
(3) See HINDU LAW (WILL), 20 B. 450.
(4) See PRACTICE, 20 B. 767.

Ancient Documents.

See LANDLORD AND TENANT, 20 B. 1.

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See LANDLORD AND TENANT, 20 B. 354.

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See CONTRACT ACT (IX OF 1872), 20 B. 755.

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1.—GENERAL.
2.—CRIMINAL.
3.—SECOND APPEAL.
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——1.—General.

(1) Execution—Decree—Application for execution of decree—Dismissal of the first application—Appeal from decree—Decree confirmed on appeal—Application for execution of appellate decree—Appellate decree is the decree to be executed—Former dismissal of application for execution of original decree does not bar execution of appellate decree *Res judicata*—Limitation — Second application for execution—See EXECUTION OF DECREE, 19 B. 258.
(2) See ACT X OF 1876 (BOMBAY REVENUE JURISDICTION), 20 B. 803.
(3) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 20 B. 667.
(4) See BOND, 20 B. 791.
(5) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 303; 20 B. 736.
(6) See COSTS, 20 B. 167.
(7) See HINDU LAW (ADOPTION), 19 B. 331.
(8) See LIMITATION, 20 B. 104.
(9) See LIMITATION ACT (XV OF 1877), 19 B. 48.
(10) See PRACTICE, 19 B. 307.
(11) See REGULATION VIII OF 1827 (BOMBAY ADMINISTRATION OF ESTATES), 19 B. 399.
(12) See STAMP, 19 B. 198.
(13) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 790.
(14) See VALUATION, 20 B. 265.
(15) See ZANZIBAR, 20 B. 480.

——2.—Criminal.

See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 714, 732; 20 B. 145.

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(1) See PRACTICE, 19 B. 323; 20 B. 753.
(2) See VENDOR AND PURCHASER, 19 B. 43.

Appeal—4.—To Privy Council. PAGE

(1) *Privy Council—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 596—*Substantial question of law—Practice—Procedure.—Per* JARDINE, J.—Where the High Court in appeal has confirmed the decree of the lower Court and has taken substantially the same view of the facts and where, upon the facts as found by both Courts, no question of law arises, leave to appeal to the Privy Council should be refused.

Per RANADE, J.—There is a distinction between the confirmation of a decree and the affirmation of the decision and findings of the Court of first instance by the High Court. The substantial question of law referred to in s. 596 of the Code of Civil Procedure (Act XIV of 1882) need not directly arise out of the concurrent findings of fact, but it is enough if it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument. *In re* VISHWAMBHAR PANDIT, 20 B. 699 ... 1035

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 10.

(3) See PRIVY COUNCIL, 19 B. 301.

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See HINDU LAW (WILL), 19 B. 647.

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(1) *Agreement to refer future differences to arbitration—Naming of arbitrators—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 523—*Agreements to refer within the section.*—A general agreement to refer future differences to arbitration comes within s. 523 of the Civ. Pro. Code (Act XIV of 1882) and may be filed under that section. The section is not confined to cases in which a dispute actually existing at date of agreement is agreed to be referred to arbitration.

But the agreement must name the arbitrator or arbitrators, and an agreement which provides for the future appointment or election of arbitrators does not fall within the section.

The effect of the last clause of s. 523 is to give the parties to such an agreement power to nominate the arbitrator, even when they have agreed that he shall be appointed by the Court. In such cases the Court must appoint their nominee. FAZULBHOY MEHRALI CHINOY v. THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED, 20 B. 232 ... 713

(2) *Application to file award— Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 525, 526—*Objections as to factum or validity of submission and award—Ss.* 521 *and* 522 *of the Civ. Pro. Code (Act* XIV *of* 1882)—*Practice—Procedure.*—Where on an application to file an award under ss. 525 and 526, Civ. Pro. Code (Act XIV of 1882), objections, which in the opinion of the Court are not merely frivolous or colourable, are raised to the factum or validity of the submission and award, the Court has no jurisdiction to deal with them and must refer the parties to a regular suit. TEJPUR v. MAHOMED JAMA, 20 B. 596 = Chitty's S.C C.R. 472 ... 965

(3) Reference by executor to arbitration—Award—Power of executor to refer to arbitration—Effect of award—Jurisdiction—Jurisdiction of Testamentary Court to decide question of award—Probate—Application for probate—Executor—See PROBATE, 20 B. 238.

(4) Reference of suit to arbitration—Award—Submission and award filed as an agreement—Civ. Pro. Code (Act XIV of 1882), s. 525—Practice—Procedure—Civ. Pro. Code (Act XIV of 1882), s. 375—Agreement adjusting suit—Power of Court to determine fact of agreement having been made—See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 304.

(5) Stamp—Letters submitting to arbitration—See STAMP, 19 B. 32.

(6) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 553.

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(1) See ARBITRATION, 20 B. 232.

(2) See STAMP, 19 B. 32.

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(1) See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 72.

(2) See MALICIOUS PROSECUTION, 19 B. 485.

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(1) See COSTS, 20 B. 167.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 B. 290.

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(1) See COSTS, 20 B. 167.

(2) See DEED, 19 B. 12.

(3) See LEASE, 20 B. 439.

(4) See MORTGAGE (REDEMPTION), 20 B. 677.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 B. 290.

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(1) Before judgment—See INSOLVENCY, 20 B. 403.

(2) See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 19 B. 250.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 121, 127, 328, 710.

(4) See EXECUTION OF DECREE, 20 B. 377.

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Auditch Brahmans.

See CASTE QUESTION, 20 B. 784.

Auditch Panch.

See CASTE QUESTION, 20 B. 784.

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(1) See ARBITRATION, 20 B. 593.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 304.

(3) See PROBATE, 20 B. 238.

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See TRUST, 20 B. 310.

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See HINDU LAW (WILL), 19 B. 401.

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(1) *Hundi—Dishonour—Stamp—Penalty—Offer to pay stamp duty and penalty in second appeal not allowed—Practice—Procedure.*—An instrument which is in the nature of a bond, is not the less a bond because it does not come into operation unless and until the *hundi* with respect to which it is passed has been dishonoured.

An instrument which is not duly stamped will not be admitted, on second appeal, on payment of stamp and penalty when there is no evidence that the stamp and penalty were tendered and refused on the hearing of the first appeal. LAKSHMANDAS v. RAMBHAU, 20 B. 791 ... 1038

(2) See HINDU LAW (JOINT FAMILY), 20 B. 435.

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(5) See EVIDENCE, 20 B. 367.

(6) See HINDU LAW (JOINT FAMILY), 19 B. 803.

(7) See INSURANCE, 20 B. 99.

(8) See JURY, 20 B. 215.

(9) See MINOR, 20 B. 534.

(10) See MUNICIPALITY, 20 B. 732.

(11) See POSSESSION, 20 B. 738.

Calls.

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Caste Debts.

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Caste Fund.

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Caste Question.

(1) *Caste—Contributions to the caste fund—Arrangement between members of the caste for the purpose of paying off the debts of the caste—Hindus—Mahomedans—Regulation* II *of* 1827, s. 21.—The term "caste" in s. 21 of Regulation II of 1827 is not necessarily confined to Hindus, but comprises any well-defined native community governed for certain internal purposes by its own rules and regulations.

An agreement embodying an arrangement come to between members of the caste for the purpose of paying off the debts of the caste, out of certain contributions to the caste funds, involves a caste question. ABDUL KADIR v. DHARMA, 20 B. 190 ... 685

(2) *Mochi caste at Surat—Auditch Brahmans of Ahmedabad—Hereditary priests—Delegates of Auditch panch at Ahmedabad—Dismissal of delegates by the caste—Suit for injunction and damages—Decision of caste—Jurisdiction of Civil Courts—Jurisdiction.*—The hereditary priests of the Mochi caste deputed certain persons to perform religious ceremonies for the caste. The caste, however, dismissed these delegates, and the defendants, who were members of the caste, employed other persons to perform certain religious ceremonies for them. The plaintiffs sued for an injunction and damages, alleging that they were entitled to perform these ceremonies and to receive the fees.

Held, that the Court had no jurisdiction. The Civil Court could not enquire into the validity or otherwise of the decision of the caste in the matter. The parties were bound by it, and the plaintiffs could not legally complain of the action of the defendant, who had done no more than obey that decision. DAYARAM HARGOVAN v. JETHABHAT LAKHMIRAM, 20 B. 784 ... 1093

(3) See HINDU LAW (CASTE), 19 B. 507.

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(1) See EXECUTION OF DECREE, 20 B. 351.

(2) See HUNDI, 20 B. 133.

(3) See PRACTICE, 20 B. 767.

(4) See VENDOR AND PURCHASER, 19 B. 43.

Certificate.

(1) Of guardianship—See ACT VIII OF 1990 (GUARDIAN AND WARDS), 19 B. 832.

(2) Of heirship—See ESTOPPEL, 19 B. 374.

(3) Of heirship—See REGULATION VIII OF 1827 (BOMBAY ADMINISTRATION OF ESTATES), 19 B. 399; 20 B. 548.

(4) Of heirship—Act VII of 1889—Ss. 17 and 20—Hindu family—Political Agent—Grant of certificate by Political Agent—Irregularities in making grant—Stamp on certificate—Court Fees' Act, VII of 1870, s. 26 — Notification of Governor-General — See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 145.

(5) See LUNACY, 20 B. 659.

(6) See RES JUDICATA, 19 B. 321.

(7) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 338, 790; 20 B. 76.

(8) See WILL, 19 B. 320.

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(1) See LIMITATION ACT (XV OF 1877), 20 B. 403.

(2) See REGISTRATION ACT (III OF 1877), 20 B. 553.

(3) See TAXATION, 20 B. 301.

Charity Estate.

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Charity Suit.

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Christian. PAGE

(1) *Mortgage—Redemption—Decree against manager alone on the mortgage how far binding on the property—Parties—Practice—Will—Joint family—Ancestral property—Right of Christian of Salsette to deal by will with his share in ancestral property — Christian—Native—Conversion from Hinduism to Christianity, effect of—Hindu convert —Salsette, law applicable to Christian inhabitants of—Succession—Inheritance—Co-parcenary— Primogeniture—Hindu law, how far applicable—Manager of family—Mortgage by manager when binding on family property.*—The law of a conquered territory continues in force until altered by the Crown or the Legislature. The Island of Salsette was conquered from the Marathas by the British in 1774 and the law of succession for the Christian inhabitants of the island remained unaltered until the passing of the Indian Succession Act (X of 1865). Until that Act was passed, the law of primogeniture was not in force among the Christian inhabitants of Salsette. In the absence of a widow and daughter, the sons took the property of their father in equal shares.

Quære whether they did so under the Hindu law or the Portuguese law or by force of usage existing among them.

A mortgage of certain property was made in 1875 by the eldest of three brothers (Pedro, Minguel and Enos), who were Christian inhabitants of the Island of Salsette. They had inherited the property from their father, who died in 1840. The family had originally been a Hindu family, but had been converted to Christianity. Enos died in 1876, and Minguel died in 1883, bequeathing his interest in the property to his nephew the plaintiff, who was Pedro's son. In that year (1883) the mortgagee sued Pedro alone upon the mortgage and obtained a decree which he afterwards assigned to the defendant who sold the mortgaged property in execution of the decree, and at the sale purchased the property himself. The plaintiff (son of Pedro the mortgagor) now sued to redeem the property, and the question arose (1) whether under the law applicable to the Christian inhabitants of Salsette the eldest brother Pedro had succeeded on the father's death to the whole of the family property, and (2) if not, then to what extent the mortgage in question bound the property of the family.

Held, (1) that the law of primogeniture prior to the passing of the Indian Succession Act (X of 1865) did not exist among the Christian inhabitants of Salsette and that Pedro, although eldest son, had not succeeded to the whole of the family property. He and his brothers took equal shares in the property of their father.

(2) That the mortgage by Pedro had been authorised by the family and was for family purposes and was binding upon the family property. Although Pedro and his brothers could not be regarded as co-parceners under Hindu law, yet having regard to the fact that they were descendants of converts from Hinduism, among whom Hindu usages largely prevailed, the question should be treated in much the same way as if the family was still a Hindu family, and the Court would not require the same direct proof of the manager's authority to mortgage as it would in the case of an English manager under similar circumstances.

(3) That the plaintiff was not entitled to redeem. What was intended to be sold at the sale held in execution of the decree upon the mortgage was the whole interest in the mortgaged property. The defendant purchased that interest subject to the right of the plaintiff to show that his share derived from Minguel was not bound by the mortgage, and he had failed to do so. Minguel's share as well as Pedro's had passed by the sale.

(4) A member of the Christian community of the Island of Salsette is entitled to deal with his share in ancestral property by will. JALBHAI ARDESHIR SHET v. LOUIS MANOEL, 19 B. 680 ... 455

(2) Native Christians—Law applied to Native Christians prior to Indian Succession Act (X of 1865)—Custom and usage of inheritance among converts—Burden of proof—Evidence—Matter of public interest—

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Christian—(*Concluded*).

Decrees—Evidence of custom — Practice — Borah Mahomedans—Suni Borahs—Conversion, effect of—Hindu converts to Mahomedanism—Inheritance—Succession among such converts. See CONVERSION, 20 B. 53.

Civil Procedure Code (Act VIII of 1859).

(1) S. 5—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 127.

(2) S. 111—See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 380.

Civ. Pro. Code (Act XIV of 1882).

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 202.

(2) Ss. 2 and 136—See PRACTICE, 19 B. 307.

(3) Ss. 13 and 244—See HINDU LAW (JOINT FAMILY), 19 B. 532.

(4) Ss. 26 and 582—See COSTS, 20 B. 167.

(5) S. 27—See MORTGAGE (REDEMPTION), 20 B. 677.

(6) S. 30—See HINDU LAW (CASTE), 19 B. 507.

(7) S. 30—Suit by tenants to enforce rights against purchaser—Vendor and purchaser—Landlord and tenant—Sale by landlord subject to rights of tenants—Notice to purchaser of such rights—See VENDOR AND PURCHASER, 19 B. 391.

(8) S. 32—Practice—Procedure—Right of action—Suit by plaintiff having no interest in subject-matter - Joinder of a party co-plaintiff having interest—See PRACTICE, 20 B. 537.

(9) *S.* 39—*Act* VI *of* 1892, *s.* 4—*Application for execution of decree—Proceedings in the suit - Vakalatnama.*—Applications for execution of the decree are proceedings in the suit. A vakalatnama remains in force until all proceedings in the suit are ended. SADASHIV GANPATRAO v. VITHALDAS NANCHAND, 20 B. 198 ... 691

(10) S. 39—Pleader—Pleader duly appointed by a party to a suit cannot delegate his authority to another pleader - *Ex parte* decree—Practice—Procedure—See PRACTICE, 20 B. 293.

(11) S. 43—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 20 B. 469.

(12) S. 48—See LIMITATION ACT (XV OF 1877), 20 B. 109.

(13) *Ss.* 53, 562 *and* 582—*Remand—Amendment of plaint in appeal—Appellate Court's power to amend plaint—Suit for rent converted into one of ejectment.*—When a suit is not disposed of on a preliminary point, it is not competent to a Court of appeal under s. 562 of the Code of Civil Procedure (Act XIV of 1882) to remand the case for a fresh trial. The section, moreover, contemplates a remand back to the Court which first disposed of the suit, and to no other Court.

An amendment of a plaint, which materially transforms the nature of the claim, cannot be made under s. 53 of the Code, and certainly not in appeal. S. 53 permits amendment of the plaint before judgment, and not after. The larger powers conferred on appellate Courts by s. 582 do not authorize such a material transformation of a suit in appeal. BAI SHRI MAJIRAJBA v. MAGANLAL, 19 B. 303 ... 205

(14) Ss. 98, 248 and 647—See PRACTICE, 20 B. 541.

(15) *Ss.* 100, 108 *and* 157—*Presidency Court of Small Causes—Adjourned hearing—Absence of defendant*— Ex-parte *decree—Practice—Procedure.*—A defendant is entitled to avail himself of s. 108 of the Civ. Pro. Code (Act XIV of 1882) where an *ex parte* decree is passed against him at an adjourned hearing. HILDRETH v. SAYAJI PIRAJI, 20 B. 380 ... 816

(16) *Ss.* 102, 103, 157 *and* 158—*Court Fees Act* (VII *of* 1870), *s.* 7, *cl.* 4 (*c*), *sch* II, *art.* 17, *cl.* (iii)—*Civil Court's Act* (*Bom. Act* XIV *of* 1869), *s.* 26—*Suits' Valuation Act* (VII *of* 1887), *s.* 8—*Limitation Act* (XV *of* 1877), *ss.* 5, 5*A and* 14—*Suit for a declaration that a decree obtained by defendant against plaintiff was null and void—Valuation for the purposes of Court fees and jurisdiction—Decree*

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for declaration without consequential relief—Adjourned hearing—Dismissal of suit for non-appearance of plaintiff or his pleader—Appeal—Jurisdiction—Delay in presenting appeal—Discretionary power of Court to excuse delay.—A suit in which the only prayer is to have a decree set aside was null and void is a suit for a declaratory decree without consequential relief, and art. 17, cl. 3, and not s. 7, cl. 4, of the Court Fees Act VII of 1870 is applicable to it.

S. 5A of the Limitation Act (XV of 1877) is, like s. 14, a mandatory section, but does not exclude the discretionary power of the Court, under s. 5, to excuse delay in presenting an appeal.

An order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader is an order under s. 157, and its consequential s. 102, and not under s. 158, of the Civ. Pro. Code (Act XIV of 1882), and is appealable. SRIMANT SAGAJIRAO v. S. SMITH, 20 B. 736 ... 1061

(17) Ss. 111 and 243—See DEED, 19 B. 12.

(18) S. 129—See PRACTICE, 19 B. 350.

(19) S. 231—See LIMITATION ACT (XV OF 1877), 20 B. 383.

(20) S. 234—See PRACTICE, 19 B. 507.

(21) Ss. 234, 244 and 278—See HINDU LAW (JOINT FAMILY), 20 B. 385.

(22) *Ss. 235, cl. (j), and 260—Decree—Execution—Application for execution—Form of application—Practice—Procedure.*—In a suit brought under s. 539 of the Code of Civil Procedure (Act XIV of 1882) a decree was passed appointing the defendants managing trustees of a Hindu temple, and laying down certain rules, for their guidance in future. The plaintiffs applied for execution of the decree and filed a *darkhast* praying that the defendants be ordered to act as directed by the decree, and that, if they failed to do so, steps be taken according to law.

Held, that the *darkhast* was not in accordance with s. 235, cl. (*j*), or s. 260 of the Code of Civil Procedure (Act XIV of 1882), as it did not specify the mode in which the assistance of the Court was sought. SHA KARAMCHAND v. GHELABHAI CHAKALDAS, 19 B. 34 ... 23

(23) *S. 244 (c)—Claim to attached property—Order in execution proceedings—Separate suit—Execution of decree*—In execution of a decree passed against the plaintiff, certain property in his possession was attached. Thereupon he laid claim to the property, on the ground that it was his service vatan. This claim was rejected. The plaintiff then filed a regular suit for a declaration that the property was not liable to attachment and sale.

Held, that the suit was barred under s. 244 of the Code of Civil Procedure (Act XIV of 1882). The Court which originally rejected the plaintiff's claim in the execution proceedings had jurisdiction to investigate the claim under clause (*c*) of s. 244 of the Code. TRIMBAK RAMRAO v. GOVINDA, 19 B. 328 ... 222

(24) S. 248—See LIMITATION ACT (XV OF 1877), 20 B. 179.

(25) *S. 258—Amending Act (VII of 1881), s. 27—Changes of law relating to procedure—Retrospective effect—Practice.*—The change effected in the language of s. 258 of the Civ. Pro. Code (Act XIV of 1882) by s. 27 of the Amending Act (VII of 1888), by which uncertified adjustments can now be recognized by other Courts than the Court executing the decree, applies to adjustments previous to the Amending Act. Changes of law relating to procedure have retrospective effect. BALKRISHNA PANDHARINATH v. BAPU YESAJI, 19 B. 204 ... 138

(26) Ss. 263 and 332—See EXECUTION OF DECREE, 20 B. 351.

(27) *S. 272—Execution—Decree—Attachment under decree of High Court of property already attached under decree of Small Causes Court—Claim to attach property by what Court decided—Jurisdiction—Practice—Procedure*—In execution of a decree obtained in the High Court the plaintiffs on the 22nd of March, 1895, attached certain property of the defendant, which, however, had been already attached on the 22nd of February, 1895, by one Rajbai, who had obtained a decree against defendant in the Court of Small Causes.

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The plaintiffs' attachment was, therefore, effected under s. 272 of the Civ Pro. Code XIV of 1882 by a notice addressed by the Prothonotary of the High Court to the Registrar of the Small Causes Court. The claimant was mortgagee in possession and the defendants were his tenants. On the 28th February he had lodged a claim in the Small Causes Court to the said property as mortgagee in possession, and on the 25th March 1895, a consent order was passed by the Chief Judge of that Court directing that Rajbai's attachment should stand subject to the claimant's claim.

On the 22nd April, 1895, the claimant applied to the Chief Judge of the Small Causes Court to issue a notice to the plaintiffs in this suit, under s. 272 of the Civ. Pro. Code, to determine the question of priority of claim to the attached property between him and the plaintiffs. His application was refused, the Chief Judge being of opinion that he could not interfere in a High Court suit. The claimant then filed his claim in the High Court, and took out this summons to remove the plaintiffs' attachment.

Held, that under s. 272 of the Civ. Pro. Code the Small Causes Court was the only Court to decide the question of priority between the claimant and the plaintiffs. JEYNARAYAN MEGHRAJ v. ISMAIL KURIMALI, 19 B. 710 ... 475

(28) S. 274— *Decree — Attachment —Execution—Mortgage debt—Sale of mortgage-debt in execution of a decree against mortgagee—Sale carrying with it security without attaching mortgaged property.*—The sale of mortgage-debt described as such in execution of a decree carries with it the security without attaching the mortgaged property under s. 274 of the Civ. Pro. Code (XIV of 1882). BALDEV DHANRUP MARVADI v. RAMCHANDRA BALVANT KULKARNI, 19 B. 121 ... 81

(29) Ss. 278, 281, 487 and 351—See INSOLVENCY, 20 B. 403.

(30) S. 283—See LIMITATION ACT (XV OF 1877), 20 B. 801.

(31) S. 285—*Small Cause Court—First Class Subordinate Judge's Court —Grade—Small Cause Court inferior in grade to First Class Subordinate Judge's Court—Decree—Execution—Attachment and proclamation of sale in execution of decree of Small Cause Court—Subsequent application for execution of decree of First Class Subordinate Judge—Validity of sale by Small Cause Court.*—Gumma obtained a decree against Maneklal in the Small Cause Court of Surat and in execution he attached a debt due to Maneklal and a proclamation of sale was duly issued. Before the sale took place, however, one Kalyandas applied to the First Class Subordinate Judge for execution of a decree which he had obtained against Maneklal in that Judge's Court, and the same debt was then attached. The proceedings, however, under the Small Cause Court decree were continued, and the debt was sold in execution and was purchased by the applicant.

Held, following P. J. 1893, p. 194=18 B. 458 that the sale by the Small Cause Court was not rendered invalid by the subsequent proceedings in the First Class Subordinate Judge's Court.

The term "grade" in s. 285 of the Civ. Pro. Code (Act XIV of 1882) has the same meaning as it had in s. 5 of the Code (Act VIII of 1859)—that is, it depends upon "the pecuniary or other limitations" of the jurisdiction of the particular Court, and, therefore, as s. 285 is applicable to Small Cause Courts, the Small Cause Court is inferior in grade to the Court of the First Class Subordinate Judge. TURMUKLAL HARKISANRAI v. KALYANDAS KHUSHAL, 19 B. 127 ...

(32) S. 287—See REGISTRATION, 20 B. 290.

(33) S. 295—Execution—Decree—Property attached in execution of decrees of Small Cause Court and High Court—Execution proceedings in Small Cause Court transferred to High Court—Property realized in execution—See EXECUTION OF DECREE, 20 B. 377.

(34) S. 305—Practice—Procedure—Execution—Decree—Decrees of different Courts against same judgment-debtor—Leave given by both

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Courts to judgment-debtor to raise amount by private sale—Confirmation of such sale by one Court—Subsequent application for confirmation to other Court—See EXECUTION OF DECREE, 19 B. 539.

(35) *S.* 307—*Vacation—Holiday—Days on which the office is open—Office day—Payment of purchase-money for property bought at Court sale.*—The time during which a Court is closed for the vacation is not a holiday within the meaning of s. 307 of the Civ. Pro. Code (Act XIV of 1882). Days on which the office is open, and the purchase-money for property bought at a Court-sale could have been paid, are office days. MOTIRAM v. BHIVRAJ, 20 B. 745 ... 1067

(36) Ss. 311 and 316—Decree—Execution of decree—Death of judgment-debtor after attachment but before sale in execution—Sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Practice—Procedure—See PRACTICE, 19 B. 276.

(37) *Ss.* 312 *and* 320—*Transfer of execution of a decree to Collector—Court sale—Collector's order setting aside the sale—Suit by auction-purchaser to set aside the Collector's order and to have his purchase confirmed.*—Certain property was sold in execution of a decree by the Collector, to whom the execution had been transferred under s. 320 of the Code of Civil Procedure (Act XIV of 1882). The Collector set aside the sale before the date of confirmation, on the sole ground that the judgment-debtor had, subsequent to the sale, made full payment of the sum decreed. Thereupon the auction-purchaser filed a suit for a declaration that the sale had been improperly set aside, and for a confirmation of the sale.

Held, that the suit would lie. Reading s 312 with s. 311 of the Code of Civil Procedure, the suit was not barred under the last clause of s. 312, nor under s. 588, cl. 16.

Held, also, that the rules framed by Government under s. 320 of the Code only restricted the powers of the Court to interfere with the procedure of the execution of decrees transferred to the Collector. They did not come in the way of a party to bring a civil suit to establish his purchase.

Held, also, that the Collector had no power under s. 311 of the Code to set aside the sale and receive payment from the judgment-debtor. MATHURADAS v. PANHALAL, 19 B. 216 ... 147

(38) S. 325 (*a*)—See LIMITATION ACT (XV OF 1877), 19 B. 261.

(39) S. 331—See EXECUTION OF DECREE, 20 B. 175.

(40) *S.* 336—*Judgment-debtor—Surety—Judgment-debtor's application to be declared an insolvent—Release of the surety.*—A person standing surety for a judgment-debtor under s. 336 of the Civ. Pro. Code (Act XIV of 1882), is released from his obligation when the judgment-debtor has applied to be declared an insolvent. DWARKADAS PARSHOTAMDAS v. ISABHAI, 19 B. 210 ... 143

(41) *S.* 349—*Surety—Insolvency of a defendant—Surety under s.* 349—*Default of principal—Liability of surety—Mode of enforcing liability of surety—Practice—Procedure.*—The Civ. Pro. Code (Act XIV of 1882) provides no means for enforcing in execution a surety bond passed under s. 349. The proper course of the plaintiff is to obtain an assignment of the bond with a view to suing on it. MINGALE ANTONE KANE v. RAMCHANDRA BAJE, 19 B. 694 ... 464

(42) S. 368—See MORTGAGE (REDEMPTION), 20 B. 549.

(43) *S.* 375—*Agreement adjusting suit—Power of Court to determine fact of agreement having been made—Arbitration—Reference of suit to arbitration—Award—Submission and award filed as an agreement—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 525—*Practice—Procedure.*—The plaintiff sued the defendant to recover certain property of which she alleged he had taken possession. Subsequently the "matters in difference in the said suit" were by a signed submission paper referred to arbitration. An award was made ordering the defendant to pay to the plaintiff Rs. 6,000, and cancelling a certain account.

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It also decided the claim of the plaintiff to two ornaments, which was a matter not included in the "submission paper," but had been verbally referred to the arbitrator in the course of the arbitration. The plaintiff now applied that the submission and award should be filed as an agreement adjusting the suit under s. 375 of the Civ. Pro. Code (Act XIV of 1882), or, in the alternative, that the award should be filed under s. 525. The defendant disputed the agreement and denied the validity of the award.

Held, that under s. 375 of the Civ. Pro. Code, the Court had jurisdiction to determine whether, as a fact, the alleged agreement adjusting the suit has been made, and if it was satisfied that it has been made, to record it. Whether that fact should be tried on affidavit or by oral evidence, is entirely for the discretion of the Court.

The Court accordingly, holding that this suit had been adjusted by the submission and award, ordered the same to be filed and the adjustment recorded.

Held, further, that the Court could make no order as to that portion of the award which dealt with matter not relating to the subject-matter of the suit. A separate application should be made with regard to the ornaments. SAMIBAI v. PREMJI PRAGJI, 20 B. 304... 762

(44) *Ss.* 409, 413—*Application for leave to sue in* forma pauperis—*Refusal of such application a bar to subsequent application in the same right — Jurisdiction -- Plea of jurisdiction.*—The plaintiff applied for leave to sue as a pauper for the redemption of a mortgage. As he did not proceed with the application, it was rejected with costs on 29th November, 1888.

On the 4th February, 1890, plaintiff again applied for leave to sue as a pauper for the redemption of the same mortgage. There being no opposition, the application was granted, and was registered as a suit.

On the 20th September, 1893, when the suit had been heard nearly to the end, the Government Pleader intervened, and applied that it should not be allowed to proceed further until the plaintiff had paid the costs incurred by Government in opposing the first application, which had been rejected. But the plaintiff refused to do so, and thereupon the Subordinate Judge dismissed the suit with costs under s. 413 of the Code of Civil Procedure (Act XIV of 1882), and ordered the plaintiff to pay the Court fees under s. 412.

Held, on appeal, (1) that the order rejecting plaintiff's first application was an order under s. 409 of the Code of Civil Procedure; (2) that both the applications were made in respect of the same right to sue; (3) that the order rejecting the first application operated as a bar under s. 413 of the Code to the entertainment of the second application; and (4) that such bar being one to the jurisdiction of the Court, the Subordinate Judge was not only competent but bound to take notice of it at any stage of the suit. RANCHOD MORAR v. BEZANJI EDULJI, 20 B. 86 ... 616

(45) Ss. 409 and 413—Pauper—Application for leave to sue as pauper—Rejection of application—Extension of time granted for payment of Court-fees—Payment of fees after period of limitation for suit has expired—Limitation Act (XV of 1877), s. 4—Practice—See PAUPER, 20 B. 508.

(46) S. 412—See MAHOMEDAN LAW (MINORITY), 20 B. 116.

(47) *S.* 424—*Civil Courts Act* (XIV *of* 1869), *s.* 32—*Suit against an officer of Government—Suit* ex contractu—*Notice.*—S. 424 of the Civ. Pro. Code (Act XIV of 1882), which requires notice to be given to a public officer two months before the institution of a suit against him, does not apply where the suit is one *ex contractu*. RAJMAL MANIKCHAND v. HANMANT ANYABA, 20 B. 697 ... 1033

(48) S. 438—Receiver—Administration suit—Receiver appointed where executor is in possession—Suit against executor where will not proved—Will of Mahomedan testator—Parties—See RECEIVER, 19 B. 83.

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(49) S. 493—See CONTEMPT OF COURT, 19 B. 152.

(50) S. 503—Receiver—Duties and liabilities of—See RECEIVER, 19 B. 660.

(51) S. 508, cl. (*b*)—See LANDLORD AND TENANT, 20 B. 1.

(52) S. 523—Agreements to refer within the section—Arbitration—Agreement to refer future differences to arbitration—Naming of arbitrators—See ARBITRATION, 20 B. 232.

(53) S. 525—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 20 B. 208.

(54) S. 525—See PROBATE, 20 B. 238.

(55) Ss. 525, 526—Objections to factum or validity of submission and award—Ss. 521 and 522 of the Civ. Pro. Code (Act XIV of 1882)—Practice—Procedure—Arbitration—Application to file award— See ARBITRATION, 20 B. 596.

(56) S. 539—See HINDU LAW (ADOPTION), 20 B. 250.

(57) Ss. 566, 569 and 574—See PRACTICE, 19 B. 551.

(58) S. 596—See APPEAL (TO PRIVY COUNCIL), 20 B. 699.

(59) S. 598—Limitation—Limitation Act (XV of 1877), ss. 5 and 12, and sch. II—Art. 177—Privy Council—Appeal to Privy Council—Time to appeal—See PRIVY COUNCIL, 19 B. 301.

(60) *S.* 608 - *Privy Council—Appeal to Privy Council—Decree—Stay of execution before appeal admitted—Practice—Procedure.*—Where a petition for leave to appeal to the Privy Council from a decree of the High Court has been presented, the High Court may grant a stay of execution of its decree although the appeal has not yet been admitted under s. 603 of the Civ. Pro. Code (XIV of 1882). DAME JANBAI v. SALE MAHOMED, 19 B. 10 ... 7

(61) S. 622—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 116, 286.

(62) S. 622—See EXECUTION OF DECREE, 19 B. 544.

(63) S. 622—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 790.

(64) S. 622—See ZANZIBAR, 20 B. 480.

(65) Sch. IV, No. 132—See PARTNERSHIP, 20 B. 15.

Civ. Pro. Code Amendment Act (VII of 1888).

(1) S. 27—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 204.

(2) S. 53—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 303.

Claim.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 328, 710.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 B. 522.

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(1) See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 747.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B 216.

(3) See MAMLATDAR, 19 B. 675

(4) See VENDOR AND PURCHASER, 19 B. 43.

(5) See WATAN, 19 B. 581.

Commission.

See FRAUD, 19 B. 749.

Commutation.

Of service—See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 20 B. 423.

Companies Act (VI of 1882).

(1) Ss. 61, 126 and 144, cl. (*g*)—See COMPANY, 20 B. 654.

(2) S. 169—See COMPANY, 19 B. 208.

(3) S. 214—See COMPANY, 19 B. 88.

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(1) *Indian Companies' Act (VI of 1882), ss. 61, 126, 144, cl. (g)--Contributory —Liability of the heirs of a deceased contributory—Calls—Calls made before the winding up—Limitation—Official liquidators not bound to take out letters of administration to the estate of a deceased contributory before settling the list of contributories—Shares duly issued, cancellation of—Reduction of capital.*—S. 61, Indian Companies, Act VI of 1882, (corresponding with s. 38 of the English Companies' Act of 1862), creates a new liability in the shareholders, and that liability includes contribution, not only in respect of calls made since the winding up, but also in respect of unpaid calls made before the date of the winding up, whether barred by limitation at that date or not.

The official liquidator need not take out letters of administration to the estate of a deceased share-holder before settling the list of contributories.

There is nothing in ss. 126 and 148 requiring the official liquidator to place on the list all the persons who may as representatives be liable to contribute in discharge of the liability of a deceased share-holder as contemplated by s. 126. Nor can the liability, under that section, of a person who has been placed on the list as his representative be affected by the omission of the official liquidator to do so.

Directors have no power to cancel shares duly issued to a shareholder at his request and so reduce the capital of the company. SORABJI JAMSETJI v. ISHWARDAS JUGJIWANDAS, 20 B. 654 ... 1004

(2) *Indian Companies Act (VI of 1882), s. 169—"Re-hearing," meaning of—Application to set aside an ex parte order.*—S. 169 of the Indian Companies Act (VI of 1882) does not apply to an application to set aside an *ex parte* order.

The term "re-hearing" in s. 169 of the Act means a re-hearing in the nature of an appeal. PARVATISHANKAR v. ISHVARDAS JAGJIVANDAS, 19 B. 208 ... 141

(3) *Preferential dividend payable to holder of one set of shares—Contract—Construction—Construction of contract by the company to pay it to the shareholder and to his executor holding the same—Death of the shareholder—"Holder" of shares—Legal title to shares—Meaning of the word "hold"—Administration*—The good will of a business which a merchant had carried on, and the capital, property, and assets, with it, were transferred by him in 1864 to a joint stock limited company, who agreed with him that in consideration of the transfer by him of property, referred to in the contract as "the fixed assets," one hundred paid up shares of Rs. 2,500 each, of which any assignment by him during the next five years from the registration of the company should not be recognized by them as valid, should be allotted to him. It was also agreed that, in consideration of the transfer, he and "his executors or administrators shall be entitled, so long as they hold the said hundred shares, to an extra or preferential dividend."

On this agreement the parties acted, and the shareholder held the shares till he died in England in 1888, having by will directed that his executors or administrators should hold the hundred shares in trust for his surviving brothers, of whom the executor who proved the will was one. Administration with the will annexed was granted in India, to the plaintiff in this suit as the attorney of the executor. A note of this was made in the register of the company, leaving the hundred shares still in the name of the testator. The company then discontinued to pay the preferential dividend, and now contended that it was no longer payable, inasmuch as the testator's estate had been administered, and that the executor no longer held the share as executor but as trustee for the beneficiaries under the will.

Held, that the contract was still in operation, the executor still "holding" the shares within its meaning; and that the preferential dividend continued payable to the estate of the testator, the company being only concerned with the legal title to the shares, and not

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with any claims, if there were any, that might be made by beneficiaries under the will against the executor as trustee. BOMBAY-BURMAH TRADING CORPORATION v. F.Y. SMITH, 19 B. 1 (P.C.) = 21 I.A. 139 = 6 Sar. P.C.J. 498 ... 1

(4) *Voluntary winding up—Inquiry into conduct of liquidators—Indian Companies Act* (*VI of* 1882), *s.* 214—*Practice—Procedure*—Where contributories of a company in voluntary liquidation complain of the conduct of liquidators in the winding up, and desire an inquiry under s. 214 of the Indian Companies Act (VI of 1882), the proper procedure is by summons in chambers.

Where it is sought to make an officer of a company liable for misapplication of the funds of a company or for misfeasance or breach of trust in relation to its affairs, the sum sought to be recovered should be definitely stated in the summons, and the grounds upon which the application is based should be fully and adequately set out in an affidavit or affidavits. *In re* JEHANGIR B. KARANI & CO. 19 B. 88 59

(5) See STAMP, 20 B. 432.

Compensation.

(1) See CONTRACT ACT (IX OF 1872), 20 B. 755.

(2) See LANDLORD AND TENANT, 20 B. 1.

(3) See MUNICIPALITY, 19 B. 407.

Compromise.

Of decree—Decree—Effect of compromise—Mode of enforcing agreement of compromise—Contract—Reciprocal promises—Right to sue—Decree for performance of whole contract—Contract Act (IX of 1872), s. 51—See DECREE, 19 B. 546.

Concealment.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 B. 522.

Conciliation Agreement.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 202.

Conciliator.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 202.

Confession.

(1) Evidence—Retracted confession—Necessity of corroborative evidence—Practice—See EVIDENCE, 19 B. 728.

(2) See EVIDENCE ACT (I OF 1872), 19 B. 195, 363; 20 B. 795.

Consideration.

See CONTRACT ACT (IX OF 1872), 20 B. 755.

Consignment.

See PRINCIPAL AND AGENT, 20 B. 633.

Construction.

(1) Contract—Limitation Act (XV of 1877), sch. II, art. 115—Agreement—See LIMITATION ACT (XV OF 1877), 20 B. 8.

(2) Transfer of Property Act (IV of 1882), s. 135—Assignment of an actionable claim—Suit by the assignee—Recovery of the full amount of debt—See TRANSFER OF PROPERTY ACT (IV OF 1882), 19 B. 290.

(3) See ACT X OF 1876 (BOMBAY REVENUE JURISDICTION), 20 B. 803.

(4) See ACT IV OF 1890 (BOMBAY DISTRICT POLICE), 19 B. 737.

(5) See COMPANY, 19 B. 1.

(6) See EASEMENT, 19 B. 797.

(7) See FAZENDAR, 20 B. 617.

(8) See HINDU LAW (WILL), 19 B. 401, 647; 20 B. 450, 571.

(9) See LANDLORD AND TENANT, 19 B. 150.

(10) See MUNICIPALITY, 20 B. 146.

(11) See PENAL CODE (ACT XLV OF 1860), 19 B. 340.

(12) See WILL, 19 B. 221, 770.

Consular Court at Zanzibar. PAGE

See ZANZIBAR, 20 B. 480.

Contempt of Court.

Punishment by imprisonment—Practice.—On 1st September, 1890, in an administration suit in which Ganji Akhai, as executor of a Will was defendant, a receiver was appointed and Gangji Akhai was ordered to deliver to the receiver certain Government promissory notes of the value of Rs. 45,000 belonging to the estate, which was the subject-matter of the suit. He did not obey the order and absconded from Bombay, and on 16th March, 1891, in his absence, a rule for its attachment for contempt was made absolute. It was afterwards ascertained that he had used the notes for his own purposes. A warrant was issued for his arrest, and he was apprehended, and on 23rd April, 1891, he was convicted of criminal breach of trust and sentenced to eighteen months' imprisonment. Previously to his trial (*viz.*, on the 9th April, 1891), he had been committed to jail for contempt of the order of September, 1890, so that after his conviction he was in jail both under his sentence and under the order for contempt. On the 4th October, 1892, the Court passed a money decree in the administration suit against the defendant for Rs. 80,000 and costs. The sentence passed upon the defendant for the criminal offence expired on the 22nd October, 1892. Applications for his release from imprisonment under the order for contempt were made in December, 1892, and 10th April, 1893, but were refused. Counsel now moved again for his release.

Held, that the defendant should be released from imprisonment. The right of the plaintiff to demand the promissory notes from him was merged in the money decree. The right to demand the notes was gone, and the order that he should deliver them up to the receiver had ceased to be operative. The commitment, in so far as it was intended to enforce obedience to the order of the 1st September, 1890, could no longer be continued on that ground. It was the decree now and not the order which constituted the measure of the obligation between the parties. That was a simple money decree, and it was contrary to the expressly declared will of the Legislature and to all modern principle and precedent to keep a defendant under commitment for contempt to compel him to pay a money decree. If the attachment order was regarded as a punishment for the defendant's offence in not having delivered up the notes, the punishment should be commensurate with the offence. Imprisonment under it could not be indefinite. By s. 493 of the Code of Civil Procedure (Act XIV of 1882) the Legislature indicated that such imprisonment should not extend beyond six months. The defendant had, however, been in jail for more than twenty months. For the criminal offence he had suffered the punishment to which he was sentenced, and the Court would not be justified in indirectly adding to its duration. THE ADVOCATE-GENERAL OF BOMBAY v. GANGJI AKHAI, 19 B. 152 ... 103

Contract.

(1) Construction—Agreement—Limitation Act (XV of 1877), sch. II, art. 115—See LIMITATION ACT (XV OF 1877), 20 B. 8.

(2) Contract for illegal purpose—Advances made for an illegal purpose subsequently carried out cannot be recovered—Opium Act (I of 1878), s. 4, rr. 43, 44, 45 and 52 of the Rules framed under the Opium Act—Contract Act (IX of 1872), s. 23—Lease of a farm to retail opium at certain shops in a district—Sub-lease of such shops without the Collector's permission—Sub-lease void—See ACT I OF 1878 (OPIUM), 19 B. 626.

(3) See COMPANY, 19 B. 1.

(4) See CONTRACT ACT (IX OF 1872), 20 B. 755.

(5) See DECREE, 19 B. 546.

Contract Act (IX of 1872). PAGE

(1) *Ss.* 2 (*d*), 25—*Contract—Services rendered during the defendant's minority at his desire and continued at his request after majority—Agreement to compensate for services—Consideration—Annuity.*—Services rendered at the desire of the minor, expressed during his minority and continued at the same request after his majority, form a good consideration for a subsequent express promise by him in favour of the person who rendered the services. By s. 2 (*d*) of the Contract Act, services already rendered at the desire of the promisor are placed on the same footing with such services to be rendered, and constitute a good consideration for a definite agreement.

Cases where a person without the knowledge of the promisor or otherwise than at his request does the latter some service, and the promisor undertakes to compensate him for it, are covered by s. 25 of the Contract Act (IX of 1872); in them the promise does not need a consideration to support it. SINDHA SHRI GANPATSINGJI v. ABRAHAM ALIAS VAJIR, 20 B. 755 ... 1074

(2) S. 6, cl. 2—See MUNICIPALITY, 19 B. 407.

(3) S. 8—See LIMITATION ACT (XV OF 1877), 20 B. 8.

(4) Ss. 11 and 128—See DOMICILE, 19 B. 697.

(5) S. 17—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 B. 522.

(6) S. 23—See ACT I OF 1878 (OPIUM), 19 B. 626.

(7) S. 51—See DECREE, 19 B. 546.

(8) S. 130—See SURETY, 19 B. 245.

(9) S. 137—See SURETY, 19 B. 578.

Contributory.

See COMPANY, 20 B. 654.

Conversion.

(1) *Hindu converts to Mahomedanism—Borah Mahomedans—Suni Borahs—Inheritance—Succession among such converts—Native Christians—Law applied to Native Christians prior to Indian Succession Act (X of 1865)—Custom and usage of inheritance among converts—Burden of proof—Evidence—Matter of public interest—Decrees—Evidence of custom—Practice*—The Suni Borah Mahomedan community of the Dhandhuka Taluka in Gujarat are governed by the Hindu law in matters of succession and inheritance.

Held, therefore, that in this community a widow is entitled to succeed to her husband's estate to the exclusion of a daughter or a step-daughter.

As to the law governing Hindu converts to Mahomedanism, the following principles may now be regarded as settled:—(1) Mahomedan law generally governs converts to that faith from Hinduism; but (2) a well-established custom of such converts following the Hindu law of inheritance would override the general presumption. (3) This custom should be confined strictly to cases of succession and inheritance. (4) If any particular custom of succession be alleged which is at variance with the general law applicable to these communities, the burden of proof lies on the party alleging such special custom.

If evidence is given as to general prevalence of Hindu rules of succession in a Mahomedan community in preference to the rules of Mahomedan law, the burden of proof is discharged, and it then rests with the party, disputing the particular Hindu usage in question, to show that it is excluded from the sphere of the proved general usage of the community.

Among Native Christians certain classes strictly retain the old Hindu usages, others retain these usages in a modified form, and others again wholly abandon them. Before the Indian Succession Act (X of 1865) the Christian convert could elect to attach himself to any one of these particular classes, and he would be governed by the usage of the class to which he so attached himself. These same principles are applied to the case of Hindu converts to Mahomedanism such as Khojas and Cutchi Memons.

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The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities. Such decisions form an exception to the general rule, which excludes *res inter alias actæ*. BAI BAIJI v. BAI SANTOK, 20 B. 53 ... 594

(2) *Hindu converts to Mahomedanism—Retention of Hindu law and usages—Maintenance—Rights of junior member of a Thakor's family to maintenance out of an estate of the nature of an impartible* raj—*Limitation—Molesalam Girasias—Custom.*—The Hindu law of inheritance and succession applies to Molesalam Girasias who were originally Rajput Hindus, but were subsequently converted to Mahomedanism.

The plaintiff was the second son of the defendant, who was the Thakor of Amed, a talukdari estate of the nature of an impartible *raj* or principality. The plaintiff's family belonged to the community of Molesalam Girasias. Plaintiff alleged that according to a family usage he as a junior member of the family was entitled to receive maintenance from his father, who was the holder of the *gadi*. The estate was under the management of the Talukdari Settlement Officer from 1878 to 1888, during which period that officer granted the plaintiff an allowance in lieu of maintenance without any objection on the defendant's part. On the 1st August, 1888, the estate was restored to the defendant, who stopped the allowance. The plaintiff thereupon sued in 1891 to recover from the defendant arrears of maintenance for two years and eleven months at Rs. 200 a month.

Held, that the plaintiff was entitled to recover, and that the claim was not time-barred. MAHARANA SHRI FATESANGJI JASVATSANGJI v. KUVAR HARISANGJI FATESANGJI, 20 B. 181 ... 679

(3) See CHRISTIAN, 19 B. 680.

Convert.

(1) Conversion—Christian—Native—Conversion from Hinduism to Christianity, effect of — Hindu convert—Salsette, law applicable to Christian inhabitants of—Succession—Inheritance—Co-parcenary—Primogeniture—Hindu law, how far applicable — Manager of family—Mortgage by manager when binding on family property—Mortgage—Redemption—Decree against manager alone how far binding on the property—Parties—Practice—Will—Joint family—Ancestral property—Right of Christian of Salsette to deal by will with his share in ancestral property—See CHRISTIAN, 19 B. 680.

(2) Native Christian—Koli caste of fishermen—Converts to Christianity from Hinduism—Succession Act (X of 1865), ss. 2 and 331—Inheritance—Custom—Evidence of custom of inheritance—Practice—Koli caste—See NATIVE CHRISTIAN, 19 B. 783.

Conveyance.

See STAMP, 20 B. 432.

Co-owner.

(1) See MORTGAGE (REDEMPTION), 20 B. 557.

(2) See PRACTICE, 20 B. 627.

Copyright.

Infringement—Translations—Jurisdiction—Statutes 5 and 6 Vict., cap. 45—Order for books sent from Bombay to Delhi—Value payable post—Registration of copyright—Notice of disputed proprietorship—Act XX *of* 1847, *s.* 8—*Practice—Procedure.*—The plaintiffs were publishers in London. The defendant carried on a printing and publishing business at Delhi. Between the years 1869 and 1891 the defendant translated certain English works (*e.g.*, Todhunter's Mensuration, Barnard Smith's Algebra, &c.) into the Urdu language for the use of native students, and sold and distributed copies of such translations in various parts of India. The plaintiffs alleged that they were the proprietors of the copyright in the said books, and they

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sued in Bombay for a declaration of their ownership, and that the said books printed and sold by the defendant were an infringement of the said copyright, and for an injunction, &c. It appeared that in June, 1894, the plaintiffs' agent who was then in India, instructed the Bombay firm of Sunder Pandurang to order copies of the said translations from the defendant. A letter was accordingly sent by Sunder Pandurang to the defendant at Delhi requesting him to send the books to Bombay by value payable post, which the defendant did, and he received payment for them from the Post Office at Delhi. The defendant pleaded (*inter alia*) that the High Court of Bombay had no jurisdiction, and he denied that he infringed the plaintiffs' copyright.

Held, that no part of plaintiffs' cause of action arose in Bombay, and that the High Court of Bombay had no jurisdiction. The act of Sunder Pandurang in paying for and receiving the goods formed no part of the defendant's offence, which was completed when he posted the books at Delhi.

The English Copyright Act (Stat. 5 and 6 Vict., cap. 45) extends to all parts of India. Having regard to s. 15 of that Act it is clear that a person who infringes copyright must be sued, if he offends in India, not only within the limits of that country, but also in that part of India in which the offence has been committed. See also s. 13 of the Indian Act XX of 1847.

Held, also that translations are not copies, and that the defendant by translating the books had not infringed the plaintiffs' copyright.

The plaintiffs had registered themselves as the proprietors of the copyright of the books in question both in London and in India. The defendant had not given notice of his intention to dispute the plaintiffs' copyright as required by s. 8 of Act XX of 1847.

Held, that the plaintiffs' copyright in the book had been established. MACMILLAN v. SHAMSUL ULAMA M. ZAKA, 19 B. 557 ... 372

Corporate Bodies.

See MUNICIPALITY, 19 B. 212.

Co-sharers.

See HINDU LAW (WIDOW), 19 B. 36.

Costs.

(1) *Decree—Assignment of decree pending appeal—Assignee of decree made respondent to appeal—Decree reversed in appeal—Liability of assignee for costs of hearing in lower Court.*—The Standard Oil Company and one Ellis sued the defendant for damages. The lower Court found that there was no privity of contract between the company and the defendant, and dismissed the suit of the company (plaintiff No. 1) with costs, but passed a decree for Ellis (plaintiff No. 2) with costs. The defendant appealed in the first instance making Ellis (plaintiff No. 1) the sole respondent. The company, however, gave the defendant (appellant) notice that the decree obtained by Ellis had been assigned to them. Whereupon he (the appellant) obtained leave to make the company party-respondents as assignees of the decree from Ellis. The company objected to be made respondents. The appeal Court reversed the decree of the lower Court and dismissed the suit, and the question arose whether the company could be made liable for the general costs of the hearing in the lower Court.

Held, that the company were liable only for the costs of the appeal in which they had taken an active part, but not for the general costs of hearing in the lower Court, except so far as the suit was their suit. Ellis was liable for the costs throughout. The appellant (defendant) was not entitled, by bringing the company on the record against their will, to obtain an additional security for the costs already incurred in the lower Court.

The assignee of a decree who is made respondent in an appeal from it, and takes no steps actively to support it, ought not to be ordered

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to pay costs. RAMJI MORARJI v. J. E. ELLIS AND THE STANDARD OIL COMPANY OF NEW YORK, 20 B. 167 ... 670

(2) Taxation—Charity suit—Defendants' costs as between attorney and client ordered out of the charity estate—Charges allowed and disallowed as against estate—Discretion of Taxing Master—See TAXATION, 20 B. 301.

(3) See HUSBAND AND WIFE, 19 B. 293.

(4) See WILL, 19 B. 221, 770.

Counterpart.

See LANDLORD AND TENANT, 20 B. 1.

Court-fees.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

(2) See LIMITATION ACT (XV OF 1877), 20 B. 179.

(3) See PAUPER, 20 B. 508.

(4) See STAMP, 19 B. 198.

Court Fees Act (VII of 1870).

(1) S. 7, cl. 4 (*c*), sch. II, art. 17, cl. iii—Civil Courts Act (Bombay Act XIV of 1869), s. 26—Suits' Valuation Act (VII of 1887), s. 8—Suit for a declaration that a decree obtained by defendant against plaintiff was null and void—Valuation for the purposes of Court-fees and jurisdiction—Decree for declaration without consequential relief—See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

(2) S. 7 (iv), cl. (*f*)—See VALUATION, 20 B. 265.

(3) S. 26—See SUCCESSION CERTIFICATE ACT (VII OF 1839), 19 B. 145.

Court of Chancery.

(1) See GUARDIAN AND WARD, 19 B. 96.

(2) See RECEIVER, 19 B. 83.

Creditor's Trust Deed.

Assignment of all his property by debtor to trustees for payment of creditor—Suit by creditor who had signed as creditor and trustee to recover his debt notwithstanding the deed—Creditors—Deed—See DEED, 19 B. 12.

Criminal Intimidation.

See PENAL CODE (ACT XLV OF 1860), 20 B. 794.

Criminal Procedure.

(1) Salt Act XII of 1882—Limitation prescribed for charging with offence—Fraud in concealing date of offence—Limitation Act (XV of 1877), s. 18, not applicable to criminal proceedings—Revisional jurisdiction of High Court—Power to interfere with interlocutory orders of Subordinate Courts—See Act XII of 1882 (INDIAN SALT), 20 B. 543.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 732.

Crim. Pro. Code (Act X of 1882).

(1) See ACT VIII OF 1867 (BOMBAY VILLAGE POLICE), 19 B. 612.

(2) *S.* 54—*Offence committed by a British subject in foreign territory—Powers of the Police to arrest for such offence without a warrant—Wrongful arrest—Wrongful confinement—Indian Penal Code (Act XLV of 1860), s* 342.—S. 54 of the Crim. Pro. Code (Act X of 1882) does not empower a police officer to arrest, without a warrant, a British subject in British India on a charge of criminal breach of trust or other cognizable offence committed outside British India.

Mukund was a native Indian subject of the Queen-Empress, residing at Belgaum. A complaint was filed against him in the Sangli State charging him with committing breach of trust within the territories of that State. Thereupon he obtained an order from the District Magistrate of Belgaum, dated 15th November, 1891, which exempted him from arrest for the offence of criminal breach of trust

without a warrant issued by himself or by the Political Agent of the Southern Mahratha Country. This order was communicated to Mukund through the accused, who was chief constable at Belgaum. On the 27th November, 1891, a police officer from the Sangli State came to Belgaum with a warrant issued by the Sangli Court for the arrest of Mukund on a charge of criminal breach of trust. The chief constable thereupon directed Mukund's arrest. Mukund brought to the notice of the chief constable the District Magistrate's order of the 15th November, 1891, but he was detained in custody till the matter was reported to the First Class Magistrate, who ordered his discharge. In the meantime the complaint filed against Mukund in the Sangli State was dismissed without requiring his extradition.

Mukund thereupon prosecuted the chief constable on a charge of wrongful arrest and wrongful confinement.

Held, that the chief constable had no power to arrest the complainant without a warrant, and that he was guilty of the offence of wrongful confinement under s. 342 of the Indian Penal Code (XLV of 1860). *In re* MUKUND BABU VETHE, 19 B. 72 ... 49

(3) S. 90—See MALICIOUS PROSECUTION, 19 B. 485.

(4) S. 163—See PENAL CODE (ACT XLV OF 1860), 20 B. 394.

(5) S. 188—See PENAL CODE (ACT XLV OF 1860), 19 B. 105.

(6) Ss. 191 and 197—Penal Code (Act XLV of 1860), ss. 211, 500—Falsely charging a person with an offence—Defamation—Defamatory statement made by a person examined in the course of an official or departmental inquiry—Privilege—Qualified privilege—See PENAL CODE (ACT XLV OF 1860), 19 B. 51.

(7) *S.* 195—*Sanction to prosecute—Requisites of a proper sanction.*—A sanction to prosecute for giving false evidence should specify clearly the statement alleged to be false, so that the person sought to be charged may be definitely informed what is the criminal act alleged against him. *In re* JIVAN AMBAIDAS, 19 B. 362 ... 244

(8) Ss. 238, 303 and 307—See JURY, 20 B. 215.

(9) Ss. 238, 303, 307—High Court's power of interfering with the verdict of a jury—Verdict of jury—Special verdict—Murder—Culpable homicide—Grave and sudden provocation—Loss of self-control—Burden of proving loss of self-control on accused—Penal Code (Act XLV of 1860), ss. 299 and 300—See JURY, 20 B. 215.

(10) *Ss.* 298 *and* 302—*Jury—Verdict—Special verdict—Duty of Judge—Practice—Procedure.*—The accused was tried for rape. The jury, after considering their verdict, announced through their foreman that the accused "did the act with consent." The Sessions Judge thereupon, without requiring them to reconsider their verdict or giving them any fresh directions, asked them whether they found the accused guilty or not guilty. The jury again retired and brought in a verdict of guilty, upon which the Sessions Judge sentenced the prisoner to three years' rigorous imprisonment.

Held, reversing the conviction and sentence, that the first verdict of the jury being a special verdict, and there being no real ambiguity about it, the Sessions Judge was bound under s. 302 of the Code of Criminal Procedure (Act X of 1882) to record the verdict and apply the law thereto.

Held, also, that the second verdict could not be sustained, as there was nothing to show that the Sessions Judge gave the jury any fresh directions, or explained to them that a finding that the woman had consented was tantamount to an acquittal. QUEEN-EMPRESS v. MADHAVRAO, 19 B. 735 ... 492

(11) *S.* 411—*Appeal from a conviction by a Presidency Magistrate—Appeal—Practice.*—S. 411 of the Code of Criminal Procedure (Act X of 1882) does not allow an appeal in the case of a conviction by a Presidency Magistrate where the sentence inflicted is six months' rigorous imprisonment and a fine of Rs. 125, or in default a further period of three months' rigorous imprisonment. QUEEN-EMPRESS v. HARI SAVBA, 20 B. 145 ... 654

Crim. Pro. Code (Act X of 1882)—(*Continued*). PAGE

(12) *S.* 421—*Judgment rejecting an appeal need not be in writing—Practice—Procedure.*—In rejecting an appeal under s. 421 of the Code of Criminal Procedure (Act X of 1882) the appellate Court is not bound to write a judgment. QUEEN-EMPRESS v. WARUBAI, 20 B. 540. 925

(13) *Ss.* 421, 430—*Criminal procedure—Practice—Procedure—Appeal by accused—Order rejecting appeal as barred by limitation—Review of such order—Finality of judgments in criminal matters.*—A Sessions Judge dismissed an appeal on the ground that it was barred by limitation. On a subsequent application by the accused, the Judge admitted the appeal and at the hearing acquitted him. The High Court sent for the record in the exercise of its revisional jurisdiction.

Held, that the order of acquittal was *ultra vires* under s. 430 of the Code of Criminal Procedure (X of 1882). The order dismissing the appeal was final and not open to review.

It was argued that s. 421 of the Crim. Pro. Code (X of 1882) only applies to orders passed on the merits, and that as the order rejecting the appeal was not of that class, it was not an order "upon appeal" and was not final under s. 430.

Held, that s. 421 was not limited to orders passed on the merits and that the order in question was an order upon appeal and final under s. 30.

The Crim. Pro. Code (X of 1882) makes no provision for review of judgments in criminal matters by subordinate appellate Courts. The jurisdiction of revision is vested in the High Court, which has ample powers under chap. 32 to rectify any inadvertent failure of justice. QUEEN-EMPRESS v. BHIMAPPA BIN RAMANNA, 19 B. 732 ... 490

(14) *S.* 431—*Practice—Appeal by accused against conviction—Death of appellant—Abatement of appeal—Appeal—Remedy open to the deceased appellant's heirs.*—Two persons, Mahomadshah and Nabishah, were convicted of criminal breach of trust and each was sentenced to one year's rigorous imprisonment and a fine of Rs. 1,000. Both prisoners filed an appeal to the High Court. Nabishah died pending his appeal. On Mahomadshah's appeal the High Court passed an order acquitting him and reversing his conviction and sentence. Thereupon one of the relatives of the deceased Nabishah applied to the High Court to set aside the conviction and sentence passed in his case, and order the fine to be refunded.

Held, that on Nabishah's death his appeal abated under s. 431 of the Code of Criminal Procedure (Act X of 1882).

As the case turned on the appreciation of evidence, the High Court declined to interfere in the exercise of its revisional jurisdiction, referring the legal representatives of the deceased to the Governor in Council for redress. *In re* NABISHAH, 19 B. 714 ... 478

(15) S. 432—See FAZENDAR, 20 B. 617.

(16) Ss. 435, 439—Revisional jurisdiction of High Court—Power to interfere with interlocutory orders of Subordinate Courts—See ACT XII OF 1882 (INDIAN SALT), 20 B. 543.

(17) Ss. 503, 507—See FRAUD, 19 B. 749.

(18) Ss. 523 and 524—See ACT VI OF 1878 (TREASURE TROVE), 19 B. 668.

(19) *S.* 555—*Disqualification of a Judge—Pecuniary interest.*—The accused was a compounder in the employ of Treacher & Co. He was tried and convicted by the Presidency Magistrate of criminal breach of trust as a servant in respect of certain goods belonging to the company. It appeared that the Magistrate was a shareholder in the company which prosecuted the accused.

Held, that the Magistrate was disqualified from trying the case. As a shareholder of the company he had a pecuniary interest, however small, in the result of the accusation, and was, therefore, "personally interested" in the case within the meaning of s. 555 of the Code of Criminal Procedure (Act X of 1882).

Crim. Pro. Code (Act X of 1882)—(*Concluded*). PAGE

The words "personally interested" in the section are not intended to exclude pecuniary as distinguished from a personal interest. *In re* P.A. RODRIGUES, 20 B. 502 ... 899

Cross-examination.

See FRAUD, 19 B. 749.

Curator.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), 20 B. 437.

Custody.

See EVIDENCE, 20 B. 165.

Damages.

(1) Principal and agent—Consignment for sale—Unauthorized sale by agent below limit—Measure of damages—See PRINCIPAL AND AGENT, 20 B. 633.

(2) See ACT IX OF 1887 (PROVINCIAL SMALL COUSE CAURTS), 20 B. 283.

(3) See CASTE QUESTION, 20 B. 784.

(4) See DIVORCE, 20 B. 362.

(5) See EASEMENT, 20 B. 704.

(6) See LEASE, 20 B, 439.

(7) See MALICIOUS PROSECUTION, 19 B. 485.

(8) See PRACTICE 20 B. 675.

(9) See SHIPPING, 19 B. 639.

(10) See SPECIFIC PERFORMANCE, 19 B. 764.

Damdupat.

(1) *Amount of interest allowed cannot exceed the balance of principal actually due at date of suit—Part payments of principal deducted—Hindu law—Interest.*—The rule of *damdupat* limits the arrears of interest recoverable at any one time by the amount of principal remaining due at that time. DAGDUSA v. RAMCHANDNA, 20 B. 611 ... 974

(2) Applicability of the law—Account current—State of account—Mortgage—Redemption—See MORTGAGE (REDEMPTION), 20 B. 721.

Darkhast.

(1) See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 19 B. 250.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 34.

(3) See EXECUTION OF DECREE, 19 B. 258; 20 B. 175.

(4) See LIMITATION ACT (XV OF 1877), 19 B. 261.

(5) See MORTGAGE (REDEMPTION), 20 B. 279.

(6) See PRACTICE, 20 B. 541.

Declaration.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

(2) See HINDU LAW (ADOPTION), 20 B. 202.

(3) See POSSESSION, 20 B. 798.

(4) See RAILWAY COMPANY, 19 B. 165.

(5) See VENDOR AND PURCHASER, 19 B. 43.

Declaratory Decree.

(1) See HINDU LAW (ADOPTION), 20 B. 202.

(2) See VENDOR AND PURCHASER, 19 B. 43.

Decree.

(1) Appeal—Practice—Procedure—Civ. Pro. Code (Act XIV of 1882), ss. 2 and 136—Order dismissing a suit—See PRACTICE, 19 B. 307.

(2) *Compromise of decree—Effect of compromise—Mode of enforcing agreement of compromise—Contract—Reciprocal promises—Right to sue—Decree for performance of whole contract—Contract Act* (IX *of* 1872), *s.* 51.—A decree for partition having been compromised by an agreement made by the parties, and communicated to the Court which passed the decree.

Decree—(*Concluded*). PAGE

Held, that the effect of the decree was extinguished by the agreement, which could only be enforced by a fresh suit, and not by an application for execution of the former decree.

An agreement consisting of reciprocal promises to be performed by the plaintiffs and the defendant can be sued upon by the plaintiffs when they have not refused to carry out their promises, though they may not have put an allegation in the plaint saying that they are ready and willing to do so, s. 51 of the Indian Contract Act being no bar to such a suit.

When the plaintiffs are entitled to ask for the performance of the part of the contract in which they are interested and the defendant claims execution of the whole to which the plaintiffs do not object, the Court ought to pass a decree directing execution of the whole contract, instead of rejecting the claim. HARI RAGHUNATH v. KRISHNAJI ANANT, 19 B. 546 ... 365

(3) Death of party between hearing and judgment—Judgment, date of operation of—Civ. Pro. Code (Act XIV of 1882), s. 234—Practice—Procedure—See PRACTICE, 19 B. 807.

(4) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 116.

(5) See CONVERSION, 20 B. 53.

(6) See COSTS, 20 B. 167.

(7) See ENCROACHMENT, 20 B. 298.

(8) See MINOR, 19 B. 571; 20 B. 338.

(9) See TALUKDAR, 20 B. 565.

Deed.

(1) *Creditors' trust-deed—Assignment of all his property by debtor to trustees for payment of creditors—Suit by creditor who had signed as creditor and as trustee to recover his debt notwithstanding the deed.*—On the 30th March, 1894, the plaintiff sued the defendant, who traded under the name of Vassanji Jairam, to recover Rs. 7,705 due on an adjusted account. On the 17th April following the suit was on the board for hearing, but by consent of parties was adjourned for three months. Later on the same day the defendant executed a deed whereby he assigned all his property to the plaintiff and three other persons as trustees in trust for the payment of his creditors. The deed was executed by the plaintiff and the other trustees both as trustees and as creditors. It contained no release and no agreement by creditors to take less than the full amount of their debts. It conveyed all the defendant's property to the trustee, who was to collect the estate and divide it rateably among the creditors "without prejudice to the right of the several creditors to recover" the balance (if any) which might remain due to them after receiving such rateable distribution, and it declared that the said agreement for the payment of the debts was accepted by the creditors, and that "upon payment to the said creditors, respectively, of the full or whole amount of their respective claims these presents shall operate as fully and effectually as an order of discharge from the Insolvent Court in respect of the debts now due from the said debtor, or the said firm of Vassanji Jairam to the said creditors respectively, and may be pleaded in bar to any claim in respect of such debts; and each of them the said creditors for himself, his heirs, executors and administrators doth hereby covenant with the said debtor, his heirs, executors and administrators that he or they will not, if the said debtor shall pay the said full amount of the debts due by him or his said firm of Vassanji Jairam to the said creditors, bring any action, suit or proceeding against them or any of them for or in respect of the debts now due from the said debtor or the said firm of Vassanji Jairam to the said creditors respectively." On the execution of this deed the trustees took possession of defendant's books of accounts, and proceeded to recover the defendant's estate.

Deed—(*Concluded*).

PAGE

The three months for which, as above mentioned, the suit was adjourned in April, 1894, having now expired, it came on for hearing. The defendant pleaded the deed, and contended that the plaintiff having accepted the trust, and signed the deed, was not entitled to continue the suit against him.

Held, that it would be inequitable that the defendant having handed over all his property to four of his creditors as trustees with a view to the payment of his debts in full should be harassed by one of those creditors who had accepted the trust. The conduct of the plaintiff had been such as to deprive him of the right to present payment of his debt except by the assignment made to him and the other trustees. There had been a concluded agreement which precluded him from proceeding with his suit, and to allow him to proceed would be a fraud on the creditors. Under the circumstances there was an implied condition that the creditors should not sue until their remedy under the assignment was exhausted. The creditors should get what they could under the assignment, and then proceed for the rest. GOKULDAS MUCCANJI v. VASSANJI JAIRAM, 19 B. 12 ... 8

(2) Of settlement—Trust—Beneficiary—Proviso for forfeiture of interest in case of insolvency—Insolvency of beneficiary—Subsequent withdrawal of petition in insolvency—Effect of withdrawal of petition—See TRUST, 20 B. 310.

Defamation.

(1) Defamatory statement made by a person examined in the course of an official or departmental inquiry—Privilege—Qualified privilege—Crim. Pro. Code (Act X of 1882), ss. 191, 197—Penal Code (XLV of 1860), ss. 211, 500—Falsely charging a person with an offence—See PENAL CODE (ACT XLV OF 1860), 19 B. 51.

(2) Privilege of counsel—Good faith—Construction—Construction of Statute—Indian Penal Code (Act XLV of 1860), s. 499, exception 9—See PENAL CODE (ACT XLV OF 1860), 19 B. 340.

(3) Publication—Mode of publication defamatory though the imputation be true—Penal Code (Act XLV of 1860), s. 499—See PENAL CODE (ACT XLV OF 1860), 19 B. 703.

(4) *Suit for malicious prosecution—Evidence—Burden of proof—Want of reasonable and probable cause—Malice—Information given to police—Privilege—Penal Code* (XLV *of* 1860), *ss.* 182, 211, 499.—Certain property belonging to the defendant having been stolen, he informed the chief police constable entrusted with the inquiry that he suspected the stolen property to be concealed in plaintiff's house. Accordingly the plaintiff's house was searched, and its floor dug up, and the plaintiff was placed in confinement for an hour or so. No property was, however, found. Thereupon the plaintiff sued the defendant to recover damages for loss of character suffered by him in consequence. Both the lower Courts decreed the plaintiff's claim, holding that it lay on the defendant to prove reasonable and probable cause for the suspicion communicated to the police and the search of the plaintiff's house. On second appeal, the High Court reversed the decrees and dismissed the suit.

Held (*per* JARDINE, J.) that the rule as to the burden of proof in suits for malicious prosecution should be extended to a case like the present. The *onus*, therefore, lay on the plaintiff not only to allege in the plaint, but also to prove against the defendant malice and absence of reasonable and probable cause for the information given by him to the police. The plaintiff, however, had given no evidence of his own innocence, nor that the suspicion of the defendant was groundless, nor that the defendant had any malice.

Per RANADE, J.—The present case was governed by the principles which govern suits for defamation, and under the circumstances the action of the defendant fell within the exception which protects information given to a person in authority in the discharge of a public or private duty, where no malice in fact is shown to exist.

Defamation—(*Concluded*). PAGE

There is a distinction between the case of a false charge falling under s. 211 of the Penal Code (XLV of 1860) and that of false information given to the police under s. 182. A person prosecuting another for an offence under the latter section need not prove malice and want of reasonable and probable cause except so far as they are implied in the act of giving information known to the police with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. In an inquiry under s. 211, on the other hand, the absence of just and lawful ground for making the charge is an important element. RAGHAVENDRA v. KASHINATH BHAT, 19 B. 717 ... 480

Delay.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

Demolition.

See MUNICIPALITY, 19 B. 27.

Deposit.

See LIMITATION, 19 B. 352, 775.

Deshmukhi Vatan.

See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 20 B. 423.

Dhara Land.

See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 475.

Directors.

See COMPANY, 20 B. 654.

Discharge.

(1) See INSOLVENCY, 19 B. 297, 778.

(2) See INSOLVENT, 20 B. 636.

Disclaimer.

See LANDLORD AND TENANT, 20 B. 759.

Discretion.

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 20 B. 281.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

(3) See INSOLVENCY, 19 B. 778.

(4) See SUCCESSION CERTIFICATE ACT (VII OF 1884), 19 B. 790.

Dishonour.

(1) See BOND, 20 B. 791.

(2) See HUNDI, 20 B. 133.

(3) See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1880), 20 B. 488.

Dismissal.

Of delegates by the caste—See CASTE QUESTION, 20 B. 784.

Divorce.

(1) *Husband and wife—Indian Divorce Act* (IV *of* 1869)—*Jurisdiction of District Court—Place of marriage - Marriage by petitioner before decree of District Court confirmed by High Court—Ignorance of law —Damages against co-respondent - Practice.*—Under s. 2 of the Indian Divorce Act (IV of 1869) a District Court has jurisdiction to make a decree for dissolution of marriage upon being satisfied that the adultery charged has been committed in India without going into evidence as to the place of the marriage of the parties.

After the District Court had passed a decree for dissolution of marriage, but before the confirmation of the decree by the High Court, the petitioner, in ignorance of the law, married another woman, but he ceased to cohabit with the woman on discovering his mistake. Under the circumstances the High Court made the decree absolute, holding that under s. 14 of the Indian Divorce Act (IV of 1869) it had a discretion to do so.

Divorce—(*Concluded*). PAGE

The decree having awarded damages against the co-respondent, and he not having appealed on the question of damages, it was contended that the High Court could only deal with that part of the decree which dissolved the marriage.

Held, under the Indian Divorce Act (IV of 1869), that the Court had the fullest power to deal with the case according as justice might require, including the award of damages by the Court below. KYTE v. KYTE, 20 B. 362 ... 803

(2) Husband and wife—Suit against wife—Costs of wife—Practice—Procedure—See HUSBAND AND WIFE, 19 B.2 93.

Divorce Act (IV of 1869).

(1) Ss. 2, 14—See DIVORCE, 20 B. 362.

(2) S. 7—See HUSBAND AND WIFE, 19 B. 293.

Domicil.

Widow's domicil—Capacity to contract—Law—Law of domicil regulates capacity to contract--Minor—Contract by a minor—Liability of minor—Contract Act (IX *of* 1872), *ss.* 11, 128—*Principal and surety—Surety of a minor—Liability.*—The domicil of a widow is the same as that of her husband, unless she has changed it after his death. By the law of England the question of the capacity of a person to enter into a contract is decided by the law of his domicil. This principle of English law is adopted by s. 11 of the Contract Act (IX of 1872).

A minor cannot be sued on a bond executed by him during minority and not ratified by him after his majority.

A surety to a bond passed by a minor for moneys borrowed for purposes of litigation not found to be necessary, is liable to be sued on it whether the contract of the minor is considered to be void or voidable. KASHIBA v. SHRIPAT, 19 B. 697 ... 466

Easement.

(1) *Light and air—Injunction or damages—Specific Relief Act* (I *of* 1877), *s.* 54, *cl.* (*b*)—*Prescription—Agreement to prevent acquisition of easement—Not a document creating, &c., right in immoveable property—Chance of acquiring easement not immoveable property—Registration.*—The chance of acquiring a right to light and air is not immoveable property within the meaning of the Registration Act, nor can a pecuniary value be put upon it. A document, therefore, which limits or extinguishes the chance of acquiring such an easement does not require registration. 13 Bom. 252 and 16 Bom., 474 followed and approved as to the circumstances in which the Court will grant an injunction where a right to light and air is infringed. SULTAN NAWAZ JUNG v. RUSTOMJI NANABHOY, 20 B. 704 ... 1038

(2) *Right of way—Purchase of land adjoining purchaser's land—Way of access—Way of necessity—Sale-deed—Construction—Circumstances existing at the time of the sale.*—A person purchasing a plot adjoining his own land, and having access to the plot through his land, cannot acquire a way of necessity over his vendor's land of which the plot formed a part. The fact that if the plot had been sold to a third person, he would have acquired a way of necessity, does not affect the question.

Where a portion of an estate is sold, a right of way leading to such portion may be created by the use of general words, provided that the circumstances existing at the time of the sale were such as to justify the belief that such was the intention of the parties.

Where the words used in a Marathi deed of sale were "*sarva hakk wa sambandh*" (*i. e.*, all rights and accompaniments),

Held, that the words in themselves, apart from the circumstances at the time of the sale, did not include a right of way over the vendor's property as conveyed along with the portion of the land sold; but if there was an old path leading across the vendor's adjoining ground to the plot sold, and the purposes for which the plot was sold, and

Easement—(*Concluded*). PAGE

the conduct of the parties were such as to justify an inference that by the use of these words it was the intention of the parties to convey the right to use the path, it would be open to the Judge to find as a fact that such was the intention. THE MUNICIPALITY OF THE CITY OF POONA v. VAMAN RAJARAM GHOLAB, 19 B. 797 ... 534

(3) *Right to light and air—Right to have water carried off over neighbour's land—Limit of—Order directing demolition of new building when Court will grant—Sufficient light, right to access of—Light at angle of* 45°.—A right to have water carried away over the adjoining land does not give its owner any power to prevent the erection of buildings on the adjoining ground so long as the arrangements necessary to the preservation of his right are made.

An easement of light to a window only gives a right to have buildings that obstruct it removed so as to allow the access of sufficient light to the window. BALA v. MAHARU, 20 B. 788 ... 1096

(4) *Trees—Trees overhanging neighbour's land—Nuisance—Easement Act* (V *of* 1882) —Plaintiff sued for an injunction restraining the defendant from allowing the branches of a tree belonging to him to overhang plaintiff's land, and for an order directing him to cut off the branches.

Defendant pleaded that the branches of his tree had projected over plaintiff's land for forty years, and he contended that he had, therefore, acquired a prescriptive right of the nature of an easement over plaintiff's land.

Held, that the plaintiff was entitled to cut away the branches which overhung his land, though they had done so for more than 40 years. HARI KRISHNA JOSHI v. SHANKAR VITHAL, 19 B. 420 ... 284

Easement Act (V of 1882).

See EASEMENT, 19 B. 420.

Ejectment.

(1) Defendant trespasser—*Onus* of proof—Plaintiff to prove his superior title—See HINDU LAW (JOINT FAMILY), 19 B. 803.

(2) Landlord and tenant—Lease—Ejectment—Title—Tenant cannot dispute landlord's title—See LANDLORD AND TENANT, 19 B. 133.

(3) Landlord and tenant—Mirasi tenure—Ejectment—Trespasser—Suit by an inamdar to recover possession—Mirasi tenure existing—Right of inamdar against trespasser—See LANDLORD AND TENANT, 19 B. 138.

(4) Landlord and tenant—Notice to quit—Agricultural land—Tenancy-at-will—Yearly tenancy—Rent not payable until the end of the year—Construction—Land Revenue Code (Bom. Act V of 1879), s. 84—See LANDLORD AND TENANT, 19 B. 150.

(5) Tenure—Plea by defendant that he held the land by Fazendari tenure for building purposes—Permission to build—Counterparts of leases produced by landlord—Execution of counterpart denied by defendant—Ancient documents—Claim of tenant to compensation for buildings erected by him—See LANDLORD AND TENANT, 20 B. 1.

(6) Title by possession—Mamlatdar—Finding by Mamlatdar as to possession—Subsequent contrary finding by Civil Court—Mamlatdar's order not conclusive—Suit by party against whom Mamlatdar's order made—Limitation—Possession—See POSSESSION, 20 B. 270.

(7) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 303.

(8) See PRACTICE, 20 B. 196.

Election.

See HINDU LAW (JOINT FAMILY), 20 B. 316.

Encroachment.

Stranger building on land of another—Acquiescence of owner—Standing by—Delay of owner in suing for possession—Form of decree where owner succeeds in suit.—It is well established law in England that

Encroachment—(*Concluded*). PAGE

if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building. Delay by the owner in bringing a suit is not in itself sufficient to create an equity in favour of the person spending money on the land so as to deprive the owner of his strict rights.

The decree made by the High Court was that the plaintiff should recover the land with liberty to the defendant forthwith to commence to remove his building and to restore the property to the condition in which it was when he took possession, the same to be completed within one year from date of decree. In default, the plaintiff to be at liberty to remove the building at the expense of the defendant. PREMJI JIVAN BHATE v. HAJI CASSUM JUMA AHMED, 20 B. 298 ... 758

English Consular Court.

See ZANZIBAR, 19 B. 741.

Entry.

See ACT I OF 1880 (BOMBAY, KHOTI SETTLEMENT), 20 B. 729.

Estate in fee.

See HINDU LAW (WILL), 19 B. 401.

Estoppel.

(1) *Indian Evidence Act* (I *of* 1872), *s.* 115—*Estoppel by conduct—Mistake of law—Adoption—Acknowledgment of adoption.*—One Ganpatrav Raje Shirke was possessed of considerable property both in British territory and in the territory of His Highness the Gaikwar. He died in 1858, leaving three childless widows, Laxmibai, Savitribai, and Babai. Shortly after his death, the plaintiff Kuverji, who was then a minor, was taken to Baroda by Laxmibai, and on her representations as well as those of her co-widows he was acknowledged by the Gaikwar as their adopted son, and as such entitled to succeed to all the estate and privileges enjoyed by the deceased Ganpatrav. For several years afterwards the widows treated the plaintiff as the legitimate heir and successor of Ganpatrav in respect of the Baroda property. With regard to the estate in British territory, the widows at first put forward Kuverji as the adopted son of Ganpatrav. On their application a certificate of heirship was issued under Reg. VIII of 1827, declaring that "the Bais were the widow heirs, and the minor Kuverji the son heir, of the deceased Ganpatrav." In one case the widows obtained a decree as guardians of the minor, on a bond executed in favour of Kuverji as heir to Ganpatrav. When the Bombay Summary Settlement Act (II of 1863) was passed, the widows accepted the summary settlement in respect of the inam holdings of their deceased husband, and thereupon the holdings were entered in their names in the Government records. Finding themselves secure in the possession of their husband's estate, the ladies now dropped the allegation of adoption, and dealt with the property in British territory in their own right, and not as trustees or guardians of the minor Kuverji. In 1871, Kuverji sought to have part of the property in British territory transferred to his own name as the adopted son of Ganpatrav. The widows resisted this attempt and denied his adoption. In 1881, Kuverji made a similar attempt, but failed, the Revenue authorities having eventually resolved to leave the question of Kuverji's title by adoption to be determined by the Civil Court.

In 1884, Kuverji filed the present suit against the widows of Ganpatrav for a declaration of his adoption by Ganpatrav and for possession of Ganpatrav's estate in British territory. The widows denied the *factum* of the adoption, and disputed its validity. They also contended that the suit was barred by limitation. The Agent for

Estoppel—(*Concluded*). PAGE

Sardars in the Dekkhan, who tried the case, dismissed the suit, holding that the plaintiff's adoption by Ganpatrav was not proved, and that the claim was barred by limitation, the widows having been in adverse possession of the property in British territory for more than twelve years.

The plaintiff appealed against this decision to the High Court, contending (*inter alia*) that the widows were estopped by their conduct from denying the plaintiff's adoption.

Held, that the widows were not estopped.

Per BIRDWOOD, J.—The fact that the plaintiff was put forward by the widows as *their* adopted son in the Baroda territory did not estop them from disputing the plaintiff's allegation that he was adopted by Ganpatrav. Nor was the circumstance that the widows and the plaintiff obtained a joint certificate of heirship to Ganpatrav in British territory conclusive as an estoppel.

Per JARDINE, J.—There was no estoppel, (1) because there was nothing to show that the plaintiff had been led to alter his position in life through belief in any misrepresentations made by the widows, and (2) because the widows might have been under the same mistake of law as the plaintiff, *viz.*, that the Gaikwar's recognition of his adoption created a status operative everywhere, as well in British territory as in the Gaikwar's territory. KUVERJEE v. BABAI, 19 B. 374 ... 253

(2) See RES JUDICATA, 19 B. 821.

Evidence.

(1) Burden of proof—Defamation—Malicious prosecution - Want of reasonable and probable cause—Malice—Information given to police—Privilege—Penal Code (Act XLV of 1860), ss. 182, 211, 499.—See DEFAMATION, 19 B. 717.

(2) *Burden of proof—Promissory notes—Proof of consideration—Suit by professional money-lender against a young man recently come of age—Presumption—Negotiable Instruments Act* (XXVI *of* 1881), *ss.* 44, 45 *and* 118—*Evidence Act* (I *of* 1872), *s.* 114, *illus.* (*c*).—Professional money-lenders sued a young man recently come of age to recover certain loans of money alleged to have been advanced by them to him on promissory notes. The defendant, who under the will of his father was entitled to a large property but had not yet come into possession of it, was of an extravagant and reckless character. He pleaded, as to part of the consideration for the notes, that he did not receive it, and as to a further part, that the consideration was immoral. In dealing with the case the Court laid down the following propositions, not as rules of law, but as guides in considering the evidence in such a case :—

(1) That upon the above facts the ordinary presumption that a negotable instrument has been executed for value received was so much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money-lenders (the plaintiffs) the obligation of satisfying the Court that they had paid the consideration in full. That is the practical effect of illus. (*c*) to s. 114 of the Evidence Act (I of 1872).

(2) Where the plaintiff, in answer to such a defence, affirmed that he had paid the consideration in full, and was corroborated by his books and witnesses, the *onus* of proof again shifted over upon the defendant.

(3) The burden of proof thus thrown upon the defendant could only be met by a perfectly truthful and harmonious statement which the Court felt able to rely upon with confidence. In the absence of this, the ordinary presumption laid down in s. 118 of the Negotiable Instruments Act (XXVI of 1881) must prevail, *viz.*, until the contrary is proved the presumption should be made that every negotiable instrument was made for consideration. MOTI GULABCHAND v. MAHOMED MEHDI THARIA TOPAN, 20 B. 367 ... 807

Evidence—(*Concluded*). PAGE

(3) *Confession—Retracted confession—Necessity of corroborative evidence—Practice.*—A retracted confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case.

There is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law. QUEEN EMPRESS v. GHARYA, 19 B. 728 ... 487

(4) *Evidence Act* (I of 1872), *s.* 26—*Statement of accused—Custody of police—Statement made in temporary absence of police.*—A person under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed, to Godhra. A friend drove with her in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said, on the ground that she was not then in custody, and that s. 26 of the Evidence Act (I of 1872) did not apply.

Held, that, notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question must be disallowed. EMPRESS v. LESTER, 20 B. 165 ... 668

(5) See ACT I OF 1880 (BOMBAY, KHOTI SETTLEMENT), 20 B. 78.

(6) See CONVERSION, 20 B. 53.

(7) See EVIDENCE ACT (I OF 1872), 19 B. 195, 363 ; 20 B. 795.

(8) See FRAUD, 19 B. 749.

(9) See HINDU LAW (ADOPTION), 19 B. 428.

(10) See HINDU LAW (WIDOW), 19 B. 36.

(11) See HINDU LAW (WILL), 20 B. 450.

(12) See INSOLVENT, 20 B. 636.

(13) See LIMITATION ACT (XV OF 1877), 19 B. 663.

(14) See NATIVE CHRISTIAN, 19 B. 783.

(15) See PRACTICE, 19 B. 551 ; 20 B. 753.

(16) See REGISTRATION ACT (III OF 1877), 20 B. 553.

(17) See STAMP, 19 B. 635.

(18) See SUCCESSION CERTIFICATE ACT (VII OF 1884), 19 B. 338.

Evidence Act (I of 1872).

(1) *Ss.* 25 *and* 26—*Confession—Confession made to a police officer by accused while in police custody—Accomplice—Spy—Distinction between a spy and an accomplice—Evidence of an accomplice—Evidence.*—A statement made to a police officer by an accused person while in the custody of the police, if it is an admission of a criminating circumstance, cannot be used in evidence under ss. 25 and 26 of the Indian Evidence Act (I of 1872).

The action of a spy and informer in suggesting and initiating a criminal offence is itself an offence, the act not being excused or justified by any exception in the Indian Penal Code (XLV of 1860) or by the doctrine which distinguishes the spy from the accomplice.

But the act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice.

Distinction between a spy and an accomplice pointed out. QUEEN-EMPRESS v. JAVECHARAM, 19 B. 363 ... 245

(2) S. 26—See EVIDENCE, 20 B. 165.

(3) *S.* 26—*Evidence—Confession—Police custody—Jailor in a Native State.*—The custody of the keeper of a jail in a Native State, who is not a police officer, does not become that of a police officer, merely because his subordinates, the warders of the jail, are members of the police force of that State. In the absence of any suggestion of a

Evidence Act (I of 1872)—(*Concluded*). PAGE

close custody inside the jail, such as may possibly occur when an accused person is watched and guarded by a police officer investigating an offence, s. 26 of the Indian Evidence Act (I of 1872) does not exclude such a jailor from giving evidence of what the accused told him while in jail. QUEEN-EMPRESS v. TATYA BIN APPAJI, 20 B. 795 ... 110

(4) S. 30—See EVIDENCE, 19 B. 728.

(5) *S.* 30—*Confession of co-prisoner—Joint trial—Plea of guilty—Evidence.*—A and B were charged with murder. A pleaded guilty, but he was not convicted or sentenced till the conclusion of the trial of his fellow prisoner B. The Sessions Judge, holding that both the accused were jointly tried for the same offence, took into consideration as against B the confessions made by A, and convicted both of murder.

Held, that after A had pleaded guilty he could not be treated as being jointly tried with B. A's confessions were, therefore, not admissible against B under s 30 of the Indian Evidence Act (I of 1872). QUEEN-EMPRESS v. PAHUJI, 19 B. 195 ... 132

(6) S. 32, cl. 6—See REGISTRATION ACT (III OF 1877), 20 B. 562.

(7) Ss. 33 and 167—See FRAUD, 19 B. 749.

(8) S. 40—See ACT V OF 1874 (BOMBAY LAND REVENUE CODE), 20 B. 475.

(9) S. 114, Ill. (*c*)—See EVIDENCE, 20 B. 367.

(10) S. 114, Ill. (*c*)—See MUNICIPALITY, 20 B. 732.

(11) S. 115—See ESTOPPEL, 19 B. 374.

Execution of Decree.

(1) Application for execution—Form of application—Practice—Procedure—Civ. Pro. Code (XIV of 1882), ss. 235 (*j*) and 260—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 34.

(2) *Application for execution—Obstruction — Suit to remove obstruction under s. 331 of Civ. Pro. Code (Act XIV of 1882)—Failure of such suit—Subsequent application for execution of original decree—Limitation—Limitation Act (XV of 1877), sch. II, arts. 178, 179—Time occupied in suit under s. 331 not excluded where such suit fails.*—On the 7th March, 1889, a decree-holder presented a *dharkhast* for execution of a decree which awarded him possession of certain immoveable property. This *darkhast* was opposed by a third party, who was in possession of the property.

The decree-holder thereupon applied to the Court to have the obstruction removed. This application was registered under s. 331 of the Code of Civil Procedure (Act XIV of 1882), as a suit between the decree-holder as plaintiff and the party who offered the obstruction as a defendant.

On the 22nd January, 1891, the decree-holder withdrew this latter suit. Thereupon his *darkhast* of the 7th March, 1889, was struck off the file. On the 12th November, 1892, he presented a second *darkhast* for execution.

Held, that the second *darkhast* was barred by limitation. The decree-holder having failed to remove the obstruction under s. 331 of the Code of Civil Procedure, the second *darkhast* could not be treated as a continuance or revival of the first. SHIVRAM CHINTAMAN v. SARASVATIBAI, 20 B. 175 ... 675

(3) *Application for execution of decree—Dismissal of the first application—Appeal from decree—Decree confirmed on appeal—Application for—Execution of appellate decree—Appellate decree is the decree to be executed—Former dismissal of application for execution of original decree does not bar execution of appellate decree*—Res judicata—*Limitation—Second application for execution.*—Where the High Court confirms, on appeal, the decree of a Subordinate Court, such confirmation has the same effect as an order of reversal would have had, in so far as it leaves the decree of the High Court as the only decree which exists for the purpose of execution, and the decree of the lower Court becomes incorporated with it.

Execution of Decree—*(Continued)*. PAGE

On 23rd July, 1888, plaintiff obtained a decree for the redemption of certain lands, on payment within three months of the amount due to the mortgagee, which was to be ascertained in execution proceedings. Against this decree the defendant appeal to the High Court.

Pending the appeal, the plaintiff presented a *darkhast* for execution on the 4th October, 1888. This *darkhast* was dismissed, as the plaintiff failed to produce a copy of the mortgage-bond within the time allowed by the Court. The three months allowed by the decree for payment expired on the 23rd October, 1888.

On 11th February 1890, the High Court confirmed the decree, and on 11th April, 1890, plaintiff presented a fresh *darkhast* for execution. Both the lower Courts dismissed this *darkhast* on the ground that the dismissal of the first *darkhast* operated as *res judicata*.

Held, that the plaintiff was entitled to execute the decree, and that his second *darkhast* was not barred either by limitation or on the principle of *res judicata*. NANCHAND v. VITHU, 19 B. 258 ... 175

(4) *Application for—Objection to application by person not party to decree—Failure of exercise of jurisdiction vested by law—Extraordinary jurisdiction—Civ. Pro. Code (Act XIV of 1882), s. 622—Decree against wrong person as representative.*—A person, not a party to a suit, is not entitled to object to the issue of an order for execution of the decree.

A Judge having at the instance of a person not a party to a suit refused to pass an order for the execution of decree on the judgment-creditor's application.

Held, that in omitting to make such an order the Judge failed to exercise a jurisdiction vested in him by law, and that s. 622 of the Civ. Pro. Code (Act XIV of 1882) was, therefore, applicable. NATHUBHAI MULCHAND v. NANA BABU, 19 B. 544 ... 363

(5) Attachment—Execution—Mortgage-debt—Sale of mortgage-debt in execution of a decree against mortgagee—Sale carrying with it security without attaching mortgaged property—S. 274 of the Civ. Pro. Code (Act XIV of 1882)—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 121.

(6) Attachment under decree of High Court of property already attached under decree of Small Causes Court—Claim to attached property, by what Court decided—Civ. Pro. Code (Act XIV of 1882), s. 272—Jurisdiction—Practice— Procedure—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 710.

(7) Civ. Pro. Code (Act XIV of 1882), s. 244 *(c)*—Claim to attached property—Order in execution proceedings—Separate suit—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 328.

(8) Civ. Pro. Code (XIV of 1882), s. 608—Privy Council—Appeal to Privy Council—Stay of execution before appeal admitted—Practice—Procedure—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 10.

(9) Contribution—Mortgage—Sale of property subject to mortgage in execution of money decrees against mortgagors—Subsequent suit by mortgagee to recover his mortgage-debt by sale of part of mortgaged property only—Payment of mortgage-debt by holder of part of mortgaged property—Right on such payment to sue for contribution from other holders of the mortgaged property—See MORTGAGE (CONTRIBUTION), 20 B. 615.

(10) Darkhast for execution of decree—Notice to judgment-debtor to show cause why decree should not be executed—Failure of both parties to appear on the appointed day—Dismissal of *darkhast*—Practice—Procedure—Civ. Pro. Code (Act XIV of 1882), ss. 98, 248 and 647—See PRACTICE, 20 B. 541.

(11) Death of judgment-debtor after attachment but before sale in execution—Sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civ. Pro. Code (Act XIV of 1882), Ss. 311, 316—Practice—Procedure—See PRACTICE, 19 B. 276.

Execution of Decree—(*Continued*). PAGE

(12) *Decree for possession—Execution of decree—Dispossession of a third person not a party in execution—Possessory suit by third person against decree-holder—Cause of action—Mamlatadrs' Act* (*Bom. Act* III *of* 1876)*—Jurisdiction of Mamlatdars—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 263 *and* 332—Where in execution of a decree a person not a party to the suit is dispossessed, his dispossession does not give him a cause of action within the jurisdiction of the Mamlatdar. Section 332 of the Civ. Pro. Code (Act XIV of 1882) applies.

The delivery of possession under s. 263 of the Civ. Pro. Code contemplates the decree-holder being placed in actual possession by possibly dispossessing, in the eye of law, a third person who is not affected by the decree. The mere formal delivery of possession cannot of itself effect such dispossession unless the deprivation of possession be complete as a fact, a conclusion which the Court has to form on the whole of the evidence. It does not make any difference if such a decree is in a partition suit. RAMCHANDRA SUBRAO v. RAVJI, 20 B. 351 (F.B.) ... 795

(13) *Decrees of different Courts against same judgment-debtor—Leave given by both Courts to judgment-debtor to raise amount by private sale—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 305—*Confirmation of such sale by one Court—Subsequent application for confirmation to other Court—Practice—Procedure.*—Panchlingappa Baslingappa obtained a decree against Venubai in the Court of the Second Class Subordinate Judge at Saundatti. He applied (*darkhast* of 1892) for execution, but Venubai, on 19th April, 1893, obtained permission, under s. 305 of the Civ. Pro. Code (Act XIV of 1882), to raise the amount of the decree by private sale on or before the 6th June, 1893, the day fixed for the sale. She obtained a certificate of leave under s. 305.

Another decree was obtained against Venubai in the Court of the First Class Subordinate Judge at Belgaum by one Annaji Ramchandra, and he attached in execution (*darkhast* 351 of 1892) the same lands, which were already attached by the Saundatti Court. From the Belgaum Court, however, Venubai also obtained a certificate under s. 305 of the Civ. Pro. Code, on 22nd April, 1893, authorizing a private sale.

Relying on these two certificates Venubai sold the lands under attachment to the applicant Andanapa *bin* Rachapa for Rs. 2,000 by deed dated 25th May, 1893. On the 28th June, 1893, Andanapa applied to the First Class Subordinate Judge in Belgaum, under s. 305 of the Civ.Pro.Code, for confirmation of the sale and that the purchase money paid by him should be distributed as follows, *viz.*, Rs. 518-14-2 in satisfaction of the decree of the Belgaum Court, Rs. 128-7-10 in satisfaction of the decree of the Saundatti Court, and the balance, Rs. 1,352-10-0, to be paid to Venubai. The Court of Belgaum granted the application and directed that the above sum of Rs. 128-7-10 should be paid into the Court of Saundatti. On the 17th July, 1893, Andanapa applied to the Court at Saundatti to confirm the sale already confirmed by the Belgaum Court, and he brought into Court the said sum of Rs. 128-7-10. On the 19th June 1893, while the above proceedings were going on, a third decree holder (the opponent) had applied to the Second Class Subordinate Judge at Saundatti for execution of his decree. He objected to the confirmation of the sale applied for by the applicant. The Subordinate Judge allowed the objection and refused confirmation of the sale. The applicant then applied to the High Court under its extraordinary jurisdiction.

Held, that the application to the Saundatti Court by Andanapa was superfluous and ought to have been rejected, inasmuch as the sale had already been confirmed by a competent Court, (*viz.*, the Court of Belgaum) and nothing further remained to be done in regard to it. ANDANAPA v. BHIMRAO ANNAJI, 19 B. 539 ... 360

Execution of Decree—(*Concluded*). PAGE

(14) Joint decree-holder—Minority of joint decree-holder—Application for execution after attaining majority—Civ. Pro. Code (Act XIV of 1882), s. 231—Limitation Act (XV of 1877), ss. 7 and 8, and art. 179—See LIMITATION ACT (XV OF 1877), 20 B. 383.

(15) Limitation Act (XV of 1877), sch. II, art. 179, cl. 4—Step-in-aid of execution—Decree—Civ. Pro. Code (Act XIV of 1882), s. 230—Application for execution—See LIMITATION ACT (XV OF 1877), 19 B. 261.

(16) *Property attached in execution of decrees of Small Cause Court and High Court—Execution proceedings in Small Cause Court transferred to High Court—Property realized in execution— Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 295.—The plaintiffs obtained a decree in the High Court against the defendant and in execution attached goods in the defendant's shop. These goods, however, were already under attachment in execution of certain decrees obtained in the Small Cause Court against the defendant. On the 4th September, 1895, by an order of the High Court made on the application of the plaintiffs, the execution proceedings in the Small Cause Court suits were transferred to the High Court, and it was ordered that the attached property should be realized by the High Court. The records of the execution proceedings in those suits were lodged in the Prothonotary's office. On the 26th September, 1895, the decree-holder in one of the Small Cause Court suits obtained an order from the Judge in chambers directing the Sheriff to take charge of the attached property and realize it by sale. The Sheriff accordingly sold the property and certified the sale to Prothonotary's office. The plaintiffs subsequently (under the rules of the Sheriff's office) applied to the Prothonotary for payment to them of the amount realized or so much thereof as should satisfy their decree. The plaintiffs were directed to give notice of their application to the holders of the Small Cause Court decrees.

Held, that the holders of the Small Cause Court decrees were entitled to share rateably with the plaintiffs in the High Court suit in the proceeds of the property sold in execution by the Sheriff. JAYNARAYAN MEGHRAJ v. ISMAIL KARAMALI, 20 B. 377 ... 813

(17) Stay of execution on giving security—Subsequent execution—Default of judgment-debtor—Surety—Liability of surety in execution—Decree—See SURETY, 19 B. 578.

(18) Succession Certificate Act (VII of 1889), s. 4—Application for execution by legal representative of decree-holder without certificate—Necessity of certificate—Limitation Act (XV of 1877), sch. II, art. 179, cl. 4—Execution of decree—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 20 B. 76.

(19) See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 19 B. 250.
(20) See ACT III OF 1876 (BOMBAY MAMLATDAR COURTS), 20 B. 491.
(21) See ACT VI OF 1888 (BOMBAY GUJARAT TALUKDARS), 19 B. 80.
(22) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 127, 216; 20 B. 198.
(23) See HINDU LAW (JOINT FAMILY), 20 B. 385.
(24) See KHOTI LAND, 19 B. 528.
(25) See LIMITATION ACT (XV OF 1877), 20 B. 179.
(26) See MAMLATDAR, 19 B. 675; 20 B. 630.
(27) See MINOR, 20 B. 534.
(28) See MORTGAGE (PRIORITY), 20 B. 390.
(29) See MORTGAGE (REDEMPTION), 20 B. 279, 557.
(30) See REGISTRATION ACT (III OF 1877), 20 B. 158.

Executor.

(1) Arbitration—Reference by executor to arbitration—Award—Power of executor to refer to arbitration—Effect of award—Jurisdiction—Jurisdiction of Testamentary Court to decide question of award—Probate—Application for probate—See PROBATE, 20 B. 238.

Executor—(*Concluded*). PAGE

(2) Probate—Will—Executor who has acted required to lodge will and obtain probate—See PROBATE, 20 B. 227.

(3) *S.* 18 *of Act V of* 1881—*Hindu Wills Act* XXI *of* 1870—*Indian succession Act* X *of* 1865—*Acceptance or renunciation of executorship—Probate — Letters of administration with will annexed.*—An executrix after being cited as provided by s. 16 of Act V of 1881 to accept or renounce her executorship stated that she was administering the estate, but having applied for a certificate under Act VII of 1889 did not consider it necessary to take out probate.

Held, that this was not such an acceptance as is contemplated by s. 18 of Act V of 1881, the language of which is the same as that of s. 195 of the Indian Succession Act (X of 1865), and that on the executrix declining to prove the will the District Judge was right in granting letters of administration with the will annexed to the sole residuary legatee. MOTIBAI v. KARSANDAS NARAYANDAS, 19 B. 123. ... 83

(4) Will of Mahomedan testator—Parties—Civ. Pro Code (XIV of 1882), S. 438—Receiver—Administration suit—Receiver appointed where executor is in possession—Suit against executor where will not proved—See RECEIVER, 19 B. 83.

(5) See COMPANY, 19 B. 1.

(6) See HINDU LAW (WILL), 19 B. 401; 20 B. 571.

(7) See WILL, 19 B. 221.

***Ex parte* Decree.**

(1) *Ex-parte* decree—Practice—Procedure—Civ. Pro. Code (Act XIV of 1882), s. 39—Pleader—Pleader duly appointed by a party to a suit cannot delegate his authority to another pleader—See PRACTICE, 20 B. 293.

(2) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 20 B. 281.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 380.

(4) See COMPANY, 19 B. 208.

***Ex parte* Order.**

See LIMITATION ACT (XV OF 1877), 19 B. 261.

Fazendar.

Fazendar not liable to provide privy accommodation—"*Owner*"—"*Premises*"—*Meaning of the words — Construction — Construction of statutes—Bombay Municipal Act* (III *of* 1888), *s.* 248.—A fazendaris not the person liable as owner of the premises, to provide privy accommodation under s. 248 of the Bombay Municipal Act (III of 1888), the beneficial owner of the house built on the fazendar's land being "the owner" within the meaning of the section.

Per RANADE, J.—The word "premises" in s. 248 of the Municipal Act is used with reference to the building to which the privy belongs. MUNICIPALITY OF BOMBAY v. SHAPURJI DINSHA, 20 B. 617.

Fazendari Land.

See LEASE, 20 B. 439.

Fazendari Tenure.

See LANDLORD AND TENANT, 20 B. 1.

Finding of Facts.

See PRACTICE, 20 B. 755.

Foreign Subjects.

See ZANZIBAR, 19 B. 741.

Foreign Territory.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 72.

(2) See PENAL CODE (ACT XLV OF 1860), 19 B. 105.

Forest Officer. PAGE

See ACT X OF 1876 (BOMBAY REVENUE JURISDICTION), 20 B. 764, 803.

Forfeiture.

(1) See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 747.

(2) See LANDLORD AND TENANT, 20 B. 354.

(3) See LEASE, 20 B. 439.

(4) See TRUST, 20 B. 310.

Fraud.

(1) Judgment obtained by fraud—Not conclusive *inter partes*—Succession Certificate Act (VII of 1889), s. 18, cls. (*b*) and (*c*)—Revocation of certificate—*Res judicata*—Estoppel—See RES JUDICATA, 19 B. 821.

(2) *Misappropriation—Charge of misappropriation of specific sums of money—Evidence — Evidence of general deficiency — Crim. Pro. Code, ss.* 503, 507—*Commission—Evidence taken on commissions, admissibility of—Evidence Act* (I *of* 1872), *s.* 33 — *Right and opportunity to cross-examine—Evidence improperly admitted—New trial—Evidence Act* (I *of* 1872), *s.* 167—*Practice—Procedure.*—The accused was charged with abetting the offence of criminal breach of trust committed by the nazir of the Small Causes Court at Poona. The accused was a karkun in the nazir's office, and it was his duty to keep the accounts of moneys received in the office from judgment-debtors and of moneys paid out to decree-holders. He was charged with abetting the misappropriation of three sums, *viz.*, Rs. 20 on the 19th November 1885, Rs. 45 on the 23rd November 1885, and Rs. 10 on the 26th June 1886. As to the first sum, it was alleged that an instalment of Rs. 25 due under a decree had been paid into nazir's office by a judgment-debtor on the 19th November, 1885, but the accused had entered in the office day book only Rs. 5, thereby enabling the balance of Rs. 20 to be misappropriated. It appeared, however, that a sum of Rs. 25, being the instalment due to the decree-holder under the above decree, had been in due course paid out to him on the 4th December 1885. As to the second sum of Rs. 45, it was alleged that a sum of Rs. 50 had been paid in but only Rs. 5 had been entered by the accused, the balance being misappropriated. It appeared, however, in this case also that the full amount of the instalment *viz.*, Rs. 50 had been duly paid out to the decree-holder a few days after its receipts. As to the third sum, it was alleged that the total receipts entered in the book on the 26th June, 1886, were Rs. 55, but the figure entered as the total was only Rs. 45, and that the balance of Rs. 10 had been misappropriated. The jury found the accused guilty on all three charges. On appeal by him it was contended that there was no evidence of the misappropriation of the specific sums in respect of which he was charged. There was evidence of a general deficiency, but there was no evidence that these specific sums formed part of that deficiency. On the contrary the evidence showed that the instalments paid into the office had been duly paid out to the persons to whom they were payable.

Held, that the jury having had the facts brought to their notice, their verdict was final, and the High Court would not interfere with the verdict.

Depositions taken on commission in criminal cases, although inadmissible under chap. 40 of the Crim. Pro. Code (Act X of 1882) may be admitted under s. 33 of the Evidence Act (I of 1872), if the requirements of the proviso to that section have been complied with.

The words "opportunity to cross-examine" in the proviso to s. 33 do not imply that the actual presence of the cross-examining party or his agent before the tribunal taking the evidence is necessary.

To make evidence admissible against an accused person under s. 33 of the Evidence Act, the fact that he had full opportunity of cross-examination, if not admitted, must be proved.

Fraud—(*Concluded*). PAGE

Quære—Whether the opportunity to administer cross-interrogatories under a commission is an " opportunity to cross-examine " within the meaning of the proviso to s. 33 of the Evidence Act so as to render the evidence taken on interrogatories admissible.

The provisions of s. 167 of the Evidence Act (I of 1872) apply to criminal trials by jury.

When part of the evidence, which has been allowed to go to the jury, is found to be irrelevant and inadmissible, it is open to the High Court in appeal, either to uphold the verdict upon the remaining evidence on the record under s. 167 of the Indian Evidence Act (I of 1872), or to quash the verdict and order a retrial.

The law as settled in England by the 18 Q.B. D., 537 and as stated by the Privy Council in L. R. (1894) A. C., 57 with reference to the granting of new trials where evidence has been improperly admitted does not apply to India. QUEEN-EMPRESS v. RAMCHANDRA GOVIND HABSHE, 19 B. 749 ... 502

(3) See ACT XIII OF 1856 (POLICE PRESIDENCY TOWNS), 20 B. 348.

(4) See ACT XII OF 1882 (INDIAN SALT), 20 B. 543.

(5) See HINDU LAW (PARTITION), 19 B. 593.

(6) See INSURANCE, 20 B. 99.

Freehold Land.

See LEASE, 20 B. 439.

Gift.

See WILL, 19 B. 221, 770.

Good Faith.

See PENAL CODE (ACT XLV OF 1860), 19 B. 340.

Gordon Settlement.

See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 20 B. 423.

Gotraja Sapinda.

See HINDU LAW (INHERITANCE), 20 B. 173.

Government.

(1) See ACT VI OF 1878 (TREASURE TROVE), 19 B. 668.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 697.

(3) See MORTGAGE (REDEMPTION), 20 B. 492.

Governor General.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 145.

Governor in Council.

See ACT VI OF 1888 (BOMBAY GUJRAT TALUKDARS), 19 B. 80.

Grant.

See SUCCESSION CERTIFICATE ACT (VIII OF 1889), 19 B. 145.

Greek

See ZANZIBAR, 19 B. 741.

Grievous Hurt.

See PENAL CODE (ACT XLV OF 1860), 19 B. 247.

Guardian and Ward.

(1) Minor—Limitation—Limitation Act (XV of 1877), ss. 5 and 14—Decree against minor—Neglect of guardian to appeal—Leave to appeal granted to minor after attaining majority—Practice—Procedure—See LIMITATION, 20 B. 104.

(2) *Minor—Power of Court to appoint guardian of person and estate of a minor—Power of guardian to sell minor's property.*—The power of the Court of Chancery to appoint guardians to infants, whether such infants have property or not, is possessed by the High Court.

Guardian and Ward—(*Concluded*). PAGE .

Quære—Whether a guardian appointed by the Court (except under some special Act) has any authority to sell the property of his ward unless the express sanction of the Court is given. *Re* JAGANNATH RAMJI, 19 B. 96 ... 64

(3) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 19 B. 832; 20 B. 667.

(4) See MINOR, 20 B. 61, 534.

(5) See SURETY, 19 B. 245.

Halalkore Tax.

See MUNICIPALITY, 20 B. 732.

Hereditary Priests.

See CASTE QUESTION, 20 B. 784.

Hereditary Service Vatan.

Kazi—Kazi's office—Rozina allowance—Its liability to attachment and sale in execution of a decree—Pensions Act (XXIII of 1871), s. 4—Hereditary Offices Act (Bombay Act II of 1874), s. 13—Hereditary service vatan—See ACT III OF 1874 (BOMBAY HEREDITARY OFFICE), 19 B. 250.

Hindu Convert.

See CHRISTIAN, 19 B. 680.

Hindu Law.

1.—GENERAL.
2.—ADOPTION.
3.—ALIENATION.
4.—CASTE.
5.—CUSTOM.
6.—DEBTS.
7.—GIFT.
8.—GUARDIANSHIP.
9.—IMPARTIBLE ESTATES.
10.—INHERITANCE.
11.—JOINT FAMILY.
12.—MAINTENANCE.
13.—MARRIAGE.
14.—MINORITY.
15.—PARTITION.
16.—RELIGIOUS ENDOWMENTS.
17.—REVERSIONER.
18.—SUCCESSION.
19.—WIDOW.
20.—WILL.

———1.—General.

Interest—Damdupat—Amount of interest allowed cannot exceed the balance of principal actually due at date of suit—Part payments of principal deducted—See DAMDUPAT, 20 B. 611.

———2.—Adoption.

(1) *Adoption by a daughter-in-law—Adoption divesting an estate which had already vested in another person—Consent of such person to adoption—Hindu law.*—One Shri Dharnidhar, a separated Hindu, died in 1852 childless, leaving three widows and a daughter-in-law Venubai, the widow of a predeceased son Chintaman. Dharnidhar's estate was taken, on his death, by his widows and ultimately became vested in Laxumibai, the survivor of them. In 1871, while she was in possession, Venubai adopted the plaintiff. In 1874 a decision was passed against Laxumibai, in execution of which a large portion of her deceased husband's property passed into the possession of one Chinto. In 1886 the plaintiff filed this suit against Chinto, claiming, as the adopted son of Venubai, to be entitled to all the estate of his adoptive grandfather Shri Dharnidhar (Venubai's father-in-law).

Hindu Law—2.—Adoption—(*Continued*). PAGE

Held, that he could not recover. His adoption by Venubai, which could only be to her husband Chintaman, could not divest Laxumibai of the estate which had come to her as heir of her husband Shri Dharnidhar.

On Dharnidhar's death the estate had vested in his widows with remainder to his collateral heirs, and even if Laxumibai had assented to the subsequent adoption of the plaintiff by Venubai, his claim would not stand against the rights of Dharnidhar's collaterals who would succeed on Laxumibai's death.

From the moment that Dharnidhar died, and his estate vested in his widows, the right of his daughter-in-law Venubai to adopt for the purposes of representation was at an end. SHRI DHARNIDHAR v. CHINTO, 20 B. 250 ... 725

(2) *Adoption by a mother after the death of her son who has left neither child nor widow—Adoption by a grandmother without the consent of her daughter-in-law—Objection taken for the first time in appeal—Practice.*—Under the Hindu law a mother is competent to adopt when her son dies leaving no widow of other heir nearer than herself.

A Hindu of the Shudra class died, leaving him surviving his mother and a paternal grandmother. After his death his grandmother adopted the defendant. Subsequently to this adoption the deceased's mother adopted the plaintiff. Thereupon both plaintiff and defendant claimed the deceased's estate.

Held, that the plaintiff was entitled to succeed. The deceased's mother having succeeded as heir to her son, her mother-in-law could not by any adoption divest her of her rights as such heir without her consent. The defendant's adoption was, therefore, invalid.

An objection based upon a point of law, may be made in second appeal, provided it does not involve the taking of any additional evidence on matters of disputed facts. GAVDAPPA v. GIRIMALLAPPA, 19 B. 331 ... 224

(3) *Adoption directed by will—Will—Bequest—Bequest to the boy named for adoption—Conditional gift on adoption—Adoption a condition precedent to such boy taking under the will.*—Where a Hindu testator directed that a boy should be taken in adoption, and added "to this boy, all the things mentioned in my will having been done, I give the residue of my estate as his inheritance and I appoint him as my heir."

Held, that adoption was a condition precedent, and that the boy not having been adopted could not take under the will. KARAMSI MADHOWJI v. KARSANDAS NATHA, 20 B. 718 ... 1048

(4) *Adoption of an only son—Validity of such adoption among Lingayets—Custom of Lingayets—Gift by adoptive father at the time of adoption—Gift binding on adopted son—Conditional adoption—Custom—Evidence of custom.*—According to the custom of Lingayets in the districts of Dharwar and Bijapur the adoption of an only son is valid.

Where a Hindu at the time of taking a son in adoption made a gift of a portion of his ancestral property to his daughters, and the deed of gift as well as the adoption deed were executed on the same day, and they mutually referred to each other.

Held, that the plaintiff's natural father having been a party to the deed of adoption which referred to the deed of gift executed along with it, the case fell under the category of conditional adoptions which are allowed by law.

Held, also, that the deed of gift to defendants Nos. 2 and 3 was valid and binding on plaintiff.

Quære—Whether the *dwyamushayana* form of adoption has become obsolete in the southern districts of the Presidency of Bombay. BASAVA v. LINGANGAUDA, 19 B. 428 ... 289

(5) **Estoppel—Indian Evidence Act (I of 1872), s. 115—Estoppel by conduct—Mistake of law—Adoption—Acknowledgment of adoption.—See ESTOPPEL, 19 B. 374.**

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(6) *Only son.*—The adoption of a person who at the time of his adoption is an only son, is invalid. The fact that other sons are afterwards born to his parents, does not validate his adoption. RAIJI JADHAV v. BAI MATHURA, 19 B. 658 ... 440

(7) *Relinquishment by the adopted son in favour of his adoptive mother of his rights as adopted son—Release—Second adoption—Registration—Registration under the Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 56 and 60—General Registration Act (III of 1877).*—The plaintiff was adopted in 1880 by Koina, the widow of one Ganu. In June, 1885, he executed a document which recited that he and Koina had not been on amicable terms, and that his adoption had consequently been cancelled, and that she had adopted another son (defendant No. 1) to whom she had given all rights of heirship, and declared that in consideration of Rs. 200 paid by Koina he delivered back to her the rights which he had obtained by virtue of his adoption and heirship. This document was not registered under the General Registration Act (III of 1877), but was registered under s. 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), which section applied to the district in which the transaction took place. Koina died in October 1885, and the plaintiff brought this suit, as adopted son, to recover the property of Ganu. The first defendant, who had been adopted by Koina subsequently to the plaintiff's adoption, contended that he had been validly adopted and that he was entitled to the property. He relied (*inter alia*) upon the document executed by plaintiff in June, 1885.

Held, that the plaintiff could not renounce his status as adopted son although he might give up his right of inheritance and that whatever estate became vested in Koina by the release came to the plaintiff on her death, either as the adopted son of Ganu or as heir of Koina.

Held, also, that the defendant's subsequent adoption was invalid, and that nothing would pass to him by force of such adoption.

It was contended that the release in question was not admissible in evidence, not having been registered under the General Registration Act (III of 1877).

Held, that the document was admissible. It was a conveyance within s. 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the law in force as to its registration was contained in ss. 56 and 60 of that Act. MAHADU GANU v. BAYAJI, 19 B. 239 ...

(8) *Reversioner, suit by, to set aside an adoption by a Hindu widow—Right of suit—Remote reversioners—Watan property—Bom. Act V of 1886, s. 2.*—The right to sue to set aside an adoption by a Hindu widow is, as a general rule, limited to the nearest reversionary heir, and if he without sufficient cause refuses to institute proceedings, or if he has precluded himself by his own act and conduct from so doing, or has colluded with the widow, or concurred in the alleged wrongful act, the next presumable reversioner will be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversioner claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and should require the nearer reversioner to be made a party to the suit

Raghunath, a separated Hindu, died possessed of certain property, a portion of which was *watan* land, and left him surviving a widow Ramabai, a daughter Manubai and the plaintiffs, who were his brother's sons. Subsequently Ramabai adopted Vishvanath as a son. Manubai (the daughter), who lived with Ramabai and Vishvanath, did not take any steps to dispute the alleged adoption. The plaintiffs now sued for a declaration that the adoption, if made in fact, was invalid, and that they were entitled to succeed to the property of Raghunath on the death of his widow Ramabai.

Held, that as the plaintiffs were entitled under s. 2 of Bombay Act V of 1886 to succeed to the *watan* property in preference to Manubai after the death of Ramabai, and were the presumptive reversionary heirs after Ramabai to the *watan* property and the only persons

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interested in disputing the adoption so far as the *watan* property was concerned, the lower Court exercised a proper discretion in allowing the suit to be maintained by the plaintiffs. RAMABAI v. RANGRAV, 19 B. 614 ... 410

(9) *Suit for declaration that defendant was not the adopted son—Parties to suit—Suit for declaration when maintainable—Specific Relief Act* (I *of* 1877), *s.* 42,—A suit by persons who are merely distant relations and not reversionary heirs for a declaration that the defendant is not the adopted son, is not maintainable under s. 42 of the Specific Relief Act (I of 1877).

Every declaratory decree must be ancillary to some consequential relief obtainable thereby, and no such relief is possible in the case of distant and contingent, and not presumptive, reversionary heirs. ANYABA v. DAJI, 20 B. 202 ... 693

(10) See LIMITATION ACT (XV OF 1877), 19 B. 909.

(11) See REG. VIII OF 1827 (BOMBAY ADMINISTRATION OF ESTATES), 20 B. 548.

———3.—Alienation.

(1) See HINDU LAW (MINORITY), 20 B. 286.

(2) See HINDU LAW (RELIGIOUS ENDOWMENTS), 19 B. 271.

(3) See HINDU LAW (WIDOW), 19 B. 26.

(4) See LIMITATION ACT (XV OF 1877), 19 B. 809.

(5) See LUNATIC, 20 B. 150.

———4.—Caste.

(1) *Caste question—Reg.* II *of* 1827, *s.* 21—*Jurisdiction of Civil Court—Majority of caste, right of.*—The plaintiffs and defendants were members of the Kutchi Dossa Oswal caste of Hindus residing in Bombay. The plaintiffs alleged that by a resolution of the caste unanimously passed at a caste meeting held on the 19th September, 1893, a committee, of which they were members, was appointed on behalf of the caste for the purpose of preventing Brahmans from attending the feasts of the caste in the caste oart in Bombay, and that on the 16th and 18th July, 1894, by resolutions unanimously passed the members of the caste were strictly prohibited from feasting any Brahman in the caste oart, and the committee was authorized not to allow any casteman wishing to feast Brahmans in the oart, to use the caste oart and caste vessels, and if necessary to take legal steps in the matter. The plaint alleged that the defendants proposed to give a feast in the caste oart to which they had invited Brahmans, and prayed for an injunction and for a declaration that the above resolutions were validly passed and were binding upon the defendants and on the caste. The defendants contended that the subject-matter of the suit was a caste question and not cognizable by a Civil Court, and further that the meetings referred to in the plaint had not been duly convened, and that the resolutions were invalid and not binding on those who were not present and who did not consent to them. They alleged that Brahmans had from time immemorial as a matter of course attended the caste feasts, and they denied that the plaintiffs or any members of the caste had now a right to exclude them. The Court found as a fact that a large majority of the caste were in favour of excluding Brahmans from caste feasts.

Held, that the majority of the caste having arrived at a *bona fide* decision that the convenience and comfort of the caste were best advanced by the exclusion of the Brahmans from their oart, it was not a case in which the Court could say that the decision was so subversive of the interests of the minority as to amount to a practical confiscation of their property or denial of their rights, and that the Court ought to give effect to it.

The Court accordingly passed a decree in terms of the prayer of the plaint prohibiting the defendants from bringing Brahmans into the

Hindu Law—4.—Caste—(*Concluded*). PAGE

oart to dine so long as the resolution of the caste prohibiting the practice continued in force.

The Court does not decline to give effect to the expressed wishes of the majority of a caste as to the management and custody of caste property, which the minority seek to set at naught, by reason of the suit involving a caste question.

In matters relating to the management of caste property and the administration of its affairs the majority of the caste has authority to control the minority. But the Court will not by its decree enable the majority to make a tyrannical use of its power. It would not assist the majority to deprive without cause the minority of their right to use what is the common property of all, or give effect to a resolution passed in violation of the rules of natural justice or of a directly confiscatory nature. LALJI SHAMJI v. WALJI WARDHMAN, 19 B. 507 ... 339

(2) See CASTE QUESTION, 20 B. 190.

———5.—Custom.

(1) Adoption—Adoption of an only son—Validity of such adoption among Lingayets—Custom of Lingayets—Gift by adoptive father at the time of adoption—Gift binding on adopted son—Conditional adoption—Custom—Evidence of custom—See HINDU LAW (ADOPTION), 19 B. 428.

(2) See CHRISTIAN, 19 B. 680.

(3) See CONVERSION, 20 B. 53, 181.

(4) See HINDU LAW (JOINT FAMILY), 19 B. 532.

(5) See NATIVE CHRISTIAN, 19 B. 783.

———6.—Debts.

(1) Bond given in name of one member of joint family for loan made out of joint family funds—Suit on bond—Right of such member to sue alone—Other members not necessary parties—Parties—Practice—Procedure—Hindu law—See HINDU LAW (JOINT FAMILY), 20 B. 435.

(2) Succession Certificate Act (VII of 1889), s. 4—Joint family—Suit for family debt—No necessity for certificate—Hindu law—Evidence—Presumption as to nature of property where the family is joint—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 338.

(3) See HINDU LAW (JOINT FAMILY), 20 B. 155, 385.

(4) See MINOR, 20 B. 61.

(5) See PRACTICE, 20 B. 767.

———7.—Gift.

(1) Adoption—Adoption directed by will—Will—Bequest—Bequest to the boy named for adoption—Conditional gift on adoption—Adoption a condition precedent to such boy taking under the will—See HINDU LAW (ADOPTION), 20 B. 718.

(2) Gift of undivided share by adults of family—Minor co-sharer not a party to gift—Ejectment—Defendant trespasser—Onus of proof—Plaintiff to prove his superior title—Hindu Law—Joint family—Joint family property. See HINDU LAW (JOINT FAMILY), 19 B. 803.

(3) See HINDU LAW (ADOPTION), 19 B. 428.

(4) See HINDU LAW (WILL), 19 B. 647; 20 B. 450, 571.

———8.—Guardianship.

(1) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 19 B. 309.

(2) See HINDU LAW (PARTITION), 19 B. 593.

(3) See LUNACY, 20 B. 659.

(4) See MINOR, 20 B. 61.

———9.—Impartible Estates.

See CONVERSION, 20 B. 181.

Hindu Law—10.—Inheritance. PAGE

(1) *Son's daughter—Great-grandson of a brother*—Gotraja-sapinda—*Bandhu.*—According to Hindu law, the daughter of a predeceased son of the *propositus* is not a *gotraja-sapinda*, and is not entitled to inherit in preference to the great-grandson in the male line of a separated brother. VENILAL v. PARJARAM, 20 B. 173 ... 674

(2) *Step-mother—Right of step-mother to succeed to her step-son in preference to his paternal first cousin.*—A step-mother succeeds to the property of her step-son in preference to the step son's paternal uncle's son. RUSSOBAI v. ZULEKHABAI, 19 B. 707 ... 473

(3) *Succession—Father's sister's daughter's son*—Bandhu—Bhinna gotra sapinda--*Hindu Law.*—Harisukhrai, a Hindu, died, leaving a widow and a son of a first cousin, *viz*, the son of his father's sister's daughter.

Held, that on the death of the widow the latter, *viz.*, the son of his father's sister's daughter being a *bandhu* or *bhinna gotra sapinda* of Harisukhrai, was entitled to succeed to his property.

In regard to the succession of cognates, there seems to be no difference in the rules laid down in the Mayukha and the Mitakshara, and under the Mitakshara law succession depends upon propinquity and not upon religious efficacy. PAROT BAPALAL v. MEHTA HARILAL, 19 B. 631 ... 421

(4) See CHRISTIAN, 19 B. 680.

(5) See CONVERSION, 20 B. 53, 181.

(6) See NATIVE CHRISTIAN, 19 B. 783.

——11.—Joint Family.

(1) *Bond given in name of one member of joint family for loan made out of joint family funds—Suit on bond—Right of such member to sue alone—Other members not necessary parties—Parties—Practice—Procedure.*—A loan was made to the defendant out of joint family funds, and a bond for the amount was given in the name of one of the members of the joint family. He sued the defendant on the bond.

Held that the other members of the joint family were not necessary parties. HARI VASUDEV KAMAT v. MAHADU DAD GAVDA, 20 B. 435 ... 853

(2) Evidence—Presumption as to nature of property where the family is joint—Succession Certificate (Act VII of 1889), s. 4—Suit for family debt—No necessity for certificate--See SUCCESSION CERTIFICATE ACT (VII OF 1884), 19 B. 338.

(3) *Hindu family—Joint family property—Injunction—Injunction obtained by one member of a joint family against another, when granted.*—In disputes between members of a joint Hindu family with respect of joint property, the exercise of the Court's jurisdiction to grant relief by injunction should be confined to acts of waste, illegitimate use of the family property, or acts amounting to ouster. ANANT RAMBAV v. GOPAL BALVANT, 19 B. 269 ... 182

(4) *Joint family property—Gift—Gift of undivided share by adults of family—Minor co-sharer not a party to gift—Ejectment—Defendant trespasser*—Onus *of proof—Plaintiff to prove his superior title.*—According to Hindu law, under ordinary circumstances a gift by a co-parcener of his undivided share in immoveable property is invalid, and a minor's share cannot be given away by a manager except in case of necessity or for certain specified purposes.

Certain land which was joint family property was given by the adult members of the family to the plaintiff as the worshipper of a deity. A minor co-parcener did not join in the gift. The plaintiff sued the occupier for possession.

Held, that the plaintiff could not recover. The gift not being made from necessity, or for the performance of any pious duties obligatory on the minor or the family, was invalid, and could not be given effect to even with respect to the shares of the donors. ..

Hindu Law—II.—Joint Family—(*Continued*). PAGE

In an ejectment suit, the defendant, though a trespasser, is entitled to require the plaintiff who seeks to eject him to prove that he has a superior title. KALU VALAD VISHNA v. BARSU VALAD ZENDU, 19 B. 803 ... 539

(5) *Manager of joint family—Power of manager to revive a time-barred debt —Limitation—Hinau law.*—The manager of a Hindu family has no power to revive by acknowledgment a debt barred by limitation, except as against himself. DINKAR v. APPAJI, 20 B. 155 ... 661

(6) *Money decree against father—Execution against son after the death of the father—Ancestral property in the hands of the son liable—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 234, 244 *and* 278.—A money-decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality. If the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under s. 244 of the Civ. Pro. Code (Act XIV of 1882). UMED HATHISING v. GOMAN BHAIJI, 20 B. 385 ...

(7) *Partition—Accounts—Manager's liability to account—Right to mesne profits previous to partition—Mesne profits subsequent to partition how recoverable—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 13, 244.—Although, as a general rule, no member of an undivided Hindu family can have any claim to mesne profits previous to partition, yet mesne profits may be allowed on partition where one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member who claimed to treat it as impartible, and, therefore, exclusively his own.

Where a decree for partition is silent about mesne profits subsequent to the institution of the suit, a party is at liberty to assert his right to such profits by a separate suit. S. 244, para 2 of the Code of Civil Procedure (Act XIV of 1882), expressly reserves such a right of suit. BHIVRAV v. SITARAM, 19 B. 532 ... 355

(8) Partition—Minor—Partition made during minority—Partition by minor's mother as guardian—Fraud—Pleadings—Suit to set aside a partition deed—Limitation Act (XV of 1877), sch. II, arts. 91 and 95—See HINDU LAW (PARTITION), 19 B. 593.

(9) *Possession—Joint possession—Co-parcener's right to sue for joint possession of the whole or any part of the joint estate—Co-parcener not bound to sue for partition.*—A co-parcener in a joint Hindu family is entitled to claim joint possession of a portion, and need not sue for a partition. RAMCHANDRA v. DAMODHAR, 20 B. 467 ... 875

(10) *Undivided family—Ancestral property—Self-acquired property made ancestral by agreement—Operation of such agreement—Effect of such agreement on accumulations and accretions of the property—Election —Estoppel—Minor members of undivided family—Interest of minors in property made ancestral by agreement—Minor bound by acts of his father as to such property.*—Sir Mangaldas Nathubhoy and his three sons Tribhovandas, Purshotamdas and Jugmohandas lived together as an undivided Hindu family. In 1881 the youngest son, Jugmohandas, filed a suit for partition (No. 444 of 1881) against his father and his two brothers. Being apprehensive that his other sons (the plaintiffs) might make a similar claim, Sir Mangaldas on the 28th June, 1881, entered into an agreement with them (the plaintiffs) which recited (*inter alia*) that he (Sir Mangaldas) alleged that the only ancestral immoveable property belonging to him was the property specified in Part I of the sch. I annexed to the agreement, but that the plaintiffs (his sons) alleged that the immoveable property specified in Part II of that schedule was also ancestral property and provided (*inter alia*) that, in consideration of the terms and conditions therein set forth, his sons (the plaintiffs) would not "claim a partition of the said property" during the lifetime of the said Sir Mangaldas.

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The terms of this agreement were duly observed by the plaintiffs during their father's lifetime, and they continued to reside with him until his death.

In the interval, however, *viz.*, in 1886, the partition suit (No. 444 of 1881) brought by Jugmohandas was decided, and by the decree it was declared that the immoveable property specified in sch. I of the aforesaid agreement was not ancestral property, but was the self-acquired property of Sir Mangaldas.

On the 9th March, 1890, Sir Mangaldas died, leaving a will dated 27th January, 1888. By this will he directed that his executors and trustees should take possession of all his property both ancestral and self-acquired, and, after referring to the agreement of the 28th June, 1881, and to the property in Part I of the schedule thereto, continued: "Whereas it has been decided by the Court of first instance, and such decision has been confirmed by the Appellate Court, that such property (*i.e.*, the property in Part I) is not ancestral property, yet I am unwilling to disturb the said deed as between my said two sons, and I, therefore, hereby confirm the same." Then after making some other provisions he devised and bequeathed to his trustees "all the residue of my self-acquired property," and he directed that such residue when ascertained and realised should be handed over to the Chancellor and Senate of the Bombay University to be devoted to the founding of scholarship.

As directed by the will, the executors took possession of all the testator's property, including the property in Part I of the said schedule. This last named property was subsequently, *viz.*, in December, 1890, conveyed by the executors to the plaintiffs.

The plaintiffs now sued the executors, contending that the properties in Part I of the schedule to the agreement being ancestral under the agreement and will, they (the plaintiffs) were entitled not only to them, but to all the accumulations and accretions thereof, which amounted in value to about ten lakhs of rupees. The University, on the other hand, contended that the accumulations and accretions formed part of the self-acquired property of the testator, and went to the University under the residuary clause of the will.

Held (1) that the effect of the agreement was to make the property specified in Part I of the schedule thereto ancestral property as between the parties to the agreement.

(2) That the agreement was confirmed by the will, and was binding on the executors.

(3) That, although the *corpus* of the said property became ancestral under the agreement, the accumulations and accretions thereof did not. They were the self-acquired property of the testator, and passed to the trustees under the residuary clause of the will.

The plaintiffs had subsequently to the death of Sir Mangaldas taken possession of the properties in question, and had paid probate duty on them. The plaintiffs had taken conveyances from the executors and had given releases to the executors, and in a previous suit (No. 670 of 1892) the first plaintiff had in his evidence stated that he did not wish to dispute the will, and that he had elected to take under it.

Held, that by their conduct the plaintiffs had elected to take the properties in question under the will, and could not maintain a suit for an account of the rents and profits either under or in opposition to the will.

Held, also, that the sons of the plaintiffs (the minor defendants) were bound by the acts of the plaintiffs. The property in question was not really ancestral. It was only such for the purpose and by virtue of the agreement of 28th July, 1881, and the plaintiffs were entitled to waive it or rescind it if they pleased, and their sons could not prevent them from doing so. TRIBHOVANDAS MANGALDAS v. YORKE SMITH, 20 B. 316 ... 771

(11) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 19 B. 309.

(12) See CHRISTIAN, 19 B. 680.

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(13) See HINDU LAW (PARTITION), 19 B. 593.

(14) See JURISDICTION, 20 B. 495.

(15) See LUNACY, 20 B. 659.

(16) See LUNATIC, 20 B. 150.

(17) See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), 20 B. 488.

(18) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 145.

———12.—Maintenance.

See CONVERSION, 20 B. 181.

———13.—Marriage.

See MINOR, 20 B. 61.

———14.—Minority.

(1) Minor—Liability of minor for debt—Ancestral trade carried for benefit of minor by the minor's natural guardian—Minor bound by acts of the guardian—See PRACTICE, 20 B. 767.

(2) *Minor—Minor's estate—Power of mother of minor to sell her deceased husband's estate—Mother—Omission of the minor's name in the sale-deeds—Son bound by sale.*—Under Hindu law, the mother as guardian of her minor son has authority to sell her husband's estate in order to pay off his debts, and the omission of any reference to the minor in the deed of sale does not render it ineffectual if it is proved that it was her intention to deal with the son's interest, and not merely with any interest which she might have herself. MURARI v. TAYANA, 20 B. 286 ... 749

(3) See HINDU LAW (JOINT FAMILY), 20 B. 316.

(4) See LIMITATION ACT (XV OF 1877), 20 B. 383.

(5) See MINOR, 20 B. 61.

———15.—Partition.

(1) Accounts—Manager's liability to account—Right to mesne profits previous to partition—Mesne profits subsequent to partition, how recoverable—Civ. Pro. Code (Act XIV of 1882), ss. 13, 244—Hindu law—Joint family—See HINDU LAW (JOINT FAMILY), 19 B. 532.

(2) *Minor—Partition made during minority—Partition by minor's mother as guardian—Fraud—Pleadings—Suit to set aside partition deed—Limitation Act (XV of 1877), sch. II, arts. 91 and 95—Hindu Law.*—A partition made by a mother as the guardian of her minor son, a member of an undivided Hindu family, is valid, and if just and legal, will bind the minor. When the minor arrives at full age, he may apply to have the division set aside if it can be shown to be illegal or fraudulent, or even if it was made in such an informal manner that there are no means of testing its validity.

Where fraud is charged against the defendant, the plaintiff must set forth the particulars of the fraud which he alleges.

A suit to set aside a deed of partition on the ground of fraud is governed by art. 91 or 95, sch. II of the Limitation Act (XV of 1877), and must be brought within three years after the minor plaintiff has attained majority according to s. 7 of the Act. CHANVIRAPA v. DANAVA, 19 B. 593 ... 396

(3) *Suit by minors for partition—In what cases such a suit can lie—Malversation.*—Under the Hindu law a minor co-parcener cannot sue for partition unless his interests are (1) likely to be advanced thereby, or (2) protected from danger.

Where an adult co-parcener has taken up a hostile position to the interests of minor co-parceners and denied their rights, or sets up his own independent title, or where the minors live separately and the adult co-parcener does not support them, in all these cases it is in the interest of the minors that their share shall be partitioned and set apart.

The plaintiffs, who were minors, sued by their next friend for a partition of their ancestral property in the possession of their step-brother, the defendant. It appeared that soon after their father's

Hindu Law—15.—Partition—*(Concluded)*. PAGE

death disputes and differences arose between plaintiff's mother and their step-brother, which led to their separation in food and residence. The defendant managed the family property, but did not support the minors out of the rents and profits thereof. Hence the suit.

Held, that though no malversation was alleged or proved, the allegation, in the plaint of disputes and separate residence and defendant's failure to support the plaintiffs were sufficient to justify the Court in permitting the plaintiffs to maintain the suit. MAHADEV v. LAKSHMAN, 19 B. 99 ... 66

(4) See HINDU LAW (JOINT FAMILY), 20 B. 467.

(5) See HINDU LAW (WIDOW), 19 B. 36.

(6) See JURISDICTION, 20 B. 495.

(7) See MORTGAGE (REDEMPTION), 20 B. 557.

(8) See PRACTICE, 19 B. 323.

——16.—Religious Endowments.

(1) Property in British India of a temple outside British India—Right to officiate in such temple—Right to share of such property—Partition—Jurisdiction—See JURISDICTION, 20 B. 495.

(2) *Temple—Manager—Alienations by manager—Necessity.*—Grants of permanent under-tenures such as *mirasi*, *putni*, *mokurruri*, grants by managers of endowed temple lands, are not void if made for a necessary purpose. Where lands belonging to a temple were granted in *miras* by the manager of the temple, but not for a necessary purpose, and the successor of the grantor sued to eject the assignee of the grantee,

Held, that the effect of such a grant was to enable the grantee to hold the lands during the lifetime of the grantor, but would not confer on him any title binding on the successor in the management of the temple lands. RAMCHANDRA S. DRAVID v. KASHINATH N. DRAVID, 19 B. 271 ... 183

——17.—Reversioner.

(1) Adoption—Suit for declaration that defendant was not the adopted son—Parties to suit—Suit for declaration when maintainable—Specific Relief Act (I of 1877), s. 42—See HINDU LAW (ADOPTION), 20 B. 202.

(2) Reversioner, suit by, to set aside an adoption by a Hindu widow—Right of suit—Remote reversioners—Watan property—Bombay Act V of 1886, s. 2—See HINDU LAW (ADOPTION), 19 B. 614.

(3) Widow—Suit by reversioner for possession—Death of the widow—Accrual of right to sue—Unsuccessful application in execution proceedings against widow—Limitation Act (XV of 1877), sch. II, art. 141—Civ. Pro. Code (Act XIV of 1882), s. 283—See LIMITATION ACT (XV OF 1877), 20 B. 801.

——18.—Succession.

(1) Inheritance—Step-mother—Right of step-mother to succeed to her step-son in preference to his paternal first cousin—See HINDU LAW (INHERITANCE), 19 B. 707.

(2) Inheritance—Succession—Father's sister's daughter's son—Bandhu—Bhinna gotra sapinda.—See HINDU LAW (INHERITANCE), 19 B. 631.

(3) See CHRISTIAN, 19 B. 680.

(4) See CONVERSION, 20 B. 53, 181.

——19.—Widow.

(1) Adoption—Adoption by a daughter-in-law—Adoption divesting an estate which had already vested in another person—Consent of such person to adoption—See HINDU LAW (ADOPTION), 20 B. 250.

(2) *Alienation by widow—Purchaser from one of several divided co-sharers—Suit for joint possession—Partition suit - Registration—Evidence—Notice of attornment admissible without registration.*—The property in dispute (consisting of 12 *thikans* or plots of land) was

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originally held by A and B as tenants in common, and they divided the income according to their respective shares. After A's death, his widow adopted Chitko on condition that she was to remain in absolute possession and enjoyment for her life, and that Chitko was to succeed to the estate after her death. The widow mortgaged 9 out of the 12 *thikans*, sold one, and granted a perpetual lease of another to the defendant. All these alienations to the defendant were made without any legal necessity. The defendant also purchased B's share in the *thikans* in dispute. The plaintiff purchased Chitko's rights, and on the widow's death sued to set aside her alienations and to obtain joint possession with the defendant of all the *thikans*. The defendant pleaded (*inter alia*) that the widow's alienations were valid and binding on the plaintiff, and that the plaintiff's remedy was a partition suit.

Held, that A's widow, not having higher powers than those of an ordinary Hindu widow who succeeds as heir to her sonless husband could only make valid alienations for purposes warranted by the law. As no legal necessity was shown in respect of the alienations in question, which were made long after disputes had commenced between her and her adopted son, they were not binding on him or his alienee the plaintiff.

Held, also, that plaintiff was entitled to be put into joint possession with the defendant. Both were outside strangers who had purchased the several shares of the separated owners of the *thikans* in dispute. A partition suit was not, therefore, necessary.

Where on the redemption of a mortgage the mortgagee executed a document which purported to be a notice of attornment to the tenants in occupation of the mortgaged property, containing a recital that the property had been redeemed.

Held, that the document, though unregistered, was admissible in evidence for its own proper purpose of proving the attornment, though not for the purpose of proving that the mortgage charge was satisfied. ANTAJI v. DATTAJI, 19 B. 36 ... 24

(3) See HINDU LAW (ADOPTION), 19 B. 614.

(4) See HINDU LAW (WILL), 19 B. 401.

(5) See LIMITATION ACT (XV OF 1877), 19 B. 809 ; 20 B. 801.

20.—Will.

(1) Adoption—Adoption directed by will—Bequest—Bequest to the boy named for adoption—Conditional gift on adoption—Adoption a condition precedent to such boy taking under the will—Hindu law —See HINDU LAW (ADOPTION), 20 B. 718.

(2) *Construction--Bequest to 'children'--Meaning of the expression 'children' —Unexpected bequests - How Court treats—Gift to a class—Rule in Tagore case—Executors—Right of executors to have sums lent to the estate allowed them in account—Limitation—Legacy—Gift of income as required with trust for accumulation of balance—No right to arrears once accumulated.*—Considerations which only show that a testator has made a disposition in his will which the Court is surprised to find there, though they might have determined the sense in which the testator had used an ambiguous expression, cannot of themselves lead the Court to refuse to give effect to the plain language he has employed, *e.g.*, to read a bequest to "children" as a bequest to "sons" only.

A bequest to "the children of R, living at his decease" where some such children are in existence at the date of the will, need not be construed as a gift to a class of which some members might come into existence after the testator's death, when such a construction would manifestly defeat the primary object of the testator.

The right of executors, who have used their own monies for the purposes of the estate to be allowed them in their accounts, cannot be affected by limitation before such accounts are taken.

A direction in a will to trustees to pay a Hindu lady so much of certain dividends as she might from time to time require for her own use

and support, &c., and to accumulate the surplus not required by her upon trusts, entitles the legatee to receive, if she requires it, the whole interest as it falls due, but not to claim afterwards amounts which she did not require as they fell due and which have been accumulated, and this is so whether the trust for which accumulation is directed is valid or invalid. KRISHNARAO RAMCHANDRA v. BENABAI, 20 B. 571 ... 947

(3) *Construction — Bequest to executors and trustees in trust for son of testator and his widow—Life-interest—Estate in fee—Control and management of executors and trustees.*—Sir Mangaldas Nathubhoy, a Hindu, by his will bequeathed certain property to his executors and trustees "upon trust for my son Tribhovandas and his heirs from the time of my death to allow him to occupy and use the same, and to enjoy the income thereof, and after the death of my son Tribhovandas, in trust to allow his widow to occupy and use the same and enjoy the income during her life; but if the said Tribhovandas Mangaldas shall die without leaving male issue him surviving, then in trust after the death of the survivor of them without leaving such male issue to my son Purshotamdas and his heirs according to the rules of Hindu law." The sons Tribhovandas and Purshotamdas both survived the testator, and Tribhovaudas (the defendant) had a wife and three sons living at the date of suit. He contended that under the above clause he was absolutely entitled to the property subject to the interest of his widow for her life. The plaintiffs (the executors and trustees) contended that the defendant had only a life interest in the property.

Held, that the defendant Tribhovandas took only an interest for life in the property. The words "in trust for Tribhovan and his heirs," which, standing alone would give the property in fee, were to be read with the words immediately following, which showed a clear intention that Tribhovan should only take a life-interest to be followed by the same interest in his widow, after whom the heirs of Tribhovan would take as purchasers.

Held, also, that the trustees were intended to take the legal estate and to have the control of the property, allowing Tribhovan to enjoy the income of it. F. YORKE SMITH v. TRIBHOVANDAS, 19 B. 401 ... 270

(4) *Construction—Gift of residue of income of property "to be used for the purposes of A and B as trustees think proper"—Gift to future children of testator's daughter—Appointment—Power of appointment by will given to daughter in case no children born.*—One Jetha Ludhani, a Hindu inhabitant of Bombay by his will directed that his immoveable property in Bombay, should be formed into a trust of which he appointed certain trustees. Out of the net income of the trust the trustees were to pay Rs. 50 to his wife Moti and his daughter Mamu for their personal expenses, and the residue was "to be used for the purposes of my wife Moti and my daughter Mamu and her children in such manner as my trustees think proper." Mamu was thirty years of age at the hearing of the suit and had no children,

Held, that this was a gift of the residue of the net rents in equal shares to Moti and Mamu, and that the survivor of them would be entitled during her life to the entirety of the said rents.

The testator further directed that after Mamu's death the trust was to stand valid during the lifetime of her children, if any, and that afterwards the heirs of such children should divide and receive the property. But, if Mamu had no children, then after the death of Mamu and Moti the trust should become void, and the property was to be delivered to such person as Mamu might by will appoint.

Held (1) that the provisions for the future children (if any) of Mamu failed under the ruling in the *Tagore* case. If any children should be born, the question would arise as to what would become of the property;

(2) that the direction that the property should be delivered to such person as Mamu should by will appoint, was a valid direction,

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subject, however, to the limitation that the person to whom Mamu appointed should be a person in existence at the death of the testator. BAI MOTIVAHU v. BAI MAMUBAI, 19 B. 647 ... 432

(5) *Construction—Indian Succession Act* (X *of* 1865), *ss.* 101, 105, 159—*Power of disposition of moveable property, effect of—Subsequent void gift does not cut down—Gift of balance of rents of immoveable property in hands of trustees—Evidence of intention to limit duration of enjoyment of bequest—Gift by implication, what is necessary to constitute—Estates according to Hindu law in ancestral property, Court will not presume intention to create by will—Assent to provision of will by son of Hindu testator, effect of, where there is doubt whether property is ancestral or self-acquired.*—Where it is doubtful whether the property with which the will of a deceased Hindu purports to deal is ancestral or self-acquired, the assent of his only son to the provisions of the will, some of which are favourable and some unfavourable to his interest and that of his sons, will bind the latter as well as himself.

A direction in the will of a Hindu, to the following effect "my remaining moveable property shall be dealt with by my son G. according as he may think proper; and when the sons of my son G. shall attain the age of twenty-one years, the same shall be divided and duly received by G. and his sons in equal shares" confers an absolute gift on G. If the gift over to G.'s sons, on their attaining the age of twenty-one years, were valid, the absolute estate of G. would be liable to be divested on a son or sons of G. attaining the age of twenty-one years, and asking for a division; but that gift being clearly void under ss. 101 and 102 of the Indian Succession Act (X of 1865) its insertion has no effect on the words of absolute gift preceding it.

A direction in the will of a Hindu that immoveable property should be retained in the hands of trustees appointed by the will and that the balance of the rents, profits, &c., after the payment of expenses should be used and enjoyed by the testator's son G. in such manner as he might think fit, with a provision empowering the sons of such son to call him to account for the management of the property on attaining the age of twenty-one and with a direct, though void, gift over to the grandsons of such son, confers only a life estate on the son G.,—the vesting the property in trustees, the right of G.'s sons to ask for an account; and the gift over to G.'s grandsons all showing an intention on the testator's part that the enjoyment of the bequest should be of limited duration within the meaning of s. 159 of the Indian Succession Act (X of 1865).

To constitute a gift by implication in a will there must be a reasonable degree of certainty as to the persons intended to take and the nature of the estates which they are intended to take. A direction that until the son or sons of the tenant for life of immoveable property should attain a certain age, no person on behalf of such son or sons should ask the tenant for life for an account or raise any objection does not sufficiently define the persons to take or the estates in which they are to take to constitute a gift by implication.

It would be difficult, if not impossible, for a Hindu to create by express terms the estates which arise by virtue of the doctrine of Hindu law in regard to the rights of male issue in ancestral property; and even where the hypothesis that the testator intended (under a misapprehension of the law) to create such estate affords a key to the will, and gives an adequate explanation of the various estates which would have to be implied in order to give full effect to the different directions contained in the will, yet if the estates cannot be implied from the words used in the will, the Court cannot create such estates for the testator by implication, since to do so would be to construct a will for him based upon his supposed intention, not on the words which he has used. ANANDRAO VINAYAK v. ADMINISTRATOR GENERAL OF BOMBAY, 20 B. 450 ... 864

(6) *Execution—Attestation by two witnesses—Indian Succession Act* (X *of* 1865), *s.* 50—*Hindu Wills Act* (XXI *of* 1870), *s.* 2, *cl.* (*a*) *and*

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(*b*).—The Hindu Wills Act (XXI of 1870) applies s. 50 of the Indian Succession Act (X of 1865) to those wills only that are mentioned in s. 2, cls. (*a*) and (*b*), of the former Act. *In re* BAPUJI JAGANNATH, 20 B. 674 ... 1018

(7) Probate—Probate and Administration Act (V of 1881), ss. 56 and 57—Testator subject of the Baroda State—Will executed at Baroda—Disposition of immoveable property in British India—Courts in British India—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 20 B. 607.

(8) See CHRISTIAN, 19 B. 680.

Holder in due Course.

See HUNDI, 20 B. 133.

Holiday.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 745.

Hundi.

(1) *Bill of exchange*—Hundi *payable at fixed date—Dishonour by non-acceptance—Cause of action—Jurisdiction—Limitation Act* (XV *of* 1887), *s.* 14.—On the 14th April, 1889, the defendant at Gwalior drew a *hundi* for Rs. 2,500 on his firm at Bombay in favour of Damodar Sukhlal payable forty-five days after date. It was subsequently indorsed at Gwalior by Damodar Sukhlal to the plaintiff at Cawnpore, who sent it to the Bank of Bombay at Bombay for collection. It was to become payable on the 1st June, 1889, but on 23rd April, 1889, the bank presented it to the defendant's firm at Bombay for acceptance, which was refused. The Bank thereupon returned it to the plaintiff at Cawnpore, and it was never presented for payment. On the 16th June, 1891, the plaintiff filed a suit upon the *hundi* against the defendant at Cawnpore, but on the 18th March, 1893, the plaint was returned to him, the Court holding that it had no jurisdiction. On the 16th April, 1893, the plaintiff filed this suit in the High Court of Bombay. Previously to the filing of the suit the defendant had ceased to carry on business at Bombay.

The defendant contended (1) that the *hundi* being payable at a fixed date, and not having been presented for payment when due, no cause of action had arisen to the plaintiff. (2) That the Court had no jurisdiction, inasmuch as (*a*) the defendant was a foreigner and at the date of suit did not carry on business in Bombay, and (*b*) no part of the cause of action (if any) had arisen in Bombay. (3) That the suit was barred by limitation.

Held, (1) That dishonour by non-acceptance of a *hundi* payable at a fixed date gives an immediate cause of action against the drawer, and there is no need to wait until the maturity of the *huudi* or to present it for payment.

(2) That under the Negotiable Instruments Act (XXVI of 1881) the dishonour of a *hundi* by non-acceptance constitutes now, as it has always done, part of the cause of action in a suit against the drawer.

(3) That the Court had jurisdiction under cl. 12 of the Letters Patent, 1865.

(4) That the suit was not barred by limintation, the plaintiff being entitled to the benefit of s. 14 of the Limitation Act (XV of 1877). RAM RAVJI JAMBHEKAR *v.* PRALHADDAS SUBKARN, 20 B. 133 ... 647

(2) Local usage—Hundi drawn by manager of Hindu family—Liability—Notice of dishonour to the drawer necessary—Negotiable Instruments Act (XXVI of 1881), ss. 30, 93 and 106—See NEGOTIABLE INTRUMENTS ACT (XXVI OF 1881), 20 B. 488.

(3) See BOND, 20 B. 791.

(4) See STAMP, 19 B. 635.

Husband and Wife. PAGE

(1) *Suit against wife—Costs of wife—Practice—Procedure—Divorce.*—In a suit for a divorce instituted by a husband against his wife, the Court has a discretion to make the husband pay the wife's costs already incurred and to give security for her future costs.

Rule 158 (as amended 14th July, 1875) of the English Rules and Regulations in divorce cases, which govern the practice of the Court in England, ought, having regard to s. 7 of the Indian Divorce Act IV of 1869, to govern the practice of Indian Courts. MAYHEW v. MAYHEW, 19 B. 293 ... 198

(2) See DIVORCE, 20 B. 362.

Hypothecation.

See LIMITATION ACT (XV OF 1877), 20 B. 408.

Immoveable Property.

(1) See EASEMENT, 20 B. 704.

(2) Sale of growing tree—Limitation—See TREE, 19 B. 207.

Inamdar.

See LANDLORD AND TENANT, 19 B. 138.

Infant.

See MINOR, 19 B. 571.

In forma pauperis.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 86.

(2) See LIMITATION ACT (XV OF 1877). 19 B. 48.

(3) See MAHOMEDAN LAW (MINORITY), 20 B. 116.

Infringement.

See COPYRIGHT, 19 B. 557.

Injunction.

(1) Hindu law—Hindu family—Joint family property—Injunction obtained by one member of a joint family against another, when granted—See HINDU LAW (JOINT FAMILY), 19 B. 269.

(2) See CASTE QUESTION, 20 B. 784.

(3) See EASEMENT, 19 B. 420; 20 B. 704.

(4) See SPECIFIC PERFORMANCE, 19 B. 764.

Insolvency.

(1) *Attachment before judgment—Insolvency of defendant whose property has been attached before judgment—Right of Official Assignee to attached property—Practice—Procedure—Civ. Pro. Code (Act XIV of 1882), ss. 278, 281, 487, 351—Indian Insolvent Act (Stat. 11 and 12 Vic., C. 21.*—Plaintiffs filed a suit in a Subordinate Court and attached before the judgment some moveable property of the defendant. Before the hearing of the suit, the defendant filed a petition in Bombay under the Insolvency Act, and a vesting order was made. *Held*, that the Official Assignee was entitled by an application to the Court, in which the suit was filed, to have the attachment raised before the defendant was declared an insolvent.

Where a vesting order is made after attachment, and before decree, the title of the Official Assignee takes effect, and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. In such a case the Official Assignee can move by an ordinary motion instead of a regular suit. CHARLES A. TURNER v. PESTONJI FARDUNJI, 20 B. 403 ... 832

(2) *Insolvent Act, Stat. 11 and 12 Vict., c. 21, ss. 7 and 27—After acquired property of insolvent—Salary—Pension—Personal earnings of insolvent.*—After acquired property of an insolvent, whether it consists of salary, personal earnings or property of a different kind, is property which vests in the Official Assignee, but subject to the provision of s. 27 of the Indian Insolvent Act as to salary and pension and subject to the unwritten law as to personal earnings sufficient

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for the maintenance according to his position in life, of the insolvent and his family. Accordingly the Official Assignee is not entitled to claim such salary or income except by means of an order obtained under s. 27 of the Act, nor such personal earnings at all unless and until in either case the insolvent has accumulated a margin beyond what has been required for his adequate support.

An attachment upon the salary of a railway servant ceases to be operative after he has filed his petition in insolvency, and should be withdrawn on notice being given of the making of the vesting order. *In the matter of* C. M. J. DONAGHUE. 19 B. 232 ... 157

(3) *Insolvent Act* (*Stat.* 11 *and* 12 *Vict.*, c. 21), *s.* 86—*Entering up judgment against insolvent—Final discharge* —Under s. 86 of the Insolvent Act (Stat. 11 and 12 Vict , c. 21) the Court has a discretion to grant or refuse an application to enter up judgment against an insolvent for the amount of his debts. In exercising this discretion the Court must be guided by the circumstances of the insolvency. *In the matter of* HORMARJI A. HORMARJI, 19 B. 297 ... 201

(4) *Insolvent Act* (*Stat.* 11 *and* 12 *Vict.*, c. 21), *s.* 86—*Entering up judgment against insolvent—Final discharge—Discretion.*—In August, 1892, the Insolvent was found guilty of various offences under ss. 50 and 51 of the Indian Insolvent Act (11 and 12 Vict., c. 21) and was sentenced to imprisonment for three months, his discharge being also postponed for a further period of twelve months. In December, 1894, on his application for final discharge under s. 60 of the Act, the Official Assignee applied that before the order of discharge was made, judgment should be entered up against him under s. 86 for the amount of his debts. The Commissioner of the Insolvent Court in the exercise of the discretion given to him by the Act ordered judgment to be entered up accordingly. On appeal by the insolvent,

Held, reversing the order, that under the circumstances of the case the discretion of the Commissioner had been improperly exercised and that the order to enter up judgment against the insolvent should be discharged. *In the matter of* HORMORJI ARDESHIR HORMORJI, 19 B. 776 ... 522

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 694.

(6) See TRUST, 20 B. 310.

Insolvency Deed.

Creditors' trust deed—Assignment of all his property by debtor to trustees for payment of creditors—Suit by creditor who had signed as creditor and as trustee to recover his debt notwithstanding the deed—See DEED, 19 B. 12.

Insolvent.

(1) *Debt incurred before insolvency—Bond given after personal discharge in respect of—Private settlement with creditor, validity of - Absence of notice to Official Assignee and creditors—Position of insolvent with respect to property acquired after personal discharge—Agreement by creditor not to oppose final discharge—Validity of- -Evidence—Untrue recital in bond—Contradiction by obligor allowed.*—An agreement, by which an insolvent who has obtained his personal but not his final discharge, without notice to the Official Assignee or his other creditors, settles the claim of one creditor and by which that creditor agrees not to oppose his final discharge, is void as in fraud of creditors and as inconsistent with the policy of the Insolvent Debtors' Act.

In a suit on a bond containing such an agreement, evidence is admissible on behalf of the obligor to prove that a recital in it that all the other creditors had been settled with, was untrue.

Though no creditor is bound to oppose the final discharge of an insolvent, yet a private agreement by a creditor with the insolvent, by which in consideration of a money payment the creditor binds himself not to oppose, is void as opposed to the policy of the Insolvent Debtors' Act and as in fraud of creditors. NAOROJI N. THOONTHI v. KAZI SIDICK MIRZA, 20 B. 636 = Chitty's S.C.C.R. 486 ... 992

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(2) See CIV. PRO CODE (ACT XIV OF 1882), 19 B. 210.

(3) See INSOLVENCY, 19 B. 232, 778.

Insolvent Act (11 and 12 Vic., C. 21).

(1) See INSOLVENCY, 20 B. 403.

(2) Ss. 7 and 27—See INSOLVENCY, 19 B. 232.

(3) S. 86—See INSOLVENCY, 19 B. 297, 778.

Inspection.

Affidavit of documents—Minor—Practice—Procedure—See PRACTICE, 19 B. 350.

Instalment.

(1) Payment of debt by instalments—Right to sue for whole debt on default of payment of any instalment—Default in payment—Waiver of right to sue—Proof of waiver—Nature of proof—Limitation Act (XV of 1877), sch. II, art. 75—See LIMITATION ACT (XV OF 1877), 20 B. 109.

(2) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 318.

Instrument.

(1) See REGISTRATION ACT (III OF 1877), 20 B. 553.

(2) See STAMP ACT (I OF 1879), 20 B. 210.

Insurance.

(1) *Life insurance—Age of assured—Proof of age—Onus of proof—Mistake in statement of age—Fraud.*—A insured his life with the defendant company. By the terms of the policy the declaration of the assured as to his age was made the basis of the contract, and the policy was issued subject to the express condition that, in case any statement contained in the declaration were untrue, the policy should be void. The assurance was also expressly made subject to the regulations and conditions contained in the prospectus of the company. The prospectus contained the following provision with regard to the age of parties insured: "Age admitted in the company's policies in all cases where proof is given satisfactory to the directors. Proof of age can be furnished at any time: if not furnished, it will be necessary on settlement of claim;" and after stating the nature of the "evidence as to age" which the company would accept, the prospectus continued:—"The directors recommend applicants to furnish any of the above as soon as possible and get the age admitted in the policy, as it is required by all soundly conducted companies on settlement of claim if not previously produced. A died, and his administrators claimed the amount of the policy.

Held, that the above condition contained in the prospectus, which must be read into the policy, imposed on the assured, or his representatives, the obligation of giving proof of age before the company could be called upon to pay. If the evidence had been given in the life-time of the assured, and an admission of age was attached to the policy, no further proof would be needed, and the *onus* of disputing the age would be thrown on the company; but, in the absence of such evidence and of such admission, it lay upon those claiming upon the policy by reasonable proof to satisfy the Court as to the age of the assured.

The prospectus of the company contained a further provision that "policies held by parties on their own lives are indisputable on any ground whatever except fraud."

Held, that this provision did not relieve those claiming upon the policy from the burden of giving proof of age, but it covered a misstatement as to age as well as other misstatements, provided they were not fraudulent. It relieved the assured from the legal effect which an innocent misrepresentation as to age would otherwise have had under the strict terms of the contract. The result, therefore, was that the plaintiffs should give proof of the age of the

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assured, but, if such proof disclosed nothing more than an innocent mistake as to age on the part of the assured, the policy would not be vitiated. Subject to the above terms of the prospectus, any untruth in the declaration as to the age of the assured would vitiate the contract. The statement as to the age of the assured amounts to a warranty, and the warranty being broken the risk under the policy would not attach. ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY v. SARAT CHANDRA CHATTERJI, 20 B. 99 ... 624

(2) Policy of insurance or memorandum of proposed insurance—Document on the face of it not contemplating necessity of any other forma document—Stamp—Stamp Act I of 1879, s. 3, cl. 15—See STAMP, 19 B. 130.

Interest.

(1) See CIV. PRO CODE (ACT XIV OF 1882), 20 B. 745.

(2) See DAMDUPAT, 20 B. 611.

(3) See LIMITATION ACT (XV OF 1877), 19 B. 663.

Irregularities.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 145.

Jailor.

See EVIDENCE ACT (I OF 1872), 20 B. 795.

Joint Decree-holder.

See LIMITATION ACT (XV OF 1877), 20 B. 383.

Joint Ownership.

See PRACTICE, 20 B. 569.

Joint Possession.

See HINDU LAW (JOINT FAMILY), 20 B. 467.

Joint Property.

See PRACTICE, 20 B. 627.

Joint Trial.

See EVIDENCE ACT (I OF 1872), 19 B. 195.

Judge.

(1) *Bias—Possessory suit in a Mamlatdar's Court—Mamlatdar acting in the management of the property under the orders of the Talukdari Settlement Officer—Disqualification of the Mamlatdar as a Judge.*—No Judge can act in any matter in which he has any pecuniary interest, nor where he has any interest, though not a pecuniary one, sufficient to create a real bias.

A Mamlatdar who under the orders of the Talukdari Settlement Officer had acted in the management of the property in dispute in a possessory suit before him, was held to have such an interest as to disqualify him from trying the case.

Where an officer of Government has in the course of his executive duties " formed an opinion upon a matter and has acted upon that opinion, or sought to give effect to it as an agent on behalf of a public body which has become a litigant in a cause," the law will presume an interest creating a bias sufficient to disqualify him as a Judge. ALOO NATHU v. GAGUBHA, 19 B. 608 ... 406

(2) Disqualification of a Judge—Pecuniary interest—Crim. Pro. Code (Act X of 1882), s. 555—See CRIM. PRO. CODE (ACT X OF 1882), 20 B. 502.

(3) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 20 B. 779.

Judgment.

(1) Obtained by fraud—Not conclusive *inter partes*—Succession Certificate Act (VII of 1889), s. 18, cls. (*b*) and (*c*)—Revocation of certificate—*Res judicata*—Estoppel—Fraud—See RES JUDICATA, 19 B. 821.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 20 B. 540.

(3) See PRACTICE, 19 B. 807.

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Jurisdiction.

(1) Caste question—Mochi caste at Surat—Auditch Brahmans of Ahmedabad—Hereditary priests—Delegates of Auditch panch at Ahmedabad—Dismissal of delegates by the caste—Suit for injunction and damages—Decision of caste—Jurisdiction of Civil Courts—See CASTE QUESTION, 20 B. 784.

(2) *Religious endowment—Property in British India of a temple outside British India—Right to officiate in such temple—Right to share of such property—Partition.*—The plaintiff was a member of a family which had the management and received the income of certain property situate in British India belonging to a temple situate at Ashta in the Nizam's territory. Part of the income was devoted to religious services and part to the support of the family. The plaintiff sued to recover by partition his share of the income and for an injunction restraining the defendant from interfering with the plaintiff in celebrating religious worship at the temple when his turn came to officiate. The defendant (his brother) resided at Ashta.

Held, that the right to share in the income followed the devolution of the office and that the Court could not grant the relief prayed for, as the Courts in British India could not execute their decree by putting the plaintiff in possession of his office when his turn came to officiate at the temple which was outside British India.

According to Hindu text-writers as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns and of allowing alienation within certain restrictions. TRIMBAK v. LAKSHMAN, 20 B. 495 ... 894

(3) Will executed at Baroda—Disposition of immoveable property in British India—Probate—Probate and Administration Act (V of 1881), ss. 56 and 57—Testator subject of the Baroda State—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 20 B. 607.

(4) Zanzibar—Local allegiance—English Consular Court—Greek residents at Zanzibar—Jurisdiction of the British Consular Court at Zanzibar over foreign subjects enjoying British protection—Order in Council, dated 29th November, 1884, s. 6—See ZANZIBAR, 19 B. 741.

(5) See ACT X OF 1876 (BOMBAY REVENUE JURISDICTION), 20 B. 764.

(6) See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 747.

(7) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 286.

(8) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 20 B. 607.

(9) See ACT XII OF 1882 (INDIAN SALT), 20 B. 543.

(10) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 20 B. 283.

(11) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 710; 20 B. 86, 736.

(12) See COPYRIGHT, 19 B. 557.

(13) See DIVORCE, 20 B. 362.

(14) See EXECUTION OF DECREE, 19 B. 544; 20 B. 351.

(15) See HINDU LAW (CASTE), 19 B. 507.

(16) See HUNDI, 20 B. 133.

(17) See MAMLATDAR, 20 B. 630.

(18) See PARTNERSHIP, 20 B. 15.

(19) See PRACTICE, 20 B. 50, 675, 767.

(20) See PROBATE, 20 B. 238.

(21) See STAMP, 19 B. 198

(22) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 790.

(23) See VENDOR AND PURCHASER, 19 B. 43.

(24) See WATAN, 19 B. 581.

(25) See ZANZIBAR, 20 B. 480.

Jury. PAGE

(1) *Verdict of jury—Special verdict—Murder—Culpable homicide—Grave and sudden provocation—Loss of self-control—Burden of proving loss of self-control on accused—Penal Code (Act* XLV *of* 1860), *ss.* 299 *and* 300—*Crim. Pro. Code (Act* X *of* 1882), *ss.* 238, 303 *and* 307—*High Court's power of interfering with the verdict of a jury.*—The accused was tried for murder. The first verdict of the jury was "guilty of murder under grave and sudden provocation." The Sessions Judge told the jury that it was their duty, after considering the question of provocation, to return a simple verdict of guilty or not guilty. The jury, therefore, brought in a second verdict of "not guilty." The Judge, considering this verdict to be perverse, referred the case to the High Court under s. 307 of the Code of Criminal Procedure (Act X of 1882).

Held, that the direction given to the jury after the first verdict was wrong, as the case fell under s. 238 of the Crim. Pro. Code (Act X of 1882). Although the charge was only one of murder, the jury had a right to bring in a verdict of culpable homicide, if there was grave and sudden provocation so as to deprive the prisoner of the power of self-control.

Held, also that the jury were not bound to find a simple verdict of guilty or not guilty. They might have found a special verdict, or findings on matters of fact to which the Judge applies the law.

Held, also, that the first verdict was a verdict of murder, as the jury did not find that the provocation had destroyed the power of self-control.

It is not a necessary consequence of anger, or other emotion, that the power of self-control should be lost. Except where unsoundness of mind or real fear of instant death is proved, the pressure of temptation is no excuse for breaking the law.

Held, lastly, that the High Court will not interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong.

A verdict ought to be considered a proper and not a perverse verdict if it is one which reasonable men might find on the facts in evidence. QUEEN-EMPRESS v. DEVJI GOVINDJI, 20 B. 215 ...

(2) Verdict—Special verdict—Duty of Judge—Practice—Procedure—Crim. Pro. Code (Act X of 1882), ss. 298, 302—See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 735.

Kararnama.

See REGISTRATION ACT (III OF 1877), 20 B. 553.

Kazi.

Kazi's office—Rozina allowance—Its liability to attachment and sale in execution of a decree—Pension Act (XXIII of 1871), s. 4—Hereditary Offices Act (Bom. Act III of 1874), s. 13—Vatan—Hereditary service vatan — See ACT III OF 1874 (BOMBAY HEREDITARY OFFICE), 19 B. 250.

Khasgi Land.

See KHOTI LAND, 19 B. 528.

Khot.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 78, 729.

Khoti Land.

(1) *Khoti*—Khasgi (*private or personal*) *land of a khoti sharer—Mortgage of the khoti* takshim (*share*)—*Sale in execution of a decree on the mortgage—Partition among the khoti sharers—Interest acquired by the purchaser at the execution sale—Agreement by the mortgagor to be responsible for the revenue—Agreement coming to an end with the extinction of the equity of redemption.*—*Prima facie* all land not shown to be alienated is liable to assessment, and the mere fact that no revenue was paid by a khoti co-sharer in respect of *khasgi* (private or personal) land in his occupation is not sufficient to prove its exemption from liability when it has passed into the hands of a stranger.

Khoti Land—(*Concluded*). PAGE

One Sadashiv, a sharer in a khoti village, mortgaged his *khasgi* land appertaining to his share in the khoti to the plaintiff and undertook to pay the Government dues on it. Plaintiff got a decree on his mortgage and in execution the land was sold, and purchased by defendant in the year 1878. In the year 1881 the khoti sharers effected partition. In 1883 defendant took possession of the land. In 1884 and again in 1885 Sadashiv having mortgaged his *takshim* (share), including the *khasgi* land to plaintiff, the latter as mortgagee brought a suit to recover *makta* (fixed) rent in kind payable for the *khasgi* land purchased by the defendant.

Held, that as the partition between the khoti sharers took place after the execution sale, only the occupancy of the land was sold to the defendant, and that the plaintiff was entitled under the circumstances to recover a fair assessment.

Held, disallowing the defendant's contention as to exemption from payment of the rent, that the agreement by the mortgagor to be responsible for the revenue came to an end with the extinction of the equity of redemption by the Court sale. BALKRISHNA MHADSHET v. VISHVANATH KESHAV JOG, 19 B. 528 ... 352

(2) See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 475.

Khoti Sharer.

See KHOTI LAND, 19 B. 528.

Khoti Takshim.

See KHOTI LAND, 19 B. 528.

Koli Caste.

See NATIVE CHRISTIAN, 19 B. 783.

Kutchi Dossa Oswal Caste.

See HINDU LAW (CASTE), 19 B. 507.

Land Acquisition.

See MUNICIPALITY, 19 B. 407.

Land Acquisition Act (X of 1870).

See MUNICIPALITY, 19 B. 407.

Landlord and Tenant.

(1) *Ejectment—Notice to quit—Agricultural land—Tenancy at will—Yearly tenancy—Rent not payable until the end of the year—Construction—Land Revenue Code (Bom. Act V of 1879), s. 84.*—Where, in the case of an agricultural land, the tenant entered into an agreement with the landlord that he would pay the amount of the annual rent every year as long as the landlord would keep the *wadi* (part) with him, and would give back the same when the landlord would demand it.

Held that the contract between the parties took the case out of s. 84 of the Land Revenue Code (Bom. Act V of 1879), and that as the rent would not be payable until the end of the year, the landlord might put an end to the tenancy and demand the land at the end of any year without giving any previous notice of any particular period, but he could not demand immediate possession in the middle of a year. BALKRISHNA VAMNAJI GAVANKAR v. JASHA FARSI SHIREL, 19 B 150 ... 101

(2) *Ejectment—Tenure—Plea by defendant that he held the land by fazendari tenure for building purposes—Permission to build—Counterparts of leases produced by landlord—Execution of counterpart denied by defendant—Ancient documents—Claim of tenant to compensation for buildings erected by him.*—In a suit for ejectment brought in 1894 the defendant contended that he held the land on permanent fazendari tenure, and produced a document, dated 1848, by which his predecessor was given permission to build upon the land. The plaintiff (landlord), however, produced the counterparts of a subsequent lease to the same tenant (defendant's predecessor), dated 1851, which created a monthly tenancy and of later

Landlord and Tenant—(*Continued*). PAGE

one to the defendant himself, dated 1859, creating a yearly tenancy determinable on a month's notice, under which provision this suit was brought. The defendant denied that he had executed this document, and contended that it was not proved. The lower Court held that these documents were admissible as ancient documents, and relying upon them passed a decree for the plaintiff. On appeal,

Held, confirming the decree, that having regard to the circumstances, the documents must be held proved, and the plaintiff was entitled to recover possession of the land.

A tenant of land demised to him cannot on the termination of his tenancy claim compensation for buildings erected by him. SHAIK HUSAIN v. GOVERDHANDAS PARMANANDAS, 20 B. 1 ... 559

(3) Khoti Settlement Act (Bom. Act I of 1880)—Tenancy—Presumption as to nature of tenancy in absence of evidence—Payment of rent—Mortgage by tenant—Sale of tenant's interest—Rights of purchaser—Heirs of tenant cannot surrender tenancy, or affect purchaser's title—Transfer of tenancy in khoti village—Ordinary tenancy—Occupancy tenancy—See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 78.

(4) Lease—Assignment—What amounts to—Terms appropriate to freehold and fazendari land—Forfeiture by assignment without license—Waiver of forfeiture, what amounts to—Result of waiver of forfeiture—Damages on forfeiture for breach of covenant to repair—See LEASE, 20 B. 439.

(5) *Lease—Ejectment—Title—Tenant cannot dispute landlord's title.*—The plaintiff sued for possession of a certain house, alleging the expiry of the lease (*kabulayat*) on which the defendants held it as tenants. The Mamlatdar dismissed the suit, being of opinion that the plaintiff had no title to the house when he granted the lease, and the house belonged to the defendants when they passed the lease.

Held, reversing the decree, that the defendants (tenants) having executed the *kabulayat* could not deny the plaintiff's title as a ground for refusing to give up possession, and the Mamlatdar himself, therefore, could not go into the question. PATEL KILABHAI NARAYANDAS v. HARGOVAN MANSUKH, 19 B. 133 ... 89

(6) *Mirasi tenure—Ejectment—Trespasser—Suit by an inamdar to recover possession*—Mirasi *tenure existing—Right of inamdar against trespasser.*—An inamdar sued to eject the defendants from certain lands, alleging them to be trespassers. The Courts found that the lands were *mirasi* lands, and that one Ganu was mirasdar. The defendants had redeemed a mortgage effected by Ganu and claimed to hold possession as against the plaintiff.

Held, that as the land was found to belong to Ganu as mirasdar, and as his *mirasi* tenure was still subsisting, the plaintiff as inamdar was not entitled to eject the defendants, whether or not they had any rights as against the mortgagee. VINAYAK JANARDAN v. MAINAI, 19 B. 138 ... 93

(7) *Notice to quit—Land Revenue Code (Bom. Act V of 1879), s. 84—Transfer of Property Act (IV of 1882), ss 111 and 117—Annual tenancy—Denial of lessor's title prior to suit—Sufficient cause to enable lessor to recover possession without notice to quit—Landlord's right of forfeiture.*—In cases not falling under s. 117 of the Transfer of Property Act (IV of 1882), a denial of the lessor's title prior to suit is, notwithstanding s. 84 of the Land Revenue Code (Bom. Act V of 1879), a sufficient cause of action to enable the lessor to recover possession without notice to quit.

The object of s. 84 of the Land Revenue Code is to define the nature of contract of tenancy, but the landlord's right of forfeiture arising from denial of his title is no part of the contract of tenancy, but is a right which the law implies in all cases from the relationship of landlord and tenant. If the Legislature had intended to exclude the right of forfeiture in cases of annual tenancies, there would have been express provision to that effect. VENKAJI KRISHNA NADKARNI v. LAKSHMAN DEVJI KANADAR, 20 B. 354 (F.B.) ... 798

Landlord and Tenant--(*Concluded*). PAGE

(8) Sale by landlord subject to rights of tenants—Notice to purchaser of such rights—Suit by tenants to enforce rights against purchaser—Civ. Pro. Code (Act XIV of 1882), s. 30—See VENDOR AND PURCHASER, 19 B. 391.

(9) *Yearly tenant—Notice to quit—Disclaimer of landlord's title in the course of pleadings—Transfer of Property Act* (IV *of* 1882), *ss.* 111 (*b*) *and* 116—*Not retrospective.*—The sections of the Transfer of Property Act (IV of 1882) relating to notice do not apply to suits instituted before that Act came into operation. Before that Act came into operation, a tenant other than a monthly tenant, holding over on the terms of his lease, was entitled to reasonable—that is to say, in the case of lands and in the absence of usage or stipulation to the contrary—to six months' notice to quit.

Disclaimer of a landlord's title after suit brought in the pleadings does not of itself determine the tenancy and render notice to quit unnecessary. AMBABAI v. BHAU, 20 B. 759 ... 1076

(10) See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 20 B. 260.

Land Revenue.

See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 747.

Law of Domicile.

See DOMICILE, 19 B. 697.

Lease.

(1) *Assignment—What amounts to—Terms appropriate to freehold and fazendari land—Forfeiture by assignment without license—Waiver of forfeiture, what amounts to—Result of waiver of forfeiture—Damages on forfeiture for breach of covenant to repair.*—An assignment by way of mortgage of leasehold property in terms appropriate to fazendari property, the lease and mesne assignments being handed over to the mortgagee on execution of the deed, and a subsequent assignment of the equity of redemption of the same property in terms appropriate to freehold property will, in the absence of any circumstance to lead the assignees to believe that the assignor had any further interest in the property, operate as assignments of the lease.

Where there is a proviso in a lease for forfeiture on assignment without previous license of the lessor, the acceptance by the lessor of rent or insurance premia from the assignee without license or the entering into an agreement with him in respect of repairs operates as a waiver of any and all causes of forfeiture of which the lessor is at the time aware.

Where assignments of leaseholds are invalid as being in breach of a covenant not to assign without previous license and so causing forfeiture of the lease, but are valid in all other respects, on waiver of the forfeiture the assignments become operative, and those taking under them become assignees of the lease with the consent of the lessor, and are subject to all the liabilities of such assignees.

The rule in *Joyner* v. *Weeks*, ((1891) 2 Q. B. 31 at p. 43) that when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to be left, applies where a term has ceased by forfeiture as well as where it has expired by efflux of time. SARAFALI v. SUBRAYA, 20 B. 439 ... 856

(2) Landlord and tenant—Ejectment—Title—Tenant cannot dispute landlord's title—See LANDLORD AND TENANT, 19 B. 133.

(3) See ACT III OF 1875 (BOMBAY TOLLS ON ROADS AND BRIDGES), 20 B. 668.

(4) See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 20 B. 491.

(5) See ACT I OF 1878 (OPIUM), 19 B. 626.

(6) See LANDLORD AND TENANT, 20 B. 1.

Leave to sue. PAGE

See PAUPER, 20 B. 508.

Legacy.

See HINDU LAW (WILL), 20 B. 571.

Letters.

See STAMP, 19 B. 32.

Letters of Administration.

(1) See COMPANY, 20 B. 654.

(2) See EXECUTOR, 19 B. 123.

(3) See SUCCESSION ACT (X OF 1865), 19 B. 828.

Letters Patent, 1865.

(1) Cl. 12—See HUNDI, 20 B. 133.

(2) Cl. 12—See PARTNERSHIP, 20 B. 15.

(3) Cl. 12—Jurisdiction—Cause of action arising out of jurisdiction—Addition of a defendant residing out of jurisdiction in a suit brought against other defendant under cl. 12 of Letters Patent, 1865—Fresh leave to sue such new defendant necessary—Hindu law—Minor—Liability of minor for debt—Ancestral trade carried for benefit of minor by the minor's natural guardian—Minor bound by the acts of the guardian—Practice—See PRACTICE, 20 B. 767.

Life Insurance.

See INSURANCE, 20 B. 99.

Life-interest.

(1) See HINDU LAW (WILL), 19 B. 401.

(2) See WILL, 19 B. 770.

Light and Air.

See EASEMENT, 20 B. 704, 783.

Light at an Angle of 45°.

See EASEMENT, 20 B. 788.

Limitation.

(1) Amendment of plaint—Limitation Act (XV of 1877), sch. II, art, 144—See WILL, 19 B. 320.

(2) Limitation Act (XV of 1897), ss. 5, 5A and 14—Adjourned hearing—Dismissal of suit for non-appearance of plaintiff or his pleader—Appeal—Jurisdiction—Delay in presenting appeal—Discretionary power of Court to excuse delay—See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

(3) *Limitation Act* (XV *of* 1877), *ss* 5 *and* 14—*Guardian and minor—Decree against minor—Neglect of guardian to appeal—Leave to appeal granted to minor after attaining majority — Practice—Procedure.*—One Kessowji Jadhowji died in 1886 and by his will directed his daughter-in-law Ladkavahoo to adopt Karamsey Madhowji, his nephew's son, and "to this lad at his inheritance" he gave the residue of his property. In a suit filed to have the will construed, a decree was passed on 1st October, 1887, declaring (*inter alia*) that until his adoption by Ladkavahoo, Karamsey Madhowji was not entitled to any part of the estate. Karamsey Madhowji was then a minor and was represented in the suit by his father and guardian. No appeal was made against the decree, but the guardian and Ladkavahoo began to negotiate with each other as to the sum of money which each should receive out of the testator's residuary estate as the price of giving and receiving the boy in adoption. These negotiations continued until 1890, when Ladkavahoo died, and the adoption directed by the will thus became impossible. In December, 1894, Karamsey Madhowji, alleging that he had only attained majority on the 14th of that month, applied for a review of judgment, but his application was rejected. In March, 1895, he obtained a rule *nisi* for leave to appeal against

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the decree of 1st October, 1887. He submitted that the circumstances amounted to " sufficient cause " under s 5 of the Limitation Act (XV of 1877), and that he had not unduly delayed his application after attaining full age.

Held, that the special circumstances did amount to " sufficient cause " under the above section, and that leave to appeal should be granted. The guardian was desirous that the adoption ordered by the decree should take place, hoping that he would obtain a large sum of money for giving the minor in adoption. His interests were, therefore, in conflict with those of the minor, and the interest of the latter were not sufficiently consulted in deciding whether or not to appeal against the decree. KARSANDAS NATHA v. LADKAVAHOO, 20 B. 104 ... 628

(4) *Limitation Act* (XV *of* 1877), *sch.* II, *art.* 60—*Deposit—Loan.*—The plaintiff claimed to recover from the defendant, who was his grandfather, the sum of Rs. 4,917, which was the amount standing to his credit in an account in the defendant's books. In November, 1869, the plaintiff being then one year old his mother (the defendant's daughter) paid over to the defendant the sum of Rs. 650, and at her request the money was credited in the books of the defendant's firm in the name of her son the plaintiff. A further sum was similarly paid over by her in December, 1871, and at her request was credited to the same account. The plaintiff alleged, and the Court found, that these sums were presents which had been made to him on his birthday and other auspicious occasions. The said sums had been carried over from year to year in the firm's books, the interest being added each year, but no payment had ever been made to the plaintiff, or on his behalf, out of the sum so standing to his credit. Compound interest had been allowed in the account, and on the 9th November, 1893, the amount standing to the credit of the plaintiff was Rs. 4,917.

The plaintiff contended that the money had been paid to, and accepted by, the defendant as a deposit to be held in trust for him. The defendant alleged that the money in question had been lent to him by the plaintiff's mother, and contended that the plaintiff's claim was barred by limitation.

Held, that the plaintiff's claim was not barred. The defendant stood in a fiduciary position to the plaintiff, and, therefore, there was a deposit within the meaning of art. 60 of the Limitation Act (XV of 1877), and limitation did not commence to run until demand. DORABJI J. RANDIVA v. MANECHERJI B. PANTHAKI, 19 B. 352 238

(5) *Limitation Act* (XV *of* 1877), *sch.* II, *art.* 60—*Deposit—Loan.*—The plaintiff claimed to recover from the defendant, who was his grandfather, the sum of Rs. 4,917, which was the amount standing to his credit in an account in the defendant's books. In November, 1869, the plaintiff being then one year old, his mother (the defendant's daughter) paid over to the defendant the sum of Rs. 650, and at her request the money was credited in the books of the defendant's firm in the name of her son the plaintiff. A further sum was similarly paid over by her in December, 1871, and at her request was credited to the same account. The plaintiff alleged, and the Court found, that these sums were presents which had been made to him on his brithday and other auspicious occasions. The said sums were carried over from year to year in the firm's books, the interest being added each year, but no payment had ever been made to the plaintiff, or on his behalf, out of the sum so standing to his credit. Compound interest had been allowed in the account, and on the 9th November, 1893, the amount standing to the credit of the plaintiff was Rs. 4,917.

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Limitation—(*Concluded*). PAGE

Held, that the defendant had held the money not as a loan but as a deposit; that art. 60 of the sch. II of the Limitation Act (XV of 1877) applied, and that the plaintiff's claim was not barred. MUNCHERJI BOMANJI PANTHAKI v. DORABJI JEHANGIR RANDIVA, 19 B. 775 ... 520

(6) Limitation Act (XV of 1877), sch. II, arts. 96 and 120—Trust deed—Invalid trusts—Recovery of property settled—When right to sue accrues—See TRUST, 20 B. 511.

(7) Limitation Act (XV of 1877) sch. II, art. 137—Mortgage—Mortgage of joint property—Share of co-owner sold in execution of decree—Subsequent sale of the mortgaged property by all co-owners—Redemption of mortgage—Suit for partition and redemption by purchaser at Court-sale—Adverse possession—See MORTGAGE (REDEMPTION), 20 B. 557.

(8) See ACT XII OF 1882 (INDIAN SALT), 20 B. 543.

(9) See COMPANY, 20 B. 654.

(10) See CONVERSION, 20 B. 181.

(11) See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 732.

(12) See EXECUTION OF DECREE, 19 B. 258; 20 B. 175.

(13) See HINDU LAW (JOINT FAMILY), 20 B. 155.

(14) See HINDU LAW (WILL), 20 B. 571.

(15) See LIMITATION ACT (XV OF 1877), 19 B. 620, 663, 809; 20 B. 8, 109, 179, 383, 408.

(16) See MUNICIPALITY, 19 B. 407.

(17) See PAUPER, 20 B. 508.

(18) See POSSESSION, 20 B. 270.

(19) See PRIVY COUNCIL, 19 B. 301.

(20) See TREE, 19 B. 207.

(21) See VENDOR AND PURCHASER, 19 B. 43.

Limitation Act (XIV of 1859).

See LIMITATION ACT (XIV OF 1877), 19 B. 809.

Limitation Act (IX of 1871).

(1) See LIMITATION ACT (XV OF 1877), 19 B. 809.

(2) S. 20—See HINDU LAW (JOINT FAMILY), 20 B. 155.

(3) Art. 132—See LIMITATION ACT (XV OF 1877), 20 B. 408.

Limitation Act (XV of 1877).

(1) S. 4—See CRIM. PRO. CODE (ACT X OF 1882), 19 B 732.

(2) S. 4—See PAUPER, 20 B. 508.

(3) Ss. 5, 5-A and 14—See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

(4) Ss. 5 and 12 and sch. II, art. 177—See PRIVY COUNCIL, 19 B. 301.

(5) Ss. 5 and 14—See LIMITATION, 20 B. 104.

(6) *Ss. 7 and 8 and art. 179—Decree—Execution—Joint decree-holder—Minority of joint decree-holder—Application for execution after attaining majority—Civ. Pro. Code (Act XIV of 1882), s. 231.*—Govindram and his two minor nephews, Shankarlal and Davlatram, obtained a decree on 1st December, 1885. Govindram applied for execution on the 24th November, 1886, and died in May, 1887. Shankarlal attained majority on the 15th December, 1891, and on the 24th July, 1891, applied for execution, no application having been made since November, 1886.

Held, that the application was not barred by limitation. Under s. 231 of the Civ. Pro. Code (Act XIV of 1882), Shankarlal was entitled equally with the other judgment-creditors to apply for execution of the whole decree for the benefit of all the decree-holders; and as he was a minor when the decree was passed, and when the last application for execution was made, he was entitled to the benefit of s. 7 of the Limitation Act (XV of 1877), and could apply for execution within three years of attaining majority. S. 8 of the

Limitation Act (XV of 1877)—(*Continued*). PAGE

Limitation Act (XV of 1877) applies only to those cases in which the act of the joint owner is, *per se*, a valid discharge. S. 7 applies where only some of the judgment-creditors and not all, are affected by a legal disability. GOVINDRAM v. TATIA, 20 B. 383 ... 818

(7) Ss. 7 and 17—Jurisdiction—Partnership—Death of partner—Subsequent recovery of asset by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—See PARTNERSHIP, 20 B. 15.

(8) S. 10—Whether applies to suit to invalidate the trust—Suit to follow trust property—See TRUST, 20 B. 511.

(9) S. 14—Hundi—Bill of exchange—Hundi payable at fixed date—Dishonour by non-acceptance—Cause of action—Jurisdiction—See HUNDI, 20 B. 133.

(10) S. 18, not applicable to criminal proceedings—Criminal procedure—Salt Act XII of 1882—Limitation prescribed for charging with offence—Fraud in concealing date of offence—See ACT XII OF 1882 (INDIAN SALT), 20 B. 543.

(11) S. 19—See HINDU LAW (JOINT FAMILY), 20 B. 155.

(12) S. 19—Acknowledgment—Minor—Guardian and ward—Powers of guardian—Guardian not competent to bind his ward by personal covenants—Act XX of 1864, ss. 18 and 29—Guardian's authority to contract debts for the marriage of his ward without the sanction of the Court—Debts contracted for pilgrimage expenses not binding on minor—Guardian's power to acknowledge debts—See MINOR, 20 B. 61.

(13) *S.* 20—*Interest—Payment of interest as such—Mortgage—Payment of rents to mortgagee in lieu of interest on debt—Mortgage-deed not registered—Deed not admissible to prove rents paid as interest—Evidence—Practice—Registration Act (III of* 1877), *ss.* 3 *and* 17.—By a bond dated 15th July, 1872, A assigned to B the "*vahivat* of assessment" of certain lands belonging to him as security for a loan of Rs. 10,000. The bond provided that B should receive the assessment, and after making certain payments should retain the balance in lieu of interest until the principal debt should be repaid. The bond was not registered. The assessment was duly received by B until April, 1887. In February, 1890, B filed this suit to recover the principal sum from A personally, relinquishing his claim against the land, as the bond was not registered. A pleaded limitation. B contended that the receipt of the assessment in lieu of interest was a payment of "interest as such" within the meaning of s 20 of the Limitation Act XV of 1877 and that the last of such payments having been made within three years before suit his claim was not barred.

Held, that the suit was barred by limitation. The assignment of the "*vahavit* of assessment" contained in the bond was an assignment of a benefit arising out of immoveable property within the meaning of ss. 17 and 3 of the Registration Act (III of 1877) or else a mortgage; and in either case the bond could not be admitted in evidence, as it was not registered. But it was only by reading the terms of the bond that the Court could gather that the assessment was to be received in lieu of interest. This would be to admit indirectly the provisions of the bond in evidence. Apart from the bond there was no evidence that the plaintiff (B) had been paid "interest as such" within three years of the filing of the suit by the duly authorized agents of the defendants, and the claim was, therefore, barred. VENKAJI BABAJI NAIK v. SHIDRAMAPA BALAPA DESAI, 19 B. 663 ... 444

(14) Sch. II, art. 30—Railway Company—Indian Railways Act (IV of 1879), s. 11—Loss of goods—Liability of company—Declaration of value and nature of goods and payment of increased charge—See RAILWAY COMPANY, 19 B. 165.

(15) Art. 47—See POSSESSION, 20 B. 270.

(16) Art. 60—See LIMITATION, 19 B. 352, 775.

Limitation Act (XV of 1877)—(*Continued*). PAGE

(17) *Art.* 75—*Instalments—Payment of debt by instalments—Right to sue for whole debt on default of payment of any instalment—Default in payment—Waiver of right to sue—Proof of waiver—Nature of proof.* —On 15th August, 1891, the defendant executed a document admitting that he was indebted to the plaintiffs in the sum of Rs. 2,125 and agreeing to pay the amount in seven instalments, the first (Rs. 401) to be paid in August, 1891, the second on the 28th April, 1892, and the remainder at intervals of six months. The document contained the following clause :—"If any of the instalments is not duly paid, I am to pay the whole amount with interest at eight annas per cent. per annum." The defendant failed to pay the first instalment, which the plaintiffs admitted was now barred, but on the 10th June, 1895, the plaintiffs filed this suit to recover the remainder of the debt and interest. The defendant pleaded that under the above clause the whole sum became due on the failure to pay the first instalment ; that the right to sue which then accrued was never waived, and that the suit was now barred by limitation.

Held, that the plaintiffs having failed to prove waiver of the right of suit which accrued to them in August, 1891, the suit was barred by limitation.

The waiver contemplated by art. 75 of sch. II of the Limitation Act (XV of 1877) must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver. KANKUCHAND SHIVCHAND v. RUSTOMJI HORMUSJI, 20 B. 109 ... 631

(18) Arts. 91 and 95—See HINDU LAW (PARTITION), 19 B. 593.

(19) Art. 113—See DECREE, 19 B. 546.

(20) *Art.* 115—*Agreement—Construction.*—The plaintiffs were husband and wife, and they were married on the 14th March, 1888. On the day of their marriage the defendant, who was the father of the first plaintiff, gave him a note addressed to his (the defendant's) firm as follows :—

"Do you be pleased to pay Rs. 7,000, namely, seven thousand, for ornaments in respect thereof, together with interest thereon at the rate of Rs. 4, namely four, per one centum per one annum, within a period of 3, namely three years from this day."

The plaintiff took this note to the defendant's firm, and in return received the following document addressed to himself :—

"You sent one 'chithi' (note) for Rs. 7,000, namely, seven thousand, on me. The sum which your father Set Mancherji Bomanji Panthaki caused to be paid to you in respect of the ornaments appertaining to your marriage has been credited to your account, bearing interest at 4, namely four, per cent. For the same this 'receipt' has been given in writing.

No money was actually paid by the defendant to the plaintiffs, and none was lodged with the defendant's firm by the plaintiffs, but subsequently to the above transaction an account was kept in the defendant's books, in which the first plaintiff was duly credited with interest every year. In March, 1894, the plaintiff demanded from the defendant the amount standing to his credit on this account. The defendant pleaded limitation.

Held, that the purpose for which the money was to be paid, *viz.*, the purchase of ornaments for the wife, indicated that it was the intention of the parties that payment should not be made until the plaintiffs were prepared to purchase ornaments and that until then the money should remain with the defendant's firm. The intention was that the money should not be paid until the plaintiffs required it for the purpose for which it was destined, and demanded it. The contract was not broken until the plaintiffs demanded the money, which they did in March, 1894. Article 115 of sch. II of the Limitation Act (XV of 1877) applied to the case, and the suit was not barred MANCHERJI BOMANJI v. NUSSERWANJI MANCHERJI, 20 B. 8 ... 563

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(21) *Arts.* 132 *and* 147—*Bond*—*Mortgage*—*Security pledge* (taran gahan) —*Hypothecation*—*Charge* — *Simple mortgage without possession*—*Limitation.*—Where a bond given for a loan contained the following condition as to security and repayment of the money :—

"The security pledge (*taran gahan*) for this is our own property, Survey Nos. 170 and 778 in the village Ped, on all the land of which two numbers do you take satisfaction for the said money; and if it should be insufficient, I will personally make satisfaction."

Held, that the transaction was a mortgage governed by art. 147, sch. II of the Limitation Act (XV of 1877), and not a charge governed by art. 132. DATTO DUDHESHVAR v. VITHU, 20 B. 408 (F. B.) 835

(22) *Art.* 134—*Mortgage*—*Decree obtained by mortgagee for possession until payment of mortgage debt*—*Possession taken by mortgagee under decree*—*Continuance after decree of relation of mortgagor and mortgagee*—*Sale by mortgagee*—*Vendor and purchaser*—*Subsequent suit for redemption by mortgagor against mortgagee and his vendee*—*Plea by vendee of purchase for value without notice*—Bona fides, *meaning of*—*Purchaser, meaning of, in art.* 134.—A decree on a mortgage having directed the mortgagor to give possession to the mortgagee until the payment of the mortgage debt and costs found due, the mortgagee entered into possession and subsequently sold the property to a third party. More than twelve years after the sale, the mortgagor brought a redemption suit both as against the mortgagee and the purchaser.

Held that the suit (as against the purchaser) was barred under art. 134, sch. II of the Limitation Act (XV of 1877), and that notwithstanding the decree for possession, the relationship of mortgagor and mortgagee continued, whether under the original mortgage or the decree.

Absence of *bona fides* as distinguished from actual knowledge of the vendor's title does not prevent the purchaser from claiming the benefit of art. 134, sch. II of the Limitation Act (XV of 1877). In order to give the purchaser the benefit of art. 134, the purchase need not be *bona fide* in the sense of being without "constructive notice" of the restricted nature of the vendor's title, but the term "purchaser" in that article is meant a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is an absolute title. PANDU v. VITHU, 19 B. 140 ... 95

(23) Art. 137—See MORTGAGE (REDEMPTION), 20 B. 557.

(24) *Arts.* 140, 141 *and* 144—*Alienation by a Hindu widow*—*Subsequent adoption by widow*—*Suit by the adopted son to recover possession*—*Adverse possession*—*Adoption*—*Rights of adopted son.*—The childless widow of a separated Hindu being in possession of his property as his heir, alienated it in the year 1868. Twenty years afterwards (13th May, 1888) she adopted a son, who in 1890 brought the present suit to recover the alienated property.

Held, that the suit was not barred by limitation.

Per FARRAN, J.—Whether art. 140 or art. 144 of Sch. II of the Limitation Act (XV of 1877) applied to the case, the suit was not barred; for if it fell under art. 140, the possession of the defendants adverse to the widow could not affect the plaintiff's rights, and if it fell, as it seemed to do, under art. 144, the possession of the defendants did not become adverse to the plaintiff until he became entitled to possession of the property upon his adoption.

Per CANDY, J.—The suit was governed by art. 144, under which the period of limitation began to run from the time when the possession of the defendants became adverse to the plaintiff on his adoption in 1888. Assuming that the possession of the defendants was adverse to the widow, that fact did not affect the plaintiff, who did not derive his right to sue from or through her. MORO NARAYAN JOSHI v. BALAJI RAGHUNATH, 19 B. 809 ... 543

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(25) *Art.* 141—*Reversioner—Widow—Suit by reversioner for possession—Death of the widow—Accrual of right to sue—Unsuccessful application in execution proceedings against widow—Civ. Pro. Code (Act XIV of 1882), s. 283.*—Under art. 141, sch. II of the Limitation Act (XV of 1877) a reversioner's right to sue accrues on the death of the widow. The fact that the reversioner has made an unsuccessful application for possession in execution proceedings against the widow, and has not sued under s. 283 of the Civ. Pro. Code (Act XIV of 1882), does not debar him from filing a regular suit. TAI v. LADU, 20 B. 801 ... 1105

(26) Art. 144—See VENDOR AND PURCHASER, 19 B. 43.

(27) Art. 144—See WILL, 19 B. 320.

(28) *Art.* 144—*Adverse possession—Symbolical possession—Effect of symbolical possession against third parties—Auction purchaser—His right to tack on his own possession to that of judgment-debtor.*—The property in dispute belonged to one Dhondi. He sold it to Arjun on 25th April, 1873, but did not put the vendee into possession. On 18th April, 1883, Arjun sold the property to the plaintiff.

On 4th June 1883, in execution of a money-decree against Dhondi the property was put up to sale as his and was purchased by the defendants, who were put into possession by the Court on 26th March, 1885.

On 28th March, 1885, the plaintiff sued Arjun and Dhondi's wife (Dhondi being then in prison) to recover possession of the property. A decree was passed, in execution of which he obtained symbolical possession through the Court on 8th February, 1886. When he sought to take actual possession, he was resisted by the defendants.

Thereupon the plaintiff filed the present suit on 19th December, 1889, to obtain actual possession of the property from the defendants.

Held, that the suit was barred under art. 144 of the Limitation Act (XV of 1877). The defendants had a right to tack on the period of their own adverse possession as against the plaintiff to that of Dhondi's adverse possession as against Arjun. The symbolical possession obtained by the plaintiff did not break up the continuity of the adverse possession of the defendants and the person through whom they derived their title. HARJIVAN v. SHIVRAM, 19 B. 620 414

(29) *Arts.* 170, 178—*Pauper—Application for leave to appeal in* forma pauperis—*Practice—Procedure.*—Plaintiffs filed a suit for partition, which was dismissed on 9th December, 1890. On the 17th March, 1891, plaintiffs presented an appeal to the High Court on a Court-fee stamp of Rs. 10.

On 18th January, 1892, the High Court held that the memorandum of appeal was insufficiently stamped, being chargeable with an *ad-valorem* stamp on the value of plaintiffs' share.

On 16th February, 1892, plaintiffs applied for leave to appeal in *forma pauperis*. This application was granted *ex-parte*.

At the hearing of the appeal, however, the respondent contended that the pauper appeal was time-barred.

Held, that the application for leave to appeal in *forma pauperis* having been presented beyond the thirty days allowed by art. 170 of the Limitation Act (XV of 1877), was barred by limitation. The pauper appeal could not, therefore, be proceeded with. Article 178 of the Limitation Act had no application to the present case. MAHADEV BALVANT v. LAKSHMAN BALVANT, 19 B. 48 ... 33

(30) Arts. 178, 179—See EXECUTION OF DECREE, 20 B. 175.

(31) Art. 179, cl. 4—Execution of decree—Succession Certificate Act (VII of 1889), s. 4—Application for execution by legal representative of decree-holder without certificate — Necessity of certificate—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 20 B. 76.

(32) *Art.* 179, *cl.* 4—*Step-in-aid of execution—Decree—Execution—Civ. Pro. Code (Act XIV of 1882), s. 230—Application for execution.*—A obtained a decree against B upon an award, which directed that the sum of Rs. 1,840 awarded to A should be recovered with

Limitation Act (XV of 1877)—*(Concluded)*. PAGE

interest by attachment of the mortgaged property and not by sale, execept in case of its being held that the property was not liable to attachment.

On 12th October, 1874, A applied for execution of the decree, and thereupon the mortgaged property was attached and placed under the management of the Collector, who paid the proceeds from time to time into Court till 1891. The Court paid the proceeds to A on 25th February, 1876, 5th February, 1877, and 7th October, 1877.

In 1878, A being dead, his son C applied to the Court to be made a party to the record and to be allowed to continue the execution proceedings.

In 1880, C applied to the Court under s. 248 of the Code of Civil Procedure (Act XIV of 1882) to issue notice to D, as B's heir and legal representative, to show cause why the decree should not be executed against him. D did not appear, and an *ex-parte* order was passed for execution to proceed as against him.

The Collector continued in management till 5th February, 1892, when the application (*darkhast*) of 1874 was withdrawn and a fresh application was made by C on 12th June, 1892.

D resisted on the ground that the application was time-barred under art. 179 of the Limitation Act (XV of 1877).

Held, that the application of 1892 was not barred by limitation, as the execution proceedings under the first *darkhast* of 1874 were continuously going on during the whole period that the Collector's management lasted under the orders of the Court, and as each year's payment received by the decree-holder was but a partial step in aid of execution of the decree.

Held, further, that the applications made by C in 1878 and 1880 were also "steps in aid of execution" within the meaning of art. 179, cl. 4 of the Limitation Act (XV of 1877). KESHAVLAL BECHAR v. PITAMBERDAS TRIBHUVANDAS, 19 B. 261 ... 177

(33) *Art.* 179, *cl.* 4—"*Step-in aid of execution*"—*Payment of deficient Court-fee—Execution of decree—Limitation.*— An application for execution of a decree was presented on 17th July, 1890. A notice under s. 248 of the Code of Civil Procedure (Act XIV of 1882) was issued on 18th July, 1890. The process fee for service of the notice being deficient, the decree-holder paid the deficiency on 29th August, 1890. On the 22nd August, 1893, the decree-holder presented a fresh application for execution.

Held, that the second application for execution was time-barred. The payment of the additional Court-fee was not "a step in aid of execution of a decree" within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act (XV of 1877). DWARKANATH APPAJI v. ANANDRAO RAMCHANDRA, 20 B. 179 ... 678

Lingayets.

See HINDU LAW (ADOPTION), 19 B. 428.

Liquidators.

Inquiry into conduct of liquidators —Practice—Procedure—Company—Voluntary winding up—Indian Companies Act (VI of 1882), s. 214 —See COMPANY, 19 B. 88.

Loan.

See LIMITATION, 19 B. 352, 775.

Local Allegiance.

See ZANZIBAR, 19 B. 741.

Local Usage.

Hundi—Hundi drawn by a manager of Hindu family—Liability—Notice of dishonour to the drawer necessary—Negotiable Instruments Act (XXVI of 1881), ss. 30, 93 and 106—See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), 20 B. 498.

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See RAILWAY COMPANY, 19 B. 165.

Lunacy.

Act XXXV *of* 1858, *ss.* 15, 16, 17, 18 *and* 20—*Hindu lunatic—Guardian—Manager—Joint member of the lunatic's family, appointed manager of the lunatic's estate, not bound to render account—Manager charged with mismanagement is entitled to have particulars of the charges made against him—Order or certificate of appointment.*—The manager of a Hindu lunatic's estate appointed under Act XXXV of 1858, who is in possession with others of joint family property, is not, in his capacity of manager of the lunatic's estate, bound by the provisions of s. 15 of the Act to exhibit an inventory and account of the family property. The lunatic is possessed of no property for which the manager is liable to account. It does not make any difference if the manager is himself a joint owner or not. The Act provides no machinery, nor does it confer any power upon the Court, to deal with the joint family property or interfere in the affairs of a joint family.

If a manager is charged with mismanagement he is entitled to some particulars of the charges made against him.

In all cases of lunacy in which a guardian or a manager of the lunatic's estate is appointed by the Court under the Act, it is desirable to issue a formal order or certificate of appointment. TRIMBAKLAL GOVANDAS v. HIRALAL, 20 B. 659 ... 1007

Lunatic.

(1) *Limitation—Striking out lunatic plaintiff's name—Restoration of name—Suit by person not adjudged to be of unsound mind under Act* XXXV *of* 1858 *- Practice—Procedure.*—A plaint as originally framed contained the name of Kirparam, stated to be of unsound mind, as first plaintiff and of his wife Nathi as his guardian and second plaintiff. When the plaint was actually filed, Kirparam's name was struck out by the pleader and Nathi. Subsequently his name was restored on his own application, but the period of limitation prescribed for the suit had then elapsed. The first Court held that under s. 7 of the Limitation Act the plaintiffs claim was not barred. On appeal, the Judge dismissed the suit, holding that the order of the first Court restoring Kirparam's name was bad, and that the suit was time-barred at the date of that order. On second appeal,

Held, reversing the decree that the pleader and Nathi acted beyond their authority in striking out Kirparam's name, and that, therefore, the restoration of his name must relate back to the filing of the suit, which was, therefore, not barred.

Quære—Whether a person of unsound mind, but not adjudged to be so under Act XXXV of 1858, can in this country sue by his next friend. KIRPARAM JUMEKRAM MODIA v. MODIA DAYALJI JUMEKRAM, 19 B. 135 ... 91

(2) *Lunatic's estate—Act* XXXV *of* 1858, *s.* 14—*Manager appointed under the Lunacy Act—Manager of joint family—Alienation by manager.* Where a person is appointed manager of a lunatic's estate under Act XXXV of 1858, he can only make a valid alienation in accordance with the provisions of that Act, although he may also be *de facto* manager of the family property.

A Hindu married woman having a lunatic husband and minor sons was appointed guardian of the lunatic's estate under Act XXXV of 1858 She was also *de facto* manager of the family. She mortgaged the family property without the sanction of the Court, as required by s. 14 of the Act.

Held, that the mortgages were invalid as regards the lunatic's interest in the property, but as regards the interest of the minors, which was vested in them at the time of the mortgages, the property being ancestral, the mortgages were binding if made for family purposes. ANPURNABAI v. DURGAPA MAHALAPA NAIK, 20 B. 150 ... 658

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1.—ALIENATION.
2.—CASTE.
3.—CUSTOM.
4.—DEBTS.
5.—GUARDIANSHIP.
6.—INHERITANCE.
7.—MINORITY.
8.—SUCCESSION.
9.—WIDOW.
10.—WILL.

——1.—Alienation.

See MINOR, 20 B. 338.

——2.—Caste.

See CASTE QUESTION, 20 B. 190.

——3.—Custom.

See CONVERSION, 20 B. 53, 181.

——4.—Debts.

Money due by a deceased Mahomedan—Suit by a creditor against only one of the heirs of the deceased—Practice—Procedure.—A suit for money due by a deceased Mahomedan lies against one of his heirs in respect of his share in the property left by the deceased, though it may not bind the share of another heir.

Quære—Whether, there having been no division of the estate, the share of the heir sued is liable for the whole debt of the deceased. AMBASHANKAR HARPRASAD v. SAYAD ALI RASUL, 19 B. 273 ... 185

——5.—Guardianship.

See MAHOMEDAN LAW (MINORITY), 20 B. 199.

——6. Inheritance.

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——7.—Minority.

(1) *Guardian—Mother of minor—Power to sell property of minor—Mahomedan law*—According to Mahomedan law a mother, not being the legal guardian of her minor child, cannot do any act relating to the property of the minor so as to bind him. BABA v. SHIVAPPA, 20 B. 199. ... 692

(2) *Minors—Mortgage by widow—Widow—Right to mortgage shares of minors.*—In 1884 one Ismail Ebrahim, a Mahomedan, died intestate, leaving a widow, two sons and two daughters. At the time of his death he was the owner of a certain house in Bombay. After his death his widow and his eldest son Ebrahim (without the consent of the other children who were minors) mortgaged the said house to the defendant. In 1894 a younger son and one of the daughters of Ismail filed this suit, praying that their shares in the house might be ascertained and declared; that the house should be sold, and their shares in the proceeds handed over to them. The defendant pleaded that the plaintiff's mother and adult brother Ebrahim had mortgaged the house to him in 1891 as a security for a loan of Rs. 3,500 which they wanted to pay off debts incurred in rebuilding the house and to defray the marriage expenses of the said Ebrahim. He contended that the mortgage was binding on the plaintiffs, having been made for the benefit of the family, and that, if not, the plaintiffs were bound to pay him the money due to him before claiming any share in the house.

Held, that the plaintiffs were entitled to their shares in the said house free and discharged of the mortgage executed to the defendant.

The Mahomedan law makes no provision with regard to mortgages, as such transactions are, strictly speaking, unlawful, as they involve the payment of interests. As, however, mortgages do now exist among Mahomedans, they must be governed by the rules applicable to sales. To authorize a sale by the guardian of a Mahomedan

Mahomedan Law—7.—Minority—(*Concluded*). PAGE

minor, there must be an absolute necessity for the sale, or else it must be for the benefit of the minor. The money raised by the mortgage in question was not raised for any purpose specially authorised by Mahomedan law and the purpose for which it was raised was not for the benefit of the minor. Consequently, the widow had no authority to mortgage their shares. HURBAI v. HIRAJI BYRAMJI SHANJA, 20 B. 116 ... 636

(3) See MINOR, 20 B. 338.

———8.—Succession.

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———9.—Widow.

(1) See MAHOMEDAN LAW (MINORITY), 20 B. 116.

(2) See MINOR, 20 B. 338.

———10.—Will.

See RECEIVER, 19 B. 83.

Malice.

See DEFAMATION, 19 B. 717.

Malicious Prosecution.

(1) Defamation—Suit for malicious prosecution—Evidence—Burden of proof—Want of reasonable and probable cause—Malice—Information given to police—Privilege—Penal Code (XLV of 1860), ss. 182, 211, 499—See DEFAMATION, 19 B. 717.

(2) *Procuring wrongful execution of a warrant of arrest—Reasonable and probable cause.*—The plaintiff sued the Municipal Commissioner of Bombay for damages, alleging that the Commissioner had maliciously and without reasonable and probable cause procured a warrant to be issued against him on 24th March, 1892, and subsequently procured that warrant to be executed at a time when its force was spent, and under circumstances when it ought not to have been executed. From the evidence it appeared that on the 21st December, 1891, a notice was served on the plaintiff under s. 232 of the City of Bombay Municipal Act (III of 1888) requiring him to do certain drainage work upon premises belonging to him. The work not having been done, a summons was issued against him on the 11th February, 1892, requiring him to appear before the Presidency Magistrate to answer a charge of not having complied with the above notice. The summons was returnable on the 25th February, 1892, and on that day the plaintiff appeared, but the hearing was postponed until the 24th March, 1892. On the 27th February, 1892, the plaintiff wrote to the defendant objecting to the nature of the work he was required to do, and adding "after this explanation, I will leave the matter in the hands of the Drainage Department to do the work, and will pay the expenses" In reply to this letter the Executive Engineer on the 21st March informed the plaintiff that he must appear in Court on the 24th March, and also requested him to "take the work in hand at once and complete it within the time now allowed." On the 22nd March, 1892, the plaintiff replied by letter stating that he did not understand the work, and asking the Municipality to get it done, he offering to pay the expense. The letter ended as follows:—I do not see any reason now to attend in Police Court on 24th instant, as I am ready and willing to do the work." The plaintiff did not attend the Court on the 24th March. On that same day (24th) a letter signed by the Municipal Commissioner was delivered to the plaintiff, dated the 23rd March, informing him that a "fresh summons" had been issued against him for not complying with the requirements of the notice served on him. The Courts held that the non-appearance of the plaintiff on the 24th March was not caused by the receipt of this letter. On the 24th idem, in consequence of the non-appearance of the plaintiff in obedience to the summons, a warrant of arrest was issued against him. The date originally inserted in the warrant for the plaintiff's appearance before the Magistrate was the 7th April, but this date

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was subsequently altered to the 2nd June. There was no evidence as to how or by whom this alteration was made. The plaintiff having heard on the 25th March of the issue of the warrant appeared next day (the 26th) before the Magistrate and surrendered, showing to the Magistrate the defendant's letter of the 23rd March and explaining why he had not attended on the 24th. A note was made of his surrender and he was told by the Magistrate to appear on the 7th April. The plaintiff, however, did not get the warrant cancelled. He stated that at the office of the Presidency Magistrate's Court he was informed that the warrant was with the Municipality, and that he then went away and did nothing more. On the 7th April, the Municipal Engineer went to the plaintiff's premises and pointed out the work that was to be done. He (the plaintiff alleged) told the plaintiff that he need not attend the Police Court that day, as he would get the hearing of the summons postponed for a fortnight. The plaintiff then instructed a plumber to do the requisite work, which was completed (as plaintiff alleged) on the 26th April and was passed and approved by the Municipal Authorities. The plaintiff swore that he attended the Police Court on the 21st April, but apparently did not bring his appearance to the notice of the Magistrate, as the Municipal officers had left the Court before he arrived. He further stated that he attended again on the 28th April, but was told by a Municipal Inspector that he might go away, as the work was done. Another hearing was apparently fixed on the 19th May, but the case was again adjourned to the 2nd June. On the 31st May, the plaintiff was arrested in execution of the warrant of the 24th March. The evidence was that on that morning, at 8 o'clock, a Municipal Inspector (Hormasji Cursetji) who was not called as a witness at the hearing, accompanied by a police sepoy, went to the plaintiff's house and pointed out the plaintiff to the sepoy, who arrested him and took him in custody to the police station and subsequently before the Magistrate. He was released on depositing Rs. 25 as security for appearing when required. On the 16th June, the plaintiff again appeared in the Police Court when the summons was withdrawn. The plaintiff claimed Rs. 10,000 as damages for malicious prosecution, wrongful arrest and detention in custody and false imprisonment.

The defendant denied that he had applied for or obtained the warrant for the plaintiff's arrest, or that he or his servants had anything to do with the arrest or was responsible for it, save that a Sub-inspector who knew nothing of the warrant had pointed out the plaintiff to a police officer at the latter's request. He further denied that the proceedings were malicious and without reasonable and probable cause. The lower Court (Starling, J.) held that the defendant was liable for the wrongful execution of the warrant against the plaintiff and awarded the latter Rs. 500. On appeal,

Held, affirming the decree of the lower Court, that the defendant was liable. On the 28th April at any rate, the warrant in question was a spent warrant and could not be properly executed, as it was, on the 31st May. As the warrant was issued by the Magistrate of his own accord, the defendant could not be liable for its execution (as shown by the case of *West* v. *Smallwood* (3 M. and W. 418) unless he or his subordinates took an active part in executing it. The mere circumstance that the plaintiff was pointed out to the police officer who executed the warrant by a Municipal Inspector might not of itself amount to taking an active part. But there were special circumstances which should be taken into consideration in conjunction with it. The length of time which elapsed before the warrant was executed, and the alteration of the date in the direction contained in the warrant as to taking bail, not explained in any way and which could not have been made by the police, pointed to the warrant having been, if not in the actual keeping of the Municipal authorities at any rate under their control, and to the police having been set in motion by them. Under these circumstances, it was incumbent on the defendant to give rebutting evidence, and

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more especially to call the Municipal Inspector to explain the circumstances under which he pointed out the plaintiff to the police officer who executed the warrant. ACWORTH v. SHAVAKSHA DHUNJIBHAI, 19 B. 495 ... 324

Mamlatdar.

(1) Mamlatdars' Act (III of 1876)—Jurisdiction of Mamlatdar—Civ. Pro. Code (Act XIV of 1882), ss. 263 and 332—Execution—Decree—Decree for possession—Execution of decree—Dispossession of a third person not a party in execution—Possessory suit by third person against decree-holder—Cause of action—See EXECUTION OF DECREE, 20 B. 351.

(2) *Mamlatdars' Act* (*Bom. Act* III *of* 1876)—*Jurisdiction of Mamlatdar—Irregular decree of Mamlatdar made by consent of parties—Subsequent refusal by Mamlatdar to order execution of decree—Extraordinary jurisdiction of High Court—Questions of fact—Practice—Procedure.*—The applicant brought two possessory suits against the opponent in the Mamlatdars' Court for the recovery of certain pieces of land. By consent, decrees were passed in these suits, that unless the opponent paid a certain sum of money to the applicant within two months, the latter should get possession. After the expiration of two months the applicant, alleging that the money had not been paid as agreed, applied for execution of the decrees. The Mamlatdar found that the money had been tendered to the applicant, but had been wrongfully refused by him. He ordered execution to issue as to costs, but declined to make any order as to possession. The applicant thereupon applied to the High Court in its extraordinary jurisdiction and alleged that the money had not been duly tendered.

Held, that the decrees were such as the Mamlatdar could not legally make under the provisions of the Mamlatdars' Act (Bom. Act III of 1876), and the consent of parties could not give him power to do so.

Held, also, that the High Court would not go into the question as to the due tender of the money. It was not open to the High Court, in the exercise of its extraordinary jurisdiction, to go into this question of fact, nor would it be proper to further the execution of an irregular decree, especially as the applicant had a clear remedy by suit. RAMRAO v. BABAJI, 20 B. 630 ... 988

(3) *Mamlatdars' Act* (*Bom. Act* III *of* 1876), *s.* 17—*Decree passed by Mamlatdar—Execution—Execution of Mamlatdar's decree by Mamlatdar under directions of Collector.*—A Mamlatdar having under the direction of the Collector executed a decree passed by himself directing the removal of a dam.

Held, that though it might be improper for the Collector to issue such a direction, which legally could only issue from the High Court, the High Court would not set aside the execution if otherwise valid. S. 17 of the Mamlatdars' Act (III of 1876) is imperative, and leaves to the Mamlatdar no discretion as to the duty of enforcing the decree. The Act does not purport to provide detailed rules as to applications for execution, and a Mamlatdar's Court is not governed as to execution of decrees by the ordinary rules of procedure; and provided the procedure followed gives effect in the end to the intention of s. 17, the Court will not interfere.

Held, also, that under s. 17 of the Mamlatdars' Act III of 1876 a Mamlatdar was not precluded from himself supervising the execution of a decree in a case in which the village officers were from interest or other cause unlikely to give proper effect to it. RAKHMA v. TULAJI, 19 B. 675 ... 451

(4) See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 19 B. 289; 20 B. 260, 491.

(5) See JUDGE, 19 B. 608.

(6) See LANDLORD AND TENANT, 19 B. 133.

(7) See POSSESSION, 20 B. 270.

(8) See SUCCESSION ACT (X OF 1865), 19 B. 828.

Manager. PAGE

(1) Hindu law—Joint family—Manager of joint family—Power of manager to revive a time-barred debt—Limitation—See HINDU LAW (JOINT FAMILY), 20 B. 155.

(2) See CHRISTIAN, 19 B. 680.

(3) See HINDU LAW (JOINT FAMILY), 19 B. 532.

(4) See HINDU LAW (RELIGIOUS ENDOWMENTS), 19 B. 271.

(5) See LUNACY, 20 B. 659.

(6) See LUNATIC, 20 B. 150.

Marriage.

See DIVORCE, 20 B. 362.

Maxim.

Respondeat superior—See PENAL CODE (ACT XLV OF 1860), 20 B. 394.

Mesne Profits.

See HINDU LAW (JOINT FAMILY), 19 B. 532.

Minor.

(1) Contract by a minor—Liability of minor—Contract Act (IX of 1872), ss. 11, 123—Principal and surety—Surety of a minor—Liability—Domicile—Widow's domicile—Capacity to contract—Law—Law of domicile regulates capacity to contract—See DOMICILE, 19 B. 697.

(2) *Guardian—Act* XX *of* 1864, *s.* 2—*Decree to bind minors—Debts contracted for immoral and improper purposes—Burden of proof not shifted by proof of immoral habits.*—In execution of a decree against the estate of Vishnu Bhikaji his estate was sold and it ultimately came into the hands of the plaintiff as purchaser, who sued for partition. It was contended that two of the defendants, parties to the suit in which the decree was passed, being then minors were not properly represented by their mother. Gangabai, also a party defendant to the suit, she not having obtained a certificate of administration under Act XX of 1864, and that the decree did not, therefore, bind them, and also that the decree was in respect of debts contracted by Vishnu Bhikaji for immoral and improper purposes.

Held, that s. 2 of Act XX of 1864 did not apply, as though Gangabai had not obtained a certificate she did not claim charge of the estate.

Held, also, that an issue having been raised and determined in the suit in which the decree was passed that Gangabai did represent the minors as guardian for the suit, and as the decree expressly named them as sued by Gangabai, their guardian, the minors were expressly made parties and were properly represented by Gangabai.

Held, also, that proof of immoral habits in the debtor did not throw the *onus* on to the plaintiff and oblige him to prove that the debt was not incurred for an immoral or illegal purpose. VASUDEV v. KRISHNAJI, 20 B. 534 ... 921

(3) Guardian and minor—Decree against minor—Neglect of guardian to appeal—Leave to appeal granted to minor after attaining majority—Practice—Procedure—Limitation—Limitation Act (XV of 1877), ss. 5 and 14—See LIMITATION, 20 B. 104.

(4) Guardian and ward—Power of Court to appoint guardian of person and estate of a minor—Power of guardian to sell minor's property—See GUARDIAN AND WARD, 19 B. 96.

(5) *Guardian and ward—Powers of guardian—Guardian not competent to bind his ward by personal covenants—Act* XX *of* 1864, *ss.* 18 *and* 29 *—Guardian's authority to contract debts for the marriage of his ward without the sanction of the Court—Debts contracted for pilgrimage expenses not binding on minor—Guardian's power to acknowledge debts—Limitation Act* (XV *of* 1877), *s.* 19—*Acknowledgment.*—A minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate.

Act XX of 1864 gives no power to a guardian or administrator to bind his ward by personal covenants.

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A guardian appointed under Act XX of 1864 can pledge the property of his ward for purposes beneficial to the minor, but not as a security for money previously borrowed which the minor was under no obligation to pay.

Under s. 29 of Act XX of 1864 a guardian cannot contract a debt for the marriage of his ward without the sanction of the Court.

Debts contracted by the guardian of a minor for a pilgrimage not undertaken in the discharge of an urgent spiritual duty, which it was obligatory on him to perform, are not necessaries for which the minor would be held liable.

A guardian has no authority to acknowledge a debt on behalf of his ward so as to give the creditor a fresh start for the period of limitation, as he is not an agent on the part of his ward within the meaning of s. 19 of the Limitation Act (XV of 1877). MAHARANA SHRI RANMALSINGJI v. VADILAL VAKHATCHAND, 20 B. 61 599

(6) *Infant—Decree against minor—Review—Right of minor to impeach decree—Practice—Procedure.*—One Kessowji Jadowji in his will directed his daughter-in-law Ladkavahu (defendant No 1) to adopt his nephew Karamsi Madhowji (defendant No. 2), and he devised the residue of his estate to him. The executors of Kessowji's will subsequently brought this suit to have the will construed and the rights of Karamsi Madhowji in the testator's estate ascertained and declared. A decree was made on the 1st October, 1887, by which it was declared that Karamsi's adoption was a condition precedent to his inheritance, and that, unless he was adopted, he was not entitled to any part of the testator's property. On 22nd October, 1894, Karamsi Madhowji (defendant No. 2) filed a petition of review, stating that at the date of the decree he was a minor and had only recently, *viz.*, on the 14th December, 1884, attained the age of eighteen years. He contended that there was error apparent on the face of the decree, inasmuch as it did not provide that he should have an opportunity of showing cause against it in so far as it affected his interests after he attained his majority.

Held, that the review could not be granted. The Courts in India after deciding an issue in which an infant, party to a suit, is interested, have no power to reserve to the infant the right of questioning such decision. At all events a decree is not erroneous for not containing such a provision when the issue in which the infant is interested has been fully gone into and argued before the Court. A decree passed against an infant properly represented is binding upon him like a decree passed against an adult, but it is open to the infant to impeach such decree by a suit in cases where his guardian has been guilty of fraud or negligence in allowing the decree to be passed against him. CURSANDAS NATHA v. LADKAVAHU, 19 B. 571 ... 381

(7) Joint decree-holder—Minority of joint decree-holder—Application for execution after attaining majority—Civ. Pro. Code (Act XIV of 1882), s. 231—Limitation Act (XV of 1877), ss 7, 8 and art. 179—Decree—Execution—See LIMITATION ACT (XV OF 1877), 20 B. 383.

(8) Joint family—Joint family property—Gift—Gift of undivided share by adults of family—Minor co-sharer not a party to gift—Ejectment—Defendant trespasser—Onus of proof—Plaintiff to prove his superior title—Hindu Law—See HINDU LAW (JOINT FAMILY), 19 B. 803.

(9) Liability of minor for debt—Ancestral trade carried for benefit of minor by the minor's natural guardian—Minor bound by acts of the guardian—See PRACTICE, 20 B. 767.

(10) *Mahomedan family—Mortgage by Mahomedan father—Suit by mortgagee against minor son after mortgagor's death—Decree—Possession—Minor son represented by his mother—Widow represents heirs—Decree—Daughters not parties, but bound by decree—Subsequent suit by daughters as heirs of mortgagor for redemption.*—When in a mortgage suit the debt is due from the father, and after his death the

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property is brought to sale in execution of a decree against the widow or some of the heirs of the mortgagor, and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they are not bound by the sale simply because they are not parties to the record. This principle of law applies as much to a Hindu family governed by the Mitakshara law as to a Mahomedan family.

One Nur Saheb mortgaged his property in 1862 to Bhimaji and died in 1864, leaving a widow, a son and two daughters. In 1864 Bhimaji (the mortgagee) sued the minor son represented by his mother for possession as owner under the *gahan lahan* clause, and got a decree on 30th September, 1864, and obtained possession in 1865. To this suit the daughters of Nur Saheb were not parties. Bhimaji held the land till 1887 and then sold it to Somana (defendant No. 2). In 1890 Nur Sheb's daughter brought this suit against Bhimaji and Somana to redeem the mortgage of 1862, contending that they were not bound by Bhimaji's suit in 1864, not having been parties to it.

Held, that the plaintiffs could not redeem. They were bound by the decree obtained by the mortgagee in 1864. DAVALAVA v. BHIMAJI DHONDO, 20 B. 338 ... 787

(11) Mahomedan Law—Minor—Guardian—Mother of minor—Power to sell property of minor. See MAHOMEDAN LAW (MINORITY). 20 B. 199.

(12) Minor co-parcener in a joint Hindu family governed by the Mitakshara law—Guardianship—Hindu law—Guardian and Wards Act (VIII of 1890)—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 19 B. 309.

(13) Minor's estate—Power of mother of minor to sell her deceased husband's estate—Mother—Omission of the minor's name in the sale deeds—Son bound by sale—Hindu law—See HINDU LAW (MINORITY), 20 B. 286.

(14) Mortgage by widow—Widow—Right to mortgage shares of minors—Mahomedan law—See MAHOMEDAN LAW (MINORITY), 20 B. 116.

(15) Partition made during minority—Partition by minor's mother as guardian—Fraud—Pleadings—Suit to set aside a partition deed—Limitation Act (XV of 1877), sch. II, arts. 91 and 95—Hindu law—Partition—See HINDU LAW (PARTITION), 19 B. 593.

(16) Practice—Procedure — Inspection — Affidavit of documents—See PRACTICE, 19 B. 350.

(17) Suit by minors for partition—In what cases such a suit can lie—Malversation—Hindu law—Partition—See HINDU LAW (PARTITION), 19 B. 99.

(18) See CONTRACT ACT (IX OF 1872), 20 B. 755.

(19) See SURETY, 19 B. 245.

Mirasi Tenure.

Ejectment—Trespasser—Suit by an inamdar to recover possession—Mirasi tenure existing—Right of inamdar against trespasser—Landlord and tenant—See LANDLORD AND TENANT, 19 B. 138.

Misappropriation.

See FRAUD, 19 B. 749.

Mochi Caste.

See CASTE QUESTION, 20 B. 784.

Moleslam Girasias.

Custom—Hinduconverts to Mahomedanism—Retention of Hindu law and usages—Maintenance—Rights of junior members of a Thakor's family to maintenance out of an estate of the nature of an impartible raj—Limitation—See CONVERSION, 20 B. 181.

Money-lender. PAGE

See EVIDENCE, 20 B. 367.

Mortgage.

1.—GENERAL.
2.—CONTRIBUTION.
3.—EQUITY OF REDEMPTION.
4.—EXTINCTION.
5.—FORECLOSURE.
6.—PRIORITY.
7.—REDEMPTION.
8.—SALE.
9.—SIMPLE.
10.—USUFRUCTUARY.

——1.—General.

(1) Mahomedan family—Mortgage by Mahomedan father—Suit by mortgagee against minor son after mortgagor's death—Decree—Possession—Minor son represented by his mother—Widow represents heirs—Daughters not parties, but bound by decree—Subsequent suit by daughters as heirs of mortgagor for redemption—See MINOR, 20 B. 338.

(2) Mortgagee—Mamlatdar's Act (Bombay Act III of 1876), s. 15—Possessory suit—Mortgagee's possession not on behalf of the mortgagor—See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 19 B. 289.

(3) Registration—Notice—Sale of mortgaged property in execution of a money decree without express notice of mortgage—Right of mortgagee to enforce mortgage against the property in hands of purchaser—Civ. Pro. Code (Act XIV of 1882), s. 287—See REGISTRATION, 20 B. 290.

(4) *Suit by mortgagee on mortgage—Interest allowed at mortgage rate up to decree—Transfer of Property Act (IV of 1882), ss. 86 and 88.*—In a suit by a mortgagee to recover the money due on his mortgage, the plaintiff is entitled to interest at the rate specified in the mortgage-deed up to date of decree, and a Civil Court has no discretion to refuse to award such interest. CHATURBHAI v. HARBHAMJI, 20 B. 744 ... 1066

(5) See LEASE, 20 B. 439.

(6) See LIMITATION ACT (XV OF 1877), 19 B. 663.

(7) See MAHOMEDAN LAW (MINORITY), 20 B. 116.

(8) See REGISTRATION ACT (III OF 1877), 20 B. 553.

(9) See TALUKDAR, 20 B. 565.

(10) See TRUST, 20 B. 46.

——2.—Contribution.

Sale of property subject to mortgage in execution of money decrees against mortgagors—Subsequent suit by mortgagee to recover his mortgage-debt by sale of part of mortgaged property only—Payment of mortgage-debt by holder of part of mortgaged property—Right on such payment to sue for contribution from other holders of the mortgage property—Contribution.—The owner of a portion of property comprised in a mortgage who in order to save his share from sale has satisfied a decree obtained by the mortgagee on the mortgage against him, can exact contribution from the owner of another portion of the mortgaged property who was not a defendant in the mortgagee's suit. CHAGANDAS v. GANSING, 20 B. 615 ... 977

——3.—Equity of Redemption.

See KHOTI LAND, 19 B. 528.

——4.—Extinction.

See KHOTI LAND, 19 B. 528.

——5.—Foreclosure.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 20 B. 469.

Mortgage—6.—Priority. PAGE

(1) *Registration Act* III *of* 1877, *s.* 50—*Sale in execution of decree on prior unregistered mortgage—Rights of purchaser—Claim of subsequent mortgagee in possession under registered mortgage--Rights of such subsequent mortgagee where he was not a party to the suit on prior mortgage—Transfer of Property Act* (IV *of* 1882), *s.* 75.—In October, 1887, the plaintiff purchased certain lands at a sale held in execution of a decree passed on an unregistered mortgage effected in 1862. The defendant was in possession as mortgagee under a subsequent registered mortgage of 1867. He was not a party to the suit and decree of 1887. The plaintiff sued for possession. The defendant claimed that the plaintiff could not recover possession without paying off his (the defendant's) claim.

Held, that at the execution sale the plaintiff bought the property in dispute free from all subsequent incumbrances, subject only to the right of the defendant, if he so desired, to retain possession.

Held, also, that the plaintiff as purchaser stood in the place of the prior mortgagee and had a right to possession; that the defendant as subsequent mortgagee could not compel the plaintiff to pay off his (the defendant's) mortgage, but that the defendant not having been a party to the suit on the prior mortgage had a right, if he wished to retain possession, to pay off the plaintiff's claim.

Registration under Act III of 1877 does not operate so as to exclude instruments executed before Act XX of 1864 came into operation on the ground of their non-registration. DESAI LALLUBHAI JETHABHAI v. MUNDAS KUBERDAS, 20 B. 390 ... 823

(2) See REGISTRATION ACT (III OF 1877), 20 B. 158.

——7.—Redemption.

(1) *Agreement in a subsequent deed to postpone redemption until payment of another debt—Agreement valid.*—An arrangement contained in a deed executed for a fresh consideration subsequent to a mortgage deed to postpone redemption of the mortgage until the payment of another debt which has not been made a charge on the land, is valid. KRISHNAJI v. MAHESHVAR LAKSHMAN GONDHALEKAR, 20 B. 346 ... 792

(2) *Damdupat—Applicability of the law—Account current—State of account.*—The operation of the rule of *damdupat* is excluded in all mortgages the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be. GOPAL RAMCHANDRA v. GANGARAM ANAND SHET, 20 B. 721 (F.B.) ... 1050

(3) *Decree for payment and redemption within six months—Application for execution of decree after six months had expired—Transfer of Property Act* (IV *of* 1882), *s.* 93.—S. 93 of the Transfer of Property Act (IV of 1882), under which a plaintiff-mortgagor who has obtained a decree for redemption may show cause for extending the time allowed by the decree for redemption, does not apply to decrees made before the Act was put in force. CHENNAYA v. MALKAPA, 20 B. 279 ... 744

(4) Decree obtained by mortgagee for possession until payment of mortgage-debt—Possession taken by mortgagee under decree—Continuance after decree of relation of mortgagor and mortgagee—Sale by mortgagee--Vendor and purchaser—Subsequent suit for redemption by mortgagor against mortgagee and his vendee—Plea by vendee of purchase for value without notice—*Bona fide*, meaning of—Purchaser, meaning of, in art. 134—Limitation Act (XV of 1877), sch. II, art. 134—Limitation—See LIMITATION ACT (XV OF 1877), 19 B. 140.

(5) *Mortgage of joint property—Share of co-owner sold in execution of decree—Subsequent sale of the mortgaged property by all co-owners—Redemption of mortgage—Suit for partition and redemption by purchaser at Court sale—Adverse possession—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 137.—Three undivided brothers (Babaji, Ramchandra and Atmaram) mortgaged part of their joint property (plot 1) in 1870 and the rest (plot 2) in 1874. In 1875 Babaji's share

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Mortgage—7.—Redemption—(*Continued*).

both plots was sold in execution of a decree against him and was purchased by the plaintiff. In 1877 Babaji and his two brothers sold plot 1 to the defendants Nos. 3—6, who at once paid off the mortgage of 1870 and took possession. On the 11th February, 1877, the three brothers paid off the mortgage of 1874 of plot 2 and in the same month mortgaged that plot to the defendants with possession. On 26th August, 1890, the plaintiff sued for possession of Babaji's share by partition and redemption if necessary.

Held, that the suit was barred by art. 137 of the Limitation Act (XV of 1877). Babaji became entitled to possession of his share of plot 1 in 1877 when the mortgage of 1870 was paid off by the defendants, and their possession had been since then adverse to the plaintiff. As to plot 2, Babaji had become entitled to possession of his share therein on the 11th February, 1877, when the mortgage of 1874 was redeemed. GANESH v. RAMCHANDRA, 20 B. 557 ... 937

(6) *Mortgagee with possession—Mortgagee to pay Government revenue—Sale for arrears of revenue—Purchase by mortgagee at sale—Subsequent suit by mortgagor for redemption—Government sale caused by default of mortgagee.*—Where mortgaged property was sold at a Government sale for arrears of revenue,

Held, that if the sale took place owing to the mortgagee's default, it would not affect the mortgagor's right to redeem.

The general rule, that a Government sale for arrears of revenue gives a title against all the world, is subject to the exception that if it is caused by the default of a mortgagee, it does not take away the mortgagor's right to redeem the mortgage to recover the land. KALAPPA v. SHIVAYA, 20 B. 492 ... 692

(7) *Redemption after the expiry of a term—Right of redemption and foreclosure co-extensive—Power expressly given to the mortgagee to call in his money before the expiry of the term—Stipulation unilateral and void of consideration—Right to redeem fettered by confining it to a particular time or to a particular description of persons—Oppressive and unreasonable restraint on the right of redemption—Practice—Parties — Defendant who has assigned interest—No right to be made co-plaintiff - Plaintiff without right of action — Attempt to remedy defect by joining others in whom right supposed to lie—Civ. Pro. Code (Act XIV of 1882), s. 27.*—A defendant who has assigned all his rights in the subject-matter of the suit, and has no longer any interest in it, has no right to be made a co-plaintiff.

A plaintiff who has no right of action when he brings his suit cannot remedy the defect and acquire the right by joining with him persons who have the right of action.

The right of redemption and the right of foreclosure are always co-extensive, and from the postponement of the former the Court will infer an intention to postpone the latter in the absence of express provision on the point; where there is such express provision, giving the mortgagee power to foreclose at any time, any stipulation postponing the mortgagor's right to redeem is unilateral and void of consideration.

A Court of Equity will not enforce any agreement in restraint of the right of redemption which is oppressive and unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage.

A mortgagor cannot, by any contract entered into with the mortgagee at the time of the mortgage, give up his right of redemption or fetter it in any manner by confining it to a particular time or a particular description of persons. SAYAD ABDUL HAK v. GULAM JILANI, 20 B. 677 ... 1021

(8) *Sub-mortgage—Redemption—Suit by original mortgagor against mortgagee and sub-mortgagee—Death of mortgagee pending suit—Abatement—Parties—Civ. Pro. Code (Act XIV of 1882), s. 368—Practice—Procedure.*—Plaintiff sued to redeem a mortgage passed by his deceased father to defendant No. 1 and joined defendant No. 2 as being the sub-mortgagee of defendant No. 1 and in possession of the property. After suit defendant No. 1 died, and no steps were

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taken by the plaintiff within time to make his legal representatives parties. The suit was, however, allowed to be continued against defendant No. 2 and a redemption decree was passed in plaintiff's favour.

Held, on second appeal, that defendant No. 2 being the sub-mortgagee and not the assignee of defendant No. 1, on the death of the latter no cause of action survived to the plaintiff against defendant No. 2, and the suit abated under s. 368 of the Civ. Pro. Code (Act XIV of 1882). PADGAYA v. BAJI, 20 B. 549 ... 931

(9) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 318, 558; 20 B. 469.

(10) See CHRISTIAN, 19 B. 680.

(11) See PRACTICE, 19 B. 276; 20 B. 196.

———8.—Sale.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 121.

(2) See KHOTI LAND, 19 B. 528.

———9.—Simple.

Charge—Bond—Security pledge (taran gahan)—Hypothecation—Simple mortgage without possession—Limitation Act (XV of 1877), sch. II, arts. 132 and 147—See LIMITATION ACT (XV OF 1877), 20 B. 408.

———10.—Usufructuary.

Sale of the mortgaged land—Regulation V of 1827, *s.* 15, *cl.* (3).—Where a mortgage provided that the mortgagee was to take possession of the land and enjoy the profits in lieu of interest, and the mortgagor was at liberty to recover possession in any year on payment of the principal amount.

Held, that the mortgage was usufructuary mortgage, and under the circumstances of the case it was not the intention of the parties that the property should be sold, and that the mortgage-deed contained a special agreement which took the case out of the provisions of cl. (3), s. 15 of Reg. V of 1827, which was the law in force at the time the mortgage was effected. SADASHIV ABAJI BHAT v. VYANKATRAO RAMRAO SHINDE, 20 B. 296 ... 756

Moveables.

See TRUST, 20 B. 511.

Municipality.

(1) City of Bombay Municipal Act (III of 1888), s. 248—Fazendar—Fazendar not liable to provide privy accommodation—"Owner"—"Premises"—Meaning of the words—Construction—Construction of statutes—See FAZENDAR, 20 B. 617.

(2) *City of Bombay Municipal Act* (III *of* 1888), *ss.* 298, 299, 301, 504, 527 *—Land taken by the Municipality for street improvement—Compensation—Dispute as to amount of compensation—Limitation.*—In 1891 the Municipal authorities of Bombay gave notice to the plaintiffs under s. 299 of Bombay Act III of 1888 that they required 23·30 square yards of the plaintiff's land for street improvement. On the 14th December, 1891, the plaintiff gave possession of the land to the Municipality, and on 27th January, 1892, claimed Rs. 60 per square yard as compensation. By letter dated 23rd February, 1892, the Municipal Commissioner (without prejudice) offered Rs. 50 per square yard as compensation, and stated that on the plaintiff producing the title-deeds and papers to establish his title, the necessary documents in connection with the payment would be prepared. Nothing further took place in the matter until the 14th February, 1894, on which date the plaintiff wrote a letter to the Municipal Commissioner in which without mentioning any sum he requested the payment of the amount which might be due to him as compensation for his land taken by the Municipality. The Commissioner refused to pay the compensation, contending that the plaintiff's claim was time-barred. The plaintiff thereupon brought this suit claiming Rs. 1,165 (being at the rate of Rs. 50 per

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square yard) as compensation for the land taken up by the defendant or in the alternative for that sum as damages for the breach of contract to pay purchase money for the land. The defendant pleaded (1) that notice under s. 527 of the Municipal Act III of 1888 was necessary before suit filed, and (2) that the suit was barred by limitation. The Chief Judge of the Small Cause Court found for the defendant with costs and dismissed the suit contingent on the opinion of the High Court.

On a case stated for the High Court,

Held (1) that notice under s. 527 of Act III of 1888 was not necessary, that section not being applicable to suits brought to enforce payment of compensation under s. 301 of the Act;

(2) that the suit was not barred by limitation.

Per FARRAN, J.—A suit against the Municipality of Bombay for compensation for land acquired by the Municipality under s. 299 of Act III of 1888 is not an action of tort or *quasi*-tort, but a simple action for the price of land, which the terms of s. 301 of the Act impose upon the Commissioner to pay. The obligation to pay that price is of the same nature, (1) whether the owner assents to the valuation of the land placed upon it by the Commissioner, (2) whether the value is determined by the Chief Judge of the Small Cause Court, or (3) whether it is left undetermined. Section 527 does not apply to any of these three cases. In all of them the obligation to pay is imposed by s. 301 and does not arise from the manner in which the amount of the price to be paid is arrived at.

2. Section 504 prescribes the only mode in which in case of dispute the value of the land can be determined. If the owner of land disputes the Commissioner's valuation he must apply to the Chief Judge of the Small Cause Court within a year. If he does not do so, the result is that he loses the power of effectually disputing the Commissioner's valuation, but does not lose his right to the amount of the valuation.

3. The owner of land has a remedy independent of the provisions of s. 504. The section only deals with cases where there is a dispute as to the value of the land, and leaves untouched those cases where there is no such dispute, but where the Commissioner for some reason declines to pay. In such cases the owner is left to his ordinary remedy, no special mode of procedure being prescribed. Cases in which there has been a dispute, but in which the owner abandons his claim to dispute the valuation of the Commissioner, fall within the latter category. MANEKLAL MOTILAL v. THE MUNICIPAL COMMISSIONER OF BOMBAY, 19 B. 407 = Chitty's S.C.C.R. 430 ... 275

(3) *City of Bombay Municipal Act* (*Bom. Act* III *of* 1888), *s.* 353—*Notice to a house-owner to reduce the height of the building given more than three months after its completion*—"*Completion*"—*Meaning of the word.*—One Raghuhath Makund was served with a notice, under s. 353 of the City of Bombay Municipal Act (Bom. Act III of 1888) requiring him to reduce the height of a building which he had erected. The building was completed in June, 1893, and the notice was issued on 13th January, 1894. Raghunath was prosecuted for not complying with this notice. He contended that the notice was time-barred, as it had not been given within three months after the completion of the building. In answer to this plea it was urged, on behalf of the Municipality, that the building could not be said to have been completed, unless and until such accommodations as privies and cesspools had been executed in accordance with the requirements of the Health Department, and that, therefore, the notice was within time.

Held, that the notice was time-barred. The word "completion" in s. 353 of Bombay Act III of 1888 must be taken in its ordinary sense, and the Court cannot read into the section "in accordance with sanitary regulation" or "sanitary officers' opinion." *In re* RAGHUNATH MAKUND, 19 B. 372 ... 251

Municipality—*(Continued)*. PAGE

(4) *District Municipal Act (Bom. Act VI of* 1873), s. 11—*Bombay Act* II *of* 1884, *s.* 57—*Liability to pay taxes—Halalkhore tax—Water tax—Notice—Notice to Municipal Commissioners—Burden of proof —Presumption—Indian Evidence Act (I of* 1872), *s.* 114, *ill.* (e).—A defendant who in answer to a claim for arrears of taxes by a Bombay District Municipality alleges that the taxes were illegal.

(1) because no notice had been given him under s. 57 (Bom. Act II of 1884) ;

(2) because no notice had been issued by the Municipality to the Commissioners under s. 11 of Bombay Act VI of 1873 ;

must prove the defence and in the absence of such proof the Court will presume that the Municipality has used the regular procedure, and that the common course of business has been followed in the particular cases.

The liability to pay the halalkhore tax does not arise until after notice has been given under s. 57 of the Act (Bom. Act II of 1884). MUNICIPALITY OF SHOLAPUR v. SHOLAPUR SPINNING AND WEAVING COMPANY, 20 B. 732 ... 1057

(5) *District Municipal Act (Bom. Act* VI *of* 1873), *s.* 17—*Public street— —Street — Construction of Act—The City of Bombay Municipal Act (Bom. Act* III *of* 1888), *s.* 3.—In a suit brought by the plaintiff against the Municipality of Ahmedabad, the question was whether a certain street was a public street within the contemplation of the Bombay District Municipal Act (Bom. Act VI of 1873). The District Judge, on the evidence and having regard especially to the fact that the street in question was protected by a gate closed at night by a *polia*, or watchman, who lived over the gate, and was under the control of and paid by the owners of the houses in the street, *held* that there had been no dedication of the land to the public, and that the public had not acquired such a right of going over it as to make it a public street vested in the Municipality. On second appeal by the defendant the High Court refused to interfere with the decision of the lower Court.

In the absence of a definition of a public street in the Bombay District Municipal Act VI of 1873 the High Court refused to apply the definition contained in the City of Bombay Municipal Act III of 1888. AHMEDABAD MUNICIPALITY v. MANILAL UDENATH, 20 B. 146 ... 655

(6) *District Municipal Act (Bom. Act* VI *of* 1873) *s.* 33, *cl.* 1—*Notice of proposed building—Want of such notice—Want of permission to build— —Demolition of building.*—On the 18th August, 1890, plaintiffs sent a notice to the Town Municipality of Umreth, intimating their intention to erect a building on their land, and giving a rough sketch plan of the land intended to be built upon. In this notice plaintiffs did not expressly state their intention to build the wall in dispute.

On the 28th August, 1890, the Municipality wrote to the plaintiffs, requiring them to furnish a plan showing the design of the proposed building with its measurements.

On 30th September, 1890, the plaintiffs, without furnishing the plan as required, built a wall on their land. Thereupon the Municipality gave a notice to the plaintiffs requiring them to pull it down, as it had been built without their permission. The plaintiffs having failed to comply with this notice, the wall was demolished, and its materials were carried away by the Municipal servants. Thereupon the plaintiffs sued the Municipality to recover damages for the wrongful demolition of the wall.

Held, that the plaintiffs had contravened the provisions of cl. 1 of s. 33 of Bombay Act VI of 1873, inasmuch as they had built the wall without giving any notice, or (if they did give notice) without affording the information required by the Municipality. The Municipality were, therefore, justified in ordering the wall to be demolished. DAVE HARISHANKAR v. THE TOWN MUNICIPALITY OF UMRETH, 19 B. 27 ... 18

Municipality—(*Concluded*). PAGE

(7) *District Municipal Act* (*Bom. Act* VI *of* 1873), *ss.* 42. *cl.* (1), 48 *and* 75 —*Public street*—*Obstruction*—*Removal*—*Notice*—*Corporate bodies*—*Practice*.—Under the District Municipal Act (Bom. Act VI of 1873) a Municipality has power to have all obstructions in a public street removed, whether the obstructions were placed there lawfully or not. The only distinction which the Act draws is between obstructions erected or placed before the Act came into operation and those which have been erected or placed since it came into operation. As to the former, s. 42, cl. (1) of the Act provides that notice should be given, and if legally placed on the street, compensation should be awarded for their removal. As to the latter, the Municipality can remove them under s. 48 even without giving any notice.

The public have a right of passing over the whole of a street if it is a public street.

It is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their power." THE AHMEDABAD MUNICIPALITY v. MANILAL UDENATH, 19 B. 212 ... 144

(8) *District Municipal Act* (*Bom. Act* VI *of* 1873), *s.* 54—"*Offensive liquid*"—*Does not include mere waste or dirty water*.—A person does not render himself liable to a penalty under s. 54 of Bombay Act VI of 1873 for allowing mere waste or dirty water to run from his premises on to a public street, unless the water is offensive." *In re* GUBLABDAS BHAIDAS, 20 B. 83 ... 614

Music.

See ACT IV OF 1890 (BOMBAY DISTRICT POLICE), 19 B. 737.

Native Christian.

(1) *Conversion*—*Koli caste of fishermen*—*Converts to Christianity from Hinduism*—*Succession Act* (X *of* 1865), *ss.* 2 *and* 331—*Inheritance*—*Custom*—*Evidence of custom of inheritance*—*Practice*—*Koli caste*.—The Indian Succession Act (X of 1865) and the rules of inheritance prescribed by it, apply to Hindus who have become Christians; and evidence to show that they and the community to which they belong have retained the Hindu custom of inheritance, is inadmissible. DAGREE v. PACOTTI SAN JAO, 19 B. 783 ... 525

(2) Mortgage—Redemption—Decree against manager alone on the mortgage how far binding on the property—Parties—Practice—Will—Joint family—Ancestral property—Right of Christian of Salsette to deal by will with his share in ancestral property—Christian—Conversion from Hinduism to Christianity, effect of—Hindu convert—Salsette, law applicable to Christian inhabitants of—Succession—Inheritance—Co-parcenary—Primogeniture—Hindu law, how far applicable—Manager of family—Mortgage by manager when binding on family property—See CHRISTIAN, 19 B. 680.

(3) See CONVERSION, 20 B 53.

Native Indian Subject.

See PENAL CODE (ACT XLV OF 1860), 19 B. 105.

Native State.

See EVIDENCE ACT (I OF 1872), 20 B. 795.

Nazar.

See LIMITATION ACT (XV OF 1877), 20 B. 408.

Negotiable Instruments Act (XXVI of 1881).

(1) See HUNDI, 20 B. 133.

(2) *Ss.* 30, 93 *and* 106—Hundi—*Local usage*—Hundi *drawn by a manager of Hindu family*—*Liability*—*Notice of dishonour to the drawer necessary*.—The Negotiable Instruments Act (XXVI of 1881) in the absence of local usage to the contrary, applies to *hundis*.

A member of a Hindu family whom it is sought to make liable by a suit on a *hundi* drawn by the manager of the family is entitled to urge that no notice of dishonour had been given to the manager

Negotiable Instruments Act (XXVI of 1881)—(*Concluded*). PAGE.

(drawer) so as to make the latter liable under s. 30 of the Negotiable Instruments Act (XXVI of 1881). KRISHNASHET v. HARI VALJI, 20 B. 488 ... 889

(3) Ss. 44, 45 and 118—See EVIDENCE, 20 B. 367.

(4) S. 46—See STAMP, 19 B. 635

New Trial.

See FRAUD, 19 B. 749.

Noise.

See ACT IV OF 1890 (BOMBAY DISTRICT POLICE), 19 B. 737.

Notice.

(1) To quit—See LANDLORD AND TENANT, 19 B. 150 ; 20 B. 354, 759.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 697.

(3) See HINDU LAW (WIDOW), 19 B. 36.

(4) See INSOLVENT, 20 B. 636.

(5) See MUNICIPALITY, 19 B. 27, 212, 372 ; 20 B. 732.

(6) See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), 20 B. 488.

(7) See PRACTICE, 20 B. 541.

(8) See REGISTRATION, 20 B. 290.

(9) See VENDOR AND PURCHASER, 19 B. 391.

Notification.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 145.

Nuisance.

(1) Noise—Music in neighbouring house—Bombay District Police Act (Bombay Act IV of 1890), s. 48, cl. (*b*)—"Near a street"—Meaning of the words—Power of the police to regulate the playing of music in private houses—Construction—See ACT IV OF 1890 (BOMBAY DISTRICT POLICE), 19 B. 737.

(2) See EASEMENT, 19 B. 420.

Objection.

(1) See EXECUTION OF DECREE, 19 B. 544.

(2) See HINDU LAW (ADOPTION), 19 B. 331.

(3) See VENDOR AND PURCHASER, 19 B. 43.

Obstruction.

(1) See EXECUTION OF DECREE, 20 B. 175.

(2) See MUNICIPALITY, 19 B. 212.

Occupancy Tenancy.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 78.

Offence.

See PENAL CODE (ACT XLV OF 1860), 19 B. 105.

Office Day.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 745.

Official Assignee.

(1) Right of Official Assignee to attached property—Insolvency—Attachment before judgment—Insolvency of defendant whose property has been attached before judgment—Practice—Procedure—Civ. Pro. Code (Act XIV of 1882), ss. 278, 281 487, and 351—Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21)—See INSOLVENCY, 20 B. 403.

(2) See INSOLVENCY, 19 B. 232.

(3) See INSOLVENT, 20 B. 636.

Official Liquidators.

See COMPANY, 20 B. 654.

Opium.

See ACT I OF 1878 (OPIUM), 19 B. 626.

Order in Council, dated 29th November 1894.

S. 6—See ZANZIBAR, 19 B. 741.

Parsis.

See SUCCESSION ACT (X OF 1865), 19 B. 828.

Parties.

(1) Administration suit—Receiver—Receiver appointed where executor is in possession—Suit against executor where will not proved—Will of Mahomedan testator—Civ. Pro. Code (XIV of 1882), s. 438—See RECEIVER, 19 B. 83.

(2) See CHRISTIAN, 19 B. 680.

(3) See HINDU LAW (ADOPTION), 20 B. 202.

(4) See HINDU LAW (JOINT FAMILY), 20 B. 435.

(5) See LIMITATION ACT (XV OF 1877), 20 B. 8.

(6) See MORTGAGE (REDEMPTION), 20 B. 549, 677.

(7) See PARTNERSHIP, 20 B. 15.

(8) See PRACTICE, 19 B. 276 ; 20 B. 537.

Partnership.

(1) *Death of partner—Subsequent recovery of asset by surviving partner—Suit by administrator of deceased partner against surviving partner for recovered assets—Suit for partnership account—Limitation Act* (XV *of* 1877), *ss.* 7 *and* 17—*Jurisdiction.*—In 1889 one Hemabai, a widow and a partner in a firm carrying on business in partnership with two persons, *viz.*, Goculdas and Bhugwandas (defendants Nos. 1 and 2), in Sind and at Behrin in the Persian Gulf, died, and the partnership was then dissolved. She had no children, but it was alleged that she had adopted one Purshotam, the brother of the second defendant. On the 13th February, 1890, the guardian of one Kissondas, a minor (her husband's nephew), applied to the High Court of Bombay for letters of administration to her estate, alleging that Kissondas was her heir and next of kin. A *caveat* was filed by her father and others, in which they denied that Kissondas was her heir, and alleged that Purshotam had performed her funeral ceremonies. The matter came on as a suit on the 19th February, 1894, when an order was made, without prejudice to any of the questions raised by the issues, dismissing the application and ordering letters of administration to Hemabai's estate to issue to the Administrator General of Bombay. Letters of administration were accordingly granted to him on the 30th March, 1894.

In the meantime, however, *viz.*, on the 12th April, 1893, Bhugwandas (defendant No. 2) had filed three suits in the High Court of Bombay, in the name of himself and Goculdas (defendant No. 1), as surviving partners of Hemabai's firm, to recover certain debts due to that firm. Disputes subsequently arose between Bhugwandas and Goculdas, and by a consent order of the 22nd July, 1893, it was ordered that any moneys recovered in the said three suits should be paid over to a receiver (defendant No. 3), to be held by him until further order. On the 1st August, 1893, consent decrees were passed in the above three suits for a total sum of Rs. 28,335, which was forthwith handed over to the receiver.

On the 22nd April, 1894, this suit was filed by the Administrator General of Bombay as administrator of Hemabai appointed as above stated. He claimed to recover the whole sum paid to the receiver, alleging that the first and second defendants as her partners were largely indebted to the firm, and that the money really belonged to her estate. He prayed that the receiver might be directed to pay over the money to him, and that, if necessary, the partnership accounts should be taken. The second defendant (*inter alia*) pleaded that the suit was one for partnership accounts, and was barred by limitation, and also that the High Court of Bombay had no jurisdiction to try it.

Partnership—(*Concluded*). PAGE

Held, that the Court had jurisdiction to hear the suit. The cause of action alleged was that the second defendant was endeavouring, under cloak of his position as surviving partner, to get into his hands a sum of money within the jurisdiction of the Court, with a view to deprive the representatives of his deceased partner of it, and to employ it for his own purposes. That was, at all events, part of the cause of action, and leave to sue had been obtained under cl. 12 of the Letters Patent, 1865.

Held, also that s. 17 of the Limitation Act (XV of 1877) applied, and that under its provisions the suit was not barred. RIVETT-CARNAC v. GOCULDAS SOBHANMULL AND OTHERS, 20 B. 15 ... 568

(2) See ACT III OF 1875 (BOMBAY TOLLS ON ROADS AND BRIDGES), 20 B. 668.

(3) See VALUATION, 20 B. 265.

Patelki Inam.

See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 747.

Pauper.

(1) Application for leave to appeal in *forma pauperis*—Practice—Procedure—Limitation Act (XV of 1877), sch. II, arts. 170 and 178—See LIMITATION ACT (XV OF 1877), 19 B. 48.

(2) *Application for leave to sue as pauper—Rejection of application—Extension of time granted for payment of Court-fees—Payment of fees after period of limitation for suit has expired—Limitation Act* (XV *of* 1877), *s.* 4—*Practice—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 409 *and* 413.—On the 2nd February, 1890, the plaintiffs applied for leave to sue in *forma pauperis*. After investigation the Court on the 15th July, 1890, refused leave, but on the plaintiff's application granted him time to pay the Court-fees. He paid the fees on 12th August, 1890. At this date the suit was barred, and the defendant pleaded limitation. The plaintiff contended that the suit should be taken as instituted at the date of his application for leave to sue as a pauper. The lower Court held the suit barred, and dismissed it.

Held, confirming the decree, that the plaintiff's application to sue as a pauper having been disposed of under s. 409 of the Civ. Pro. Code (Act XIV of 1882) there was no proceeding pending which could be continued and kept alive by the payment of Court-fees. On the rejection of an application for leave to sue as a pauper the only course open to the applicant is that declared in s. 413, *viz.*, to institute a suit, and the date of the institution of that suit for the purposes of limitation is the actual date thereof. The plaintiff could not then be regarded as a pauper, and s. 4 of the Limitation Act (XV of 1876) would have no application. KESHAV RAMCHANDRA v. KRISHNARAO, 20 B. 508 902

Pecuniary Interest.

See CRIM. PRO. CODE (ACT X OF 1882), 20 B. 502.

Penal Code (Act XLV of 1860).

(1) See ZANZIBAR, 20 B. 480.

(2) Ss. 107, 408—See EVIDENCE ACT (I OF 1872), 19 B. 362.

(3) *Ss.* 109, 115, 148, 302—*Abetment—Abetment in British India of an offence committed in foreign territory not an offence under the Penal Code—Offence—Crim. Pro. Code* (*Act* X *of* 1882), *s.* 188.—An abetment in British India by a British subject of an offence committed in foreign territory is not an offence punishable under the Indian Penal Code (XLV of 1860), and cannot, therefore, be tried by a Court in British India.

The accused, a Native Indian subject of Her Majesty, was committed to the Court of Sessions for abetting the commission of murder or of rioting under ss. 302 and 147 of the Indian Penal Code. The alleged abetment consisted of words spoken in British territory by the accused, inciting certain Portuguese subjects to kill one Bhana

Penal Code (Act XLV of 1860)—(*Continued*).

if he attempted to remove the produce of certain lands situate in the Portuguese territory of Daman. A disturbance afterwards occurred at Daman in connection with this matter, in which one man was killed and another wounded. Thereupon the Governor-General of Portuguese India moved the Government of Bombay to bring the accused to justice as the instigator of the murder. The Government of Bombay being of opinion that s. 188 of the Code of Criminal Procedure (Act X of 1882) was applicable to the case, passed a Resolution in the Political Department directing the District Magistrate to take the necessary action in the matter. The District Magistrate thereupon committed the accused to the Court of Session on a charge of abetment of murder or of rioting.

Held, quashing the commitment, that the alleged abetment was not an offence punishable under the Indian Penal Code, and that, therefore, the Sessions Court had no jurisdiction to try the accused.

Held, also that s. 188 of the Code of Criminal Procedure (Act X of 1882) had no application to the present case, the alleged offence of abetment not having been committed outside British India. QUEEN-EMPRESS v. GANPATRAO RAMCHANDRA, 19 B. 105 ... 70

(4) Ss. 109 and 409—See FRAUD, 19 B. 749.

(5) Ss. 109 and 417—See CRIM. PRO. CODE (ACT X OF 1882), 20 B. 145.

(6) Ss. 182, 211 and 499—See DEFAMATION, 19 B. 717.

(7) *Ss.* 211, 500—*Falsely charging a person with an offence—Defamation—Defamatory statement made by a person examined in the course of an official or departmental inquiry—Privilege—Qualified privilege—Crim. Pro. Code* (*Act X of* 1882), *ss.* 191, 197.—The complainant was Deputy Collector and First Class Magistrate of Bijapur. Certain petitions said to emanate from the accused were received by Government charging the complainant with bribery and corruption. Government thereupon ordered Mr. Monteath, Collector and Magistrate of the district, to enquire into the matter. Mr. Monteath enforced the attendance of the accused by writing to the police, who brought the accused before him. In answer to questions put to him, the accused denied having sent any petition to Government, but stated that he had paid a bribe to the complainant to secure the acquittal of his son, who was then on his trial on a charge of theft before him. Mr. Monteath examined other witnesses and reported the result of his inquiry to Government. Government permitted the Deputy Collector to prosecute the accused, and he accordingly lodged a complaint against the accused for defamation, under s. 500 of the Indian Penal Code (XLV of 1860) in having stated to Mr. Monteath, in the course of the inquiry, that he (the complainant) had accepted a bribe from him.

The trying Magistrate was of opinion that the offence fell under s. 211 of the Penal Code. He at first framed charges both under ss. 211 and 500. But subsequently he struck out the charge of defamation under s. 500 and convicted the accused under s. 211 of making a false charge.

On appeal, the Joint Sessions Judge was of opinion that the charge under s. 211 could not be maintained, as the accused had not made any "false charge" to a Court or officer having jurisdiction to investigate it. As regards the charge of defamation, he was of opinion that the fact of bribery was not proved. But he held that in making the statement to Mr. Monteath the accused had acted in good faith, and that his case fell under exception 8 to s. 499 of the Indian Penal Code. He, therefore, reversed the conviction under s. 211 and acquitted the accused of defamation under s. 500 of the Code. Against this order of acquittal Government appealed to the High Court.

Held that the accused was guilty of defamation.

Held, also, that s. 211 of the Penal Code had no application to the present case. The accused was brought before Mr. Monteath against his will. He did not make any complaint before that officer; and though what he stated, in answer to questions put to him, was

defamatory, the imputations did not constitute a "false charge" within the meaning of s. 211, as he did not intend to set the criminal law in motion.

Per RANADE, J.—The words "falsely charging" in s. 211 must be construed along with the words which speak of the "institution of proceedings." These latter words are obviously used in a technical and exclusive sense, and the same restricted sense must be given to the words which relate to a false charge as implying a false complaint.

Held, also, that, in the absence of sanction from Government, the inquiry held by Mr. Monteath, the District Magistrate, was not a taking cognizance of the offence.

Held, also, that as Mr. Monteath was not sitting as a "Court" when he made the inquiry and examined the accused, the accused was not entitled to claim an absolute protection from a charge of defamation as a witness in a judicial proceeding The accused was only entitled to a qualified privilege depending on the exceptions to s. 499 of the Indian Penal Code.

Per RANADE, J.—The High Court, in exercising jurisdiction in the matter of appeals against acquittals, should confine its exercise to the particular grounds of objection which are raised by Government against the acquittal complained of. QUEEN-EMPRESS v. KARIGOWDA, 19 B. 51 ... 34

(8) *S.* 279—*Rash riding on a public way.*—The accused was convicted of a rash riding on a public way under s. 279 of the Indian Penal Code (Act XLV of 1860). He contended that his conviction was bad, on the ground that there was no proof that any person was on the road in question at the time when he was alleged to have ridden in a rash or negligent manner.

Held, that though there was no such proof, it was competent to the Court to take into its consideration the probability of persons using the public way being placed in danger by the act of the accused. The accused's act came within the mischief struck at by s. 279 of the Indian Penal Code and was included within its terms. QUEEN-EMPRESS v. HORMUSJI NOWROJI LORD, 19 B. 715 ... 479

(9) *Ss.* 292 *and* 293—"*Obscene*" —*Meaning of the word.*—In interpreting the word "obscene" in ss. 292 and 293 of the Indian Penal Code, the Courts may rightly follow *Reg* v. *Hicklin* (L.R., 3 Q B., 360) where Lord Cockburn, C.J., says: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

Whether a publication is obscene, is a question of fact. QUEEN-EMPRESS v. PARASHRAM YESHWANT, 20 B. 193 ... 687

(10) Ss. 299 and 300—Verdict of jury—Special verdict—Murder—Culpable homicide—Grave and sudden provocation—Loss of self-control—Burden of proving loss of self-control on accused—Crim. Pro. Code (Act X of 1882), ss. 238, 303 and 307—High Court's power of interfering with the verdict of a jury—See JURY, 20 B. 215.

(11) S. 304—See ZANZIBAR, 19 B. 741.

(12) *Ss.* 320 *and* 326—*Grievous hurt—Remaining in hospital for twenty days—Presumption.*—The accused were charged with causing grievous hurt. The Joint Sessions Judge, relying apparently on evidence that the injured person remained in a hospital for the space of twenty days, drew from that circumstance alone the inference that he was during that period unable to follow his ordinary pursuits, and convicted the accused under s. 326 of the Indian Penal Code (XLV of 1860).

Held, reversing the convictions, that in the absence of any evidence that the injured person was unable to follow his ordinary pursuits during the space of twenty days, such an inference could not legally be drawn.

Penal Code (Act XLV of 1860)—(*Concluded*). PAGE

Before a conviction can be passed for the offence of grievous hurt, one of the injuries defined in s. 320 of the Indian Penal Code must be strictly proved, and that the eighth clause is no exception to the general rule that a penal statute must be construed strictly.

Proof of being in a hospital for the space of twenty days cannot be taken as equivalent to proof of grievous hurt. QUEEN-EMPRESS v. VASTA CHELA, 19 B. 247 ... 168

(13) *S.* 330—*Using violence for the purpose of extorting a confession—Abetment—Illegal omission to act—"Respondeat superior"—Bombay Police Act (Act IV of 1890), ss. 51 and 52—Duty of a police officer to shelter a person in custody.*—A policeman who stands by, acquiescing in an assault on a prisoner committed by another policeman for the purpose of extorting a confession, is guilty of abetment of an offence under s. 330 of the Indian Penal Code.

Nothing but fear of instant death is a defence for a policeman who tortures any one by order of a superior. The maxim *respondeat superior* has no application in such a case. Under the Bombay Police Act (Act IV of 1890) every police officer is bound to shelter a person in custody, and to arrest persons committing assaults likely to cause grievous bodily injury. If he omits to perform this duty, he is guilty of abetment.

When the law imposes a duty to act on a person, his illegal omission to act renders him liable to punishment. QUEEN-EMPRESS v. LATIFKHAN, 20 B. 394 ... 825

(14) S. 342—See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 72.

(15) *S.* 499—*Defamation—Publication—Mode of publication defamatory though the imputation be true.*—Under s. 499 of the Indian Penal Code the person who publishes, and the person who makes, an imputation are alike guilty of defamation.

A Court may find that an imputation is true and made for the public good, but on considering the manner of the publication (*ex. gr.*, in a newspaper) it may hold that the particular publication is not for the public good, and is, therefore, not privileged. QUEEN-EMPRESS v. JANARDHAN DAMODAR DIKSHIT, 19 B. 703 ... 470

(16) *S.* 499, *Exception 9—Defamation—Privilege of counsel—Good faith—Construction—Construction of statute.*—A pleader, in addressing a Mamlatdar on behalf of his client, who was charged under s. 125 of the Bombay Land Revenue Code (Bombay Act V of 1879) with wilfully removing boundary marks, commented on some of the witnesses for the prosecution, and called them loafers. Thereupon one of those witnesses prosecuted the pleader for defamation. The Magistrate held that there was no justification for the offence, and convicted the pleader, and sentenced him to pay a fine of Rs. 15 under s. 500 of the Indian Penal Code.

Held, reversing the conviction and sentence, that in the absence of express malice (which was not to be presumed) the pleader was protected by exception 9 to s. 499 of the Indian Penal Code.

Held, also that in considering whether there was good faith (*i.e.*, due care and attention) the position of the person making the imputation must be taken into consideration. In the case of an advocate, where express malice is absent, a Court having due regard to public policy would be extremely cautious before depriving him of the protection of exception 9 to s. 499 of the Indian Penal Code.

Semble.—S. 499 of the Indian Penal Code should be construed without reference to the English law. *In re* NAGARJI TRIKAMJI, 19 B. 340 ... 23

(17) *Ss.* 503, 506—*Criminal intimidation.*—A threat of getting a police constable dismissed from the police service is not such a threat of injury as is punishable under s. 503 of the Indian Penal Code (XLV of 1860). QUEEN-EMPRESS v. DADA HANMANT, 20 B. 794.

Penalty.

See BOND, 20 B. 791.

Pension.

See INSOLVENCY, 19 B. 232.

Personal Earnings.

See INSOLVENCY, 19 B. 232.

Pilgrimage Expenses.

See MINOR, 20 B. 61.

Plaint.

(1) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 20 B. 283.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 303.
(3) See POSSESSION, 20 B. 798.
(4) See PRACTICE, 19 B. 323 ; 20 B. 50, 675.
(5) See WILL, 19 B. 320.

Plea.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 86.
(2) See EVIDENCE ACT (I OF 1872), 19 B. 195.

Pleader.

See PRACTICE, 20 B. 293.

Pleadings.

(1) See HINDU LAW (PARTITION), 19 B. 593.
(2) See LANDLORD AND TENANT, 20 B. 759.

Pledge.

(1) See LIMITATION ACT (XV OF 1877), 20 B. 408.
(2) See MINOR, 20 B. 61.

Police.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 72.
(2) See DEFAMATION, 19 B. 717.
(3) See EVIDENCE, 20 B. 165.

Police Officer.

(1) See EVIDENCE ACT (I OF 1872), 19 B. 363.
(2) See PENAL CODE (ACT XLV OF 1860), 20 B. 394.

Police Patel.

Bombay Act VIII of 1867, ss. 10, 11, 12—Duties of the police patel in cases of unnatural or sudden death—Ancient village system of police not affected by the Code of Criminal Procedure (Act X of 1882)—See ACT VIII OF 1867 (BOMBAY VILLAGE POLICE), 19 B. 612,

Political Agent.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 145.

Possession.

(1) *Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Evidence—Failure of plaintiff to prove title—No evidence of defendant's title—Effect of plaintiff's possession—Plaint—Prayer for general relief—Practice—Specific Relief Act* (I *of* 1877), *s.* 42.—The plaintiff who was in possession of certain land sued for a declaration that the defendant had no title to it and that it belonged to him. The plaint also contained a prayer for general relief. At the trial both plaintiff and defendant failed to prove any title to the land, but the plaintiff proved that he had been for ten years in possession and had built a shed on it.

Possession—(*Concluded*). PAGE

Held, that no declaration of this plaintiff's title could be made; but

Held, on the authority of 20 I.A., 99, that the plaintiff was lawfully entitled to the land and to the shed thereon.. GANGARAM v. SECRETARY OF STATE FOR INDIA, 20 B. 798 ... 1103

(2) *Ejectment—Title by possession—Mamlatdar—Finding by Mamlatdar as to possession—Subsequent contrary finding by Civil Court—Mamlatdar's order not conclusive—Suit by party against whom Mamlatdar's order made—Limitation.*—The plaintiff brought this suit to recover possession of certain land which had belonged to her nephew, and of which after his death in 1878 she had assumed the management. In 1881 she brought a possessory suit against the first defendant in the Mamlatdar's Court, which suit was dismissed in January, 1885, the Mamlatdar holding that she had not been in possession. In a civil suit, however, which (pending the proceedings in the Mamlatdar's Court) she had filed against the first defendant in the Court of the Subordinate Judge of Haveri, the Judge found that she had been in possession since 1880, and awarded her damages against the first defendant (who was held to be her farm servant) for crops which had been taken away by him. In 1887, the second defendant as mortgagee from defendant No. 1 obtained a decree against plaintiff in the Mamlatdar's Court awarding him possession of the land, and in execution of that decree the plaintiff was dispossessed in December, 1887.

In 1890 the plaintiff filed this suit to recover possession and for mesne profits since 1887. The defendant pleaded that the plaintiff had no title to the land and that the suit was barred by limitation, inasmuch as the plaintiff had not brought a suit to establish her right within three years after the Mamlatdar's order in 1885 dismissing her possessory suit.

Held, that the Mamlatdar's order of January, 1885, had no conclusive effect and was rendered ineffectual by the subsequent decree of the civil Court; and as the plaintiff continued in possession, notwithstanding that order, down to 1887, the present suit was not barred by limitation, and neither her remedy nor her right to the land was extinguished.

Held, also, that the plaintiff's possession prior to 1887, confirmed as it was by the decree of the civil Court in 1885 and by the finding of the lower Court of Appeal in the present case, must prevail against the defendant, who claimed through plaintiff's farm servant only and whose possession commenced with the disturbance which compelled the plaintiff to bring the suit.

Possession is *prima facie* evidence of title and is primarily exclusive, and it is for him who impugns this exclusive title to show that the possession originated in a way not to affect his own right. KRISHNACHARYA v. LINGAWA, 20 B. 270 ... 738

(3) Joint family—Possession—Joint possession—Co-parcener's right to sue for joint possession of the whole or any part of the joint estate—Co-parcener not bound to sue for partition—See HINDU LAW (JOINT FAMILY), 20 B. 467.

(4) Joint property—Suit by co-owner for exclusive possession—Practice—Procedure—See PRACTICE, 20 B. 627.

(5) Suit for exclusive possession—Joint possession proved at hearing—Procedure—Practice—See PRACTICE, 20 B. 569.

(6) See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 20 B. 491.

(7) See LIMITATION ACT (XV OF 1877), 20 B. 801.

(8) See MINOR, 20 B. 338.

(9) See PRACTICE, 20 B. 753.

Possessory Suit.

(1) See ACT III OF 1876 (BOMBAY MAMLATDARS' COURTS), 19 B. 289; 20 B. 260.

(2) See EXECUTION OF DECREE, 20 B. 351.

(3) See JUDGE, 19 B. 608.

Power of Appointment. PAGE

See HINDU LAW (WILL), 19 B. 647.

Practice.

(1) Adjournment—Dismissal of suit for non-appearance of plaintiff—See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

(2) Crim. Pro. Code (Act X of 1882), s. 431—Appeal by accused against conviction—Death of appellant—Abatement of appeal—Appeal—Remedy open to the deceased appellant's heirs—See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 714.

(3) Execution—Application for—Form of application—Procedure—Civ. Pro. Code (XIV of 1882), ss. 235, cl (*j*) and 260—Decree—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 34.

(4) Execution—Stay of execution on giving security—Subsequent execution—Default of judgment-debtor—Surety—Liability of surety in execution—See SURETY, 19 B. 578.

(5) *Jurisdiction—Cause of action arising out of jurisdiction—Addition of a defendant residing out of jurisdiction in a suit brought against other defendant under cl.* 12 *of Letters Patent*, 1865—*Fresh leave to sue such new defendant necessary—Hindu law—Minor—Liability of minor for debt—Ancestral trade carried for benefit of minor by the minor's natural guardian—Minor bound by the acts of the guardian.*—Where a defendant is added who does not reside within the jurisdiction of the High Court and against whom the cause of action has not arisen wholly within that jurisdiction, leave must be obtained under cl. 12 of the Letters Patent, 1865, even if leave was obtained when the suit was originally filed.

Under Hindu law where an ancestral trade descends upon a minor as the sole member of the family, and the ancestral trade is carried on under the superintendence of the minor's natural guardian, for the benefit of herself (she having a claim for maintenance) and the said minor, the minor will be bound by all acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade. RAMPARTAB v. FOOLIBAI, 20 B. 767 ... 1082

(6) Jury—Verdict—Special verdict—Duty of Judge—Practice—Procedure—Crim. Pro. Code (Act X of 1882), ss. 298 and 302—See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 735.

(7) Objection taken for the first time in appeal—See HINDU LAW (ADOPTION), 19 B. 331.

(8) Parties—Defendant who has assigned interest—No right to be made co-plaintiff—Plaintiff without right of action—Attempt to remedy defect by joining others in whom right supposed to lie—Civ. Pro. Code (Act XIV of 1882), s. 27—Mortgage—Redemption after the expiry of a term—Right of redemption and foreclosure co-extensive—Power expressly given to the mortgagee to call in his money before the expiry of the term—Stipulation unilateral and void of consideration—Right to redeem fettered by confining it to a particular time or to a particular description of persons—Oppressive and unreasonable restraint on the right of redemption—See MORTGAGE (REDEMPTION), 20 B. 677.

(9) Parties—Procedure—Hindu law—Joint family—Bond given in name of one member of joint family for loan made out of joint family funds—Suit on bond—Right of such member to sue alone—Other members not necessary parties—See HINDU LAW (JOINT FAMILY), 20 B. 435.

(10) Pauper—Application for leave to sue as pauper—Rejection of application — Extension of time granted for payment of Court-fees — Payment of fees after period of limitation for suit has expired—Limitation Act (XV of 1877), s. 4—Civ. Pro. Code (Act XIV of 1882), ss. 409 and 413—See PAUPER, 20 B. 508.

(11) *Possession—Suit for exclusive possession—Joint ownership proved at hearing—Procedure.*—Exclusive possession can only be awarded on proof of exclusive title.

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If a case not alleged by the plaintiff is disclosed in the evidence, the Court can allow it to be set up, provided a specific issue is raised on it and the defendant is given an opportunity of meeting it. PARSHRAM v. MIRAJI, 20 B. 569 ... 945

(12) Procedure—Amendment of plaint—Civ. Pro. Code (Act XIV of 1882), ss. 53, 562 and 582—Remand—Appellate Court's power to amend plaint—Suit for rent converted into one of ejectment—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 303.

(13) *Procedure—Amendment of plaint—Original form of plaint the test of jurisdiction.*—A plaint praying for a declaration that a certain tax was illegal and also for damages for illegal entry into the plaintiff's house was presented to the Court of the First Class Subordinate Judge of Surat. The Judge amended the plaint by striking out the portion "regarding the reliefs other than the relief for damages," and then holding that the claim for damages would lie only in the Small Cause Court, returned the plaint for presentation in that Court.

Held, that the Subordinate Judge was not justified in returning the plaint at that stage of the proceedings. The shape in which the suit was originally instituted is the test of jurisdiction. MOTABHAI v. SURAT CITY MUNICIPALITY, 20 B. 675 ... 1019

(14) Procedure—Appeal by accused—Order rejecting appeal as barred by limitation—Review of such order—Finality of judgments in criminal matters—Crim. Pro. Code (X of 1882), ss. 421, 430—Criminal Procedure—See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 732.

(15) Procedure—Arbitration—Application to file award—Civ. Pro. Code (Act XIV of 1882), ss. 525, 526—Objections as to factum or validity of submission and award—Ss. 521 and 522 of the Civ. Pro. Code (Act XIV of 1882)—See ARBITRATION, 20 B. 596.

(16) Procedure—Bond—Hundi—Dishonour—Stamp—Penalty—Offer to pay stamp duty and penalty in second appeal not allowed—See BOND, 20 B. 791.

(17) *Procedure—Civ. Pro. Code (Act XIV of 1882), ss. 2 and 136—Order dismissing a suit—Decree—Appeal.*—An order dismissing a suit under s. 136 of the Civ. Pro. Code (Act XIV of 1882) is a decree under the definition contained in s. 2 of the Code, and as such is appealable. MANSINGJI v. MEHTA HARIHARRAM NARHARRAM, 19 B. 307 ... 208

(18) *Procedure—Civ. Pro. Code (Act XIV of 1882), s. 39—Pleader—Pleader duly appointed by a party to a suit cannot delegate his authority to another pleader*—Ex parte *decree.*—The applicant (defendant No. 2) was one of two defendants in a suit in the Court of Small Causes in Bombay. He and his co-defendant (defendant No. 1) appointed separate pleaders (K. and W.) to conduct their case. On the day of hearing the applicant was unavoidably unable to be present, and his pleader (K.) being also engaged elsewhere requested W., the pleader of the other defendant in the suit, to hold his brief and to conduct the case for both defendants. W. did so. A decree was passed against both defendants. The applicant subsequently applied to the Full Court under s. 37 of the Presidency Small Causes Court Act (XV of 1882) for a new trial on the ground that he had not been represented at the hearing and that the decree had been passed against him *ex parte*. The Full Court refused the application, holding that the applicant had been represented by a pleader, and that the decree against him was not *ex parte*. The appellant then applied to the High Court in its extraordinary jurisdiction.

Held, discharging the order of the Full Court, that the decree against the applicant was an *ex parte* decree. K., who was the applicant's duly appointed pleader, could not delegate his authority to W., and as the applicant was not himself present, the decree was *ex parte*. W. was not the duly appointed pleader of the applicant and could not, therefore, represent him at the hearing ; see s. 89 of the Civ. Pro. Code (Act XIV of 1882). The High Court sent back the case

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to the Small Causes Court to deal with the application for a new trial on its merits. SHIVDAYAL RAMCHARAN v. KHETU GANGU, ... 754
20 B. 293

(19) *Procedure—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 99, 248 *and* 647 *—Darkhast for execution of decree—Notice to the judgment-debtor to show cause why decree should not be executed—Failure of both parties to appear on the appoint-d day—Dismissal of darkhast.*—A darkhast for the execution of a decree can be dismissed when on its presentation a notice is issued to the judgment-debtor under s. 248 of the Civ. Pro. Code (Act XIV of 1882), and neither party appears on the day on which it is made returnable. TUKARAM v. KHANDU, ... 926
20 B. 541

(20) Procedure—Civ. Pro. Code (Act XIV of 1882), ss. 100, 108 and 157—Presidency Court of Small Causes—Adjourned hearing—Absence of defendant—*Ex parte* decree—See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 380.

(21) *Procedure—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 566, 569 and 574—*Remand—Findings on issues—Duty of Appellate Court to form its own opinion on the evidence or record reasons for findings.*—In certifying to the High Court the findings on issues sent back on remand and found by the Court of first instance, the lower appellate Court is, in the absence of any admission by the party against whom the issues have been found, bound to form its own opinion on the evidence and record its findings with the reasons for them. RAMCHANDRA GOVIND MANICK v. SONO SADASHIV SARKHOT, ... 368
19 B. 551

(22) Procedure—Civ. Pro. Code (XIV of 1882), s. 608—Privy Council—Appeal to Privy Council—Decree—Stay of execution before appeal admitted—Practice—Procedure—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 10.

(23) Procedure—Commission—Evidence taken on commission—Admissibility of—Evidence Act (I of 1872), s. 33—Right and opportunity to cross-examine—Evidence improperly admitted—New trial—Evidence Act (I of 1872), s. 167—See FRAUD, 19 B. 749.

(24) Procedure—Crim. Pro. Code (Act X of 1882), s. 421—Judgment rejecting an appeal need not be in writing—See CRIM. PRO. CODE (ACT X OF 1882), 20 B. 540.

(25) *Procedure—Decree—Death of party between hearing and judgment—Judgment, date of operation of—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 234.—An appeal having been argued on the 11th November, 1892, the case was adjourned for judgment which was delivered on the 30th November, 1892, and was in favour of the plaintiffs. In the meanwhile the defendant had died. On application for execution it was contended that the decree was null and void, as the respondent was dead when it was passed.

Held, that the judgment should be treated as operating as if it had been delivered on the day when the arguments were closed. NARNA AND PARAMESHVAR v. ANANT, 19 B. 807 ... 542

(26) *Procedure—Decree—Execution of decree—Death of judgment-debtor after attachment but before sale in execution—Sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 311, 316.—Tukaram obtained a decree against one Subhankhan, and in execution attached certain land which Subhankhan had previously mortgaged to Krishnaji. On the 11th June, 1877, a warrant for sale was issued followed by the usual proclamation. Subhankhan died on the 27th September, 1877, and a few days afterwards, *viz.*, on the 3rd October, 1877, the sale took place without any notice being given to Dhondu Bai, who was the heir and legal representative of Subhankhan, who, however, came to know of it shortly after. Tukaram the decree-holder, purchased the land at the sale, and in 1883 sold it to Aba, who redeemed the mortgage from Krishnaji and took possession. In 1891, Dhondu Bai, as heir and legal representative of Subhankhan, brought this

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suit claiming to redeem the mortgage. She made Krishnaji (original mortgagee) and Aba (the purchaser) parties to the suit. She contended that the sale in execution was bad, having taken place after the death of the judgment-debtor and without his legal representative having been placed on the record.

Held, that the plaintiff was not entitled to redeem.

Per JARDINE, J.—As no "substantial injury" was alleged to have resulted by reason of the plaintiff not having been brought on the record of the execution proceedings immediately on the death of the judgment-debtor and before the sale took place, the purchaser acquired a valid title under s. 316 of Code of Civil Procedure (Act XIV of 1882).

Per RANADE, J.—The omission to join the name of the representative of the deceased judgment-debtor as a party to the record was a material irregularity and a serious defect in the title of the auction-purchaser. But this irregularity did not vitiate the sale under the special circumstances of the present case, *viz.*, that the plaintiff had taken no step to set aside the sale although she came to know of the sale within a few days after it took place; that there was no fraud or *mala fides* on the part of the judgment-creditor; that the sale had not resulted in any substantial injury to the plaintiff, and that the auction-purchaser and his assignee had been in adverse possession for more than twelve years. ABA v. DHONDU BAI, 19 B. 276 ... 187

(27) Procedure—Execution—Decree—Attachment under decree of High Court of property already attached under decree of Small Causes Court—Claim to attached property, by what Court decided—Civ. Pro. Code (Act XIV of 1882), s. 272—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 710.

(28) *Procedure—Inspection—Affidavit of documents—Minor.*—An affidavit of documents may be required from a minor defendant. NATHMULL NARSINGDAS v. MALHARRAO HOLKAR, 19 B. 350 ... 236

(29) Procedure—Lunatic—Limitation—Striking out lunatic plaintiff's name—Restoration of name—Suit by person not adjudged to be of unsound mind under Act XXXV of 1858—See LUNATIC, 19 B. 135.

(30) Procedure—Mortgage—Sub-mortgage—Redemption—Suit by original mortgagor against mortgagee and sub mortgagee—Death of mortgagee pending suit—Abatement—Parties—Civ. Pro. Code (Act XIV of 1882), s. 368—See MORTGAGE (REDEMPTION), 20 B. 549.

(31) *Procedure—Plaint—Alternative reliefs—Partition—Findings of fact unaccompanied by reasons—Not conclusive in second appeal—Second appeal.*—The plaintiff sued to recover possession of the northern half of a certain plot of land, alleging that it had fallen to his share at a partition made in 1887, and that he was illegally dispossessed thereof by the defendant in 1890. He also prayed, in the alternative, that if the alleged partition were not proved, the land should be partitioned and his share awarded to him. The suit was dismissed by the lower Courts on the ground that the alleged partition was not proved, and that no order for partition could be made in the face of the plaintiff's distinct allegation that it had already taken place.

Held, that the plaintiff's allegation of partition did not preclude him from seeking the alternative relief on the strength of his general title.

Held, also, that where no reasons are given by a lower appellate Court for the conclusions arrived at, such conclusions cannot be accepted as legal findings of fact in second appeal. NINGAPPA v. SHIVAPPA, 19 B. 323 ... 219

(32) *Procedure—Plaint, presentation of—Return of plaint for presentation to proper Court—Jurisdiction—High Court, power of, to interfere under Reg. II of 1827, s. 5, cl. 2.*—A Second Class Subordinate Judge returned a plaint for presentation in the proper Court on the ground that the subject-matter exceeded his pecuniary jurisdiction. The First Class Subordinate Judge, to whom the plaint was then presented, also returned it for presentation in the proper Court

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on the ground that the subject-matter was below his pecuniary jurisdiction. The plaintiff thereupon presented the plaint to the successor of the Second Class Subordinate Judge who had originally returned the plaint. That Judge held that he had no jurisdiction to review the order passed by his predecessor. The plaintiff appealed, and the Judge rejected the appeal, holding that no appeal lay against an order refusing to grant a review.

The plaintiff applied to the High Court under its extraordinary jurisdiction.

Held, that the case was one in which the High Court ought to interfere under cl. 2, s. 5 of Reg. II of 1827.

The order of the Second Class Subordinate Judge was set aside with a direction that he should admit the plaint as of the date of its original presentation. GIRDHARLAL HARGOVANDAS v. LALLU JAGJIVAN, 20 B. 50 ... 592

(33) *Procedure—Possession—Joint property—Suit by co-owner for exclusive possession.*—The plaintiff sued for possession of certain land. The lower Court held that the land was the joint property of the plaintiff and defendant, but finding that the plaintiff had been in exclusive possession allowed his claim and gave him a decree. On second appeal.

Held, that exclusive possession could not be awarded unless exclusive title was proved. On plaintiff's application, which was not opposed by the defendant, the decree of the lower Court was varied, and the plaintiff was awarded joint possession of the property in suit. NANA v. APPA, 20 B. 627 ... 986

(34) *Procedure—Right of action—Suit by plaintiff having no interest in subject-matter—Joinder of a party co-plaintiff having interest—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 32.—If a plaintiff at the time he brings his suit has no interest in the subject-matter thereof, the joinder of a person as co-plaintiff who has an interest cannot alter the plaintiff's position or confer on him any right of suit. BHANU v. KASHINATH, 20 B. 537 ... 923

(35) *Procedure—Suit for ejectment turned into a redemption suit.*—A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. PARSHOTAM BHAISHANKAR v. RUMAL ZUNJAR, 20 B. 196 ... 689

(36) *Procedure—Suit for possession—Issues to be raised—Second appeal—Finding of fact—Finding of lower Court based on misconception of evidence.*—The finding on an issue of a lower appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it.

In a suit to recover possession based on a deed of sale,

Held, that the Court should have raised issues as to ownership and possession, as even if the sale-deed were not proved, the plaintiff might have been able to substantiate a title independently of it. GOVIND v. VITHAL, 20 B. 753 ... 1072

(37) Specific Relief Act, I of 1877, s. 42—Possession—Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Evidence—Failure of plaintiff to prove title—No evidence of defendant's title—Effect of plaintiff's possession—Plaint—Prayer for general relief—See POSSESSION, 20 B. 798.

(38) Will—Certificate—Reg. VIII of 1827—Amendment of plaint—Limitation—Limitation Act (X of 1877), sch. II, art. 144—See WILL, 19 B. 320.

(39) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 46, 202.

(40) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 20 B. 667.

(41) See APPEAL (TO PRIVY COUNCIL), 20 B. 699.

(42) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 204, 694 ; 20 B. 304.

(43) See COMPANY, 19 B. 88.

(44) See CONTEMPT OF COURT, 19 B. 152.

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(45) See CONVERSION, 20 B. 53.
(46) See COPYRIGHT, 19 B. 557.
(47) See CRIM. PRO. CODE (ACT X OF 1882), 20 B. 145.
(48) See DIVORCE, 20 B. 362.
(49) See EVIDENCE, 19 B. 728.
(50) See EXECUTION OF DECREE, 19 B. 539.
(51) See HUSBAND AND WIFE, 19 B. 293.
(52) See INSOLVENCY, 20 B. 403.
(53) See LIMITATION, 20 B. 104.
(54) See LIMITATION ACT (XV OF 1877), 19 B. 48, 663.
(55) See MAHOMEDAN LAW (DEBTS), 19 B. 273.
(56) See MAMLATDAR, 20 B. 630.
(57) See MINOR, 19 B. 571.
(58) See MUNICIPALITY, 19 B. 212.
(59) See NATIVE CHRISTIAN, 19 B. 783.
(60) See STAMP, 19 B. 635.
(61) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 790.
(62) See VALUATION, 20 B. 265.
(63) See VENDOR AND PURCHASER, 19 B. 43.

Preferential Dividend.

See COMPANY, 19 B. 1.

Prescription.

See EASEMENT, 20 B. 704.

Presumption.

(1) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 78.
(2) See EVIDENCE, 20 B. 367.
(3) See MUNICIPALITY, 20 B. 732.
(4) See PENAL CODE (ACT XLV OF 1860), 19 B. 247.
(5) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 338.

Primogeniture.

See CHRISTIAN, 19 B. 680.

Principal and Agent.

Consignment for sale—Unauthorized sale by agent below limit—Measure of damages.—The measure of damages, in a case where an agent has in breach of his duty sold goods of his principal below the limit placed upon them by the principal, is the loss which the principal has sustained, and if he has sustained no loss, he can only ask for nominal damages. MANCHUBHAI NAVALCHAND v. JOHN H. TOD, 20 B. 633 ... 990

Principal and Surety.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 694.
(2) See DOMICIL, 19 B. 697.

Privilege.

(1) See DEFAMATION, 19 B. 717.
(2) See PENAL CODE (ACT XLV OF 1860), 19 B. 51, 340.

Privy Council.

(1) Appeal to Privy Council—Decree—Stay of execution before appeal admitted—Practice — Procedure—Civ. Pro., Code (XIV of 1882), s. 608—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 10.

(2) *Appeal to Privy Council—Time to appeal—Limitation—Limitation Act* (XV *of* 1877), *ss.* 5 *and* 12, *and sch.* II, *art.* 177—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 598.—An application for leave to appeal to the Privy Council must be made within six months from the date of decree. Such an application is not an appeal, and in computing the period of limitation, the time required for obtaining a copy of the decree cannot be excluded. MOROBA RAMCHANDRA v. GHANASHAM N. NADKARNI, 19 B. 301 ... 203

Probate. PAGE

(1) *Application for probate—Executor—Arbitration—Reference by executor to arbitration—Award—Power of executor to refer to arbitration—Effect of award—Jurisdiction—Jurisdiction of Testamentary Court to decide question of award.*—An executor having propounded a will and applied for probate, a caveat was filed denying the execution of the alleged will, and the matter was duly registered as a suit. The executor and the caveatrix subsequently referred "the dispute" to arbitration, and an award was made that the alleged will had not been executed. The executor nevertheless subsequently continued the suit. At hearing the caveatrix pleaded the award and contended that it was binding on the plaintiff (executor). The plaintiff (executor) contended that the Court as a Court of Probate had no jurisdiction to try any question as to the award, but was limited only to the question of the execution of the will.

Held, that the Court had jurisdiction to determine the question as to the award.

Held, also, that the award was binding on the executor. GHELLABHAI ATMARAM v. NANDUBAI, 20 B. 238 ... 717

(2) Guardian and Wards Act (VIII of 1890)—Certificate of Guardianship—Guardian appointed under a will—Necessity of probate—See ACT VIII OF 1890 (GUARDIAN AND WARDS), 19 B. 832.

(3) *Will—Executor who has acted required to lodge will and obtain probate.*—One Tulsidas Varajdas died in 1883, and by his will appointed his brother Tapidas sole residuary legatee and also his executor, and he directed that in case of Tapidas' death, Damodar (Tapidas' son) should be executor. Tapidas accordingly acted as executor until his death in May, 1886, and then his son Damodar continued to administer the estate, but neither of them obtained probate of the will. Tapidas left a will whereby he appointed his two sons Damodar and Dayabhai (the applicant) his executors and also his residuary legatees. In June, 1895, Dayabhai, stating that he was one of the residuary legatees of Tapidas, who was the sole residuary legatee of Tulsidas Varajdas, applied for a citation to be issued to Damodar directing him to bring in and prove the will of Tulsidas Varajdas. In reply, Damodar submitted that there was no necessity to prove the will; that the estate was fully administered, and that he had no funds left in his hands out of which to pay the costs of probate.

Held, that the executor Damodar must lodge the will in Court, and that on the applicant Dayabhai paying half the estimated cost of obtaining probate (including probate duty), the executor Damodar should take out probate of the will. DAYABHAI TAPIDAS v. DAMODAR TAPIDAS, 20 B. 227 ... 710

(4) *Will—New page of will not duly executed substituted by testator after execution of will—Dependent relative—Revocation.*—After the death of the testator (H. G. Meakin) his will was found among his private papers in a sealed envelope with the words "H. G. Meakin's will not to be opened until after death," written in his hand writing on the face of the envelope. The will was wholly in his writing and was written on four separate sheets of paper pinned together. The first, third and fourth pages were of blue paper and of the same size, and each of them was signed at the bottom by the testator and by two witnesses. The fourth page stated the date of the will and was signed by the testator and was duly attested by the said two witnesses. The actual execution of the will took place (as was proved by evidence) in March or April, 1894. The second page, however, was of a different kind of paper from the other pages and of smaller size, and was signed by the testator, but not by witnesses. This second page contained a bequest to a child who was born in May, 1894, *i.e.*, some months after the will was executed. The executors propounded the will.

Held, that probate must be refused. KER v. MEAKIN, 20 B. 370 ... 809

(5) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 20 B. 607.

(6) See EXECUTOR, 19 B. 123.

Procedure. PAGE

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 46.
(2) See APPEAL (TO PRIVY COUNCIL), 20 B. 699.
(3) See ARBITRATION, 20 B. 596.
(4) See BOND, 20 B. 791.
(5) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 10, 34, 204, 694, 710; 20 B. 304, 380.
(6) See COMPANY, 19 B. 88.
(7) See COPYRIGHT, 19 B. 557.
(8) See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 732, 735; 20 B. 540.
(9) See EXECUTION OF DECREE, 19 B. 539.
(10) See FRAUD, 19 B. 749.
(11) See HINDU LAW (JOINT FAMILY), 20 B. 435.
(12) See HUSBAND AND WIFE, 19 B. 293.
(13) See INSOLVENCY, 20 B. 403.
(14) See LIMITATION, 20 B. 104.
(15) See LIMITATION ACT (XV OF 1877), 19 B. 49.
(16) See LUNATIC, 19 B. 135.
(17) See MAHOMEDAN LAW (DEBTS), 19 B. 273.
(18) See MAMLATDAR, 20 B. 630.
(19) See MINOR, 19 B. 571.
(20) See MORTGAGE (REDEMPTION), 20 B. 549.
(21) See PRACTICE, 19 B. 276, 551, 307, 323, 350, 807; 20 B. 50, 196, 293, 537, 541, 569, 627, 675, 753.
(22) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 790.

Proclamation.

See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 127.

Promissory Notes.

See EVIDENCE, 20 B. 367.

Proof.

See LIMITATION ACT (XV OF 1877), 20 B. 109.

Publication.

See PENAL CODE (ACT XLV OF 1860), 19 B. 703.

Public Officer.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 697.

Public Street.

See MUNICIPALITY, 19 B. 212; 20 B. 146.

Public Way.

See PENAL CODE (ACT XLV OF 1860), 18 B. 715.

Purchase-money.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 745.

Qualified Privilege.

See PENAL CODE (ACT XLV OF 1860), 19 B. 51.

Question of Fact.

(1) See APPEAL (TO PRIVY COUNCIL), 20 B. 699.
(2) See MAMLATDAR, 20 B. 630.

Question of Law.

see ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 20 B. 779.

Railway Company. PAGE

(1) *Indian Railway Act* (IV *of* 1879), *s.* 11—*Loss of goods—Liability of company—Declaration of value and nature of goods and payment of increased charge—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 30.—In January, 1890, a box containing rupees was delivered by the plaintiffs to the defendant company in Bombay to be carried to Saugor. From the evidence it appeared that the plaintiffs did not intend to insure the box. The box was taken to the booking office at the station, and the parcel clerk asked what it contained, and was told that it contained coin, and he learned casually that the amount was Rs. 6,000. The clerk charged Rs. 18-1 0 for the box, which was the "treasure rate" for carriage. This sum was paid and the box was duly despatched, but was lost or stolen in the course of transit. The plaintiffs sued to recover the Rs. 6,000. The defendants contended that, having regard to the provisions of s. 11 of Act IV of 1879, they were not liable. inasmuch as (1) the contents of the box had not been duly disclosed, nor (2) had an increased charge been paid. The plaintiffs obtained a decree in the lower Court.

On appeal,

Held (reversing the decree) that the defendant company was not liable—

(1) Because there was no sufficient declaration of the value and contents of the box.

(2) Because the sum paid by the plaintiffs for the carriage of the box was the ordinary charge for treasure, and was not the increased charge which under s. 11 of Act IV of 1879 should have deen paid in order to make the company liable.

(3) *Per* BAYLEY, J.—That the claim of the plaintiffs was one against the defendants for compensation for losing goods, and fell within art. 30 of sch. II of the Limitation Act (XV of 1877), and that as this suit was not brought until after the expiration of two years from the date of the loss it was barred by limitation. THE G. I. P. RAILWAY COMPANY v. RAISETT, 19 B. 165 ... 112

(2) *Liability for loss of goods—Railways Act*, IX *of* 1890, *s.* 75.—(1) The words "loss, destruction or deterioration" in s. 75 of the Indian Railways Act, IX of 1890, include loss caused by the criminal misappropriation of the parcel by a servant of the railway administration in charge thereof.

(2) Under s. 75 of that Act, it is necessary that both value and contents of a parcel (if over Rs. 100 in value) should be declared before the railway administration can be held liable in respect thereof.

(3) The payment by a consignor of silver coin of the specie rate required by the general regulations of a Railway Company to be paid for the carriage of such goods is not such a payment as satisfies the requirements of s. 75 of the Indian Railways Act, IX of 1890. BALARAM HARICHUND v. THE S. M. RAILWAY COMPANY, 19 B. 159=Chitty's S. C. C. R. 422 ... 107

Rash Riding.

See PENAL CODE (ACT XLV OF 1860), 19 B. 715.

Reasonable and Probable Cause.

(1) See DEFAMATION, 19 B. 717.

(2) See MALICIOUS PROSECUTION, 19 B. 485.

Receiver.

(1) *Administration suit—Receiver appointed where executor is in possession—Suit against executor where will not proved—Will of Mahomedan testator—Parties—Civ. Pro. Code* (XIV *of* 1882), *s.* 438.—The rule of the Court of Chancery, that a receiver will not be appointed against an executor unless gross misconduct was shown, is not applicable to the case of an executor of the will of a Mahomedan.

Receiver—(*Concluded*). PAGE

Where a Mahomedan testator had by his will appointed three executors, only one of whom had acted and got possession of the estate, a suit by the testator's widow for administration of the estate was *held* sufficiently well constituted for the purpose of a motion for a receiver, although only the executor who had acted was made defendant, the other two executors not being parties to the suit.

Quære.—Whether it would not be necessary or advisable to add the said two executors before the suit came on for hearing. HAFIZABAI v. KAZI ABDUL KARIM, 19 B. 83 ... 55

(2) *Duties and liability of—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 503.—A receiver appointed under s. 503 of the Civ. Pro. Code (Act XIV of 1882), to collect the rents of an estate, is bound to make good a loss caused to it by a breach of his duties.

A receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court. He should in all important matters apply for and obtain the direction of the Judge who appoints him.

A receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties. BALAJI NARAYAN PATVARDHAN v. RACHANDRA GOVIND KANADE, 19 B 660 ... 442

Reduction.

See COMPANY, 20 B. 654.

Registration.

(1) *Notice—Sale of mortgaged property in execution of a money decree without express notice of mortgage—Right of mortgagee to enforce mortgage against the property in hands of purchaser—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 287—*Mortgagee*—A mortgagee under a registered mortgage-deed obtained a money decree against the mortgagors in some matter other than the mortgage, and sold the mortgaged property in execution of the decree. The mortgaged lien was not announced in the proclamation of sale as required by s. 287 of the Civ. Pro. Code (Act XIV of 1882), and the auction-purchaser had no actual knowledge of the mortgage. In a suit brought by the mortgagee against the mortgagors and the auction-purchaser to recover the mortgage-debt by sale of the mortgaged property.

Held, that except in a case of fraudulent concealment, the registration of the mortgage was notice to subsequent purchasers The property was, therefore, liable under the mortgage, and the auction-purchaser was bound by it.

Held, further, that the omission to declare the mortgage at the time of the sale could not be treated as an estoppel. DHONDO BALKRISHNA KANITKAR v. RAOJI, 20 B. 290 ... 751

(2) Registration Act (III of 1877), ss. 3 and 17—Evidence—Unregistered mortgage deed as evidence—Limitation—Limitation Act (XV of 1877), s. 20—Interest—Payment of interest as such—Mortgage—Payment of rents to mortgagee in lieu of interest on debt—Mortgage deed not registered—Deed not admissible to prove rents paid as interest—Evidence — Practice — See LIMITATION ACT (XV OF 1877), 19 B. 663.

(3) Registration Act (III of 1877), s. 50—Sale in execution of decree on prior unregistered mortgage—Rights of purchaser—Claim of subsequent mortgagee in possession under registered mortgage—Rights of such subsequent mortgagee where he was not a party to the suit on prior mortgage—Transfer of Property Act (IV of 1882), s. 75—Mortgage—Priorities—See MORTGAGE (PRIORITY), 20 B. 390.

(4) Registration under the Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 56 and 60—General Registration Act (III of 1877)—Hindu law—Adoption—Relinquishment by the adopted son in favour of his adoptive mother of his rights as adopted son—Release—Second adoption—See HINDU LAW (ADOPTION), 19 B. 239.

(5) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 20 B. 283.

Registration—(*Concluded*). PAGE

(6) See COPYRIGHT, 19 B. 557.
(7) See EASEMENT, 20 B. 704.
(8) See HINDU LAW (WIDOW), 19 B. 36.
(9) See REGISTRATION ACT (III OF 1877), 20 B. 158, 553, 562.

Registration Act (XVI of 1864).

See REGISTRATION ACT (III OF 1877), 20 B. 158.

Registration Act (VIII of 1871).

See REGISTRATION ACT (III OF 1877), 20 B. 150.

Registration Act (III of 1877).

(1) See HINDU LAW (ADOPTION), 19 B. 239.
(2) Ss. 3 and 17—See LIMITATION ACT (XV OF 1877), 19 B. 663.
(3) *S.* 17, *cl.* (*b*)—*Indian Evidence Act* (I *of* 1872), *s.* 32, *cl.* (6)—*Will*—*Statement*—*Words not purporting or operating to extinguish an interest in the present or in future.*—S. 17, cl. (*b*) of the Registration Act (III of 1877) does not render a passage in a will inadmissible in evidence if the words of it do not purport or operate to extinguish an interest in the present or in future, but state only past facts. Such a statement would, if proved, be admissible also under s. 32, cl. (6) of the Indian Evidence Act (I of 1872). CHAMANBU v. MULTANCHAND, 20 B. 562 ... 940

(4) *S.* 17, *cls.* (*b*) *and* (*h*)—*Instrument creating a charge in the nature of a mortgage*—*Admissibility of documents compulsorily registrable*—*Evidence*—*Registration.*—A *kararnama* (agreement), dated 11th day of June, 1885, was passed by A. to B. to the following effect :—

"As my father Shivaram valad Keshav is dead, it has been arranged that I should succeed to his estate..... Part of this estate at Vagoda, consisting of a house, fields, cattle and a cart, has been given into your possession for use and enjoyment. The reason thereof is that you have undertaken to pay Rs. 450 found due on an adjustment of *khata* from my father to Ganpatdas Khushaldas. I am unable to pay off this debt ; and so you have been put into possession of this property. I shall pass to you a sale-deed in respect of this property, and shall transfer the fields to your name from the year 1888—89."

Held, that the *kararnama* required registration. It did not fall within the exception provided for by cl. (*h*) of s. 17 of the Registration Act (III of 1877). It was not a document which merely created a right to demand another document. It created as between the parties to it a charge in the nature of a mortgage. The document of itself declared a right, and the mention of an intention to execute a deed of sale made no difference.

An unregistered mortgage bond for one hundred rupees and upwards may be admissible in evidence to prove the simple debt or a personal obligation, but it is inadmissible in evidence to prove any right to the property affected by it. VANI v. BANI, 20 B. 553 ... 934

(5) S. 50—See MORTGAGE (PRIORITY), 20 B. 390.
(6) *S.* 50—*Priority*—*San-mortgage optionally registrable, but not registered*—*Subsequent mortgage registered*—*Decree passed on san-mortgage*—*Execution*—*Purchaser at execution sale*—*Priority of mortgagee under registered mortgage to such purchaser*—*Notice.*—In 1875 the land in dispute was mortgaged to defendant No. 2 under two *san*-mortgage bonds, which were optionally registrable, but were not registered. In 1885 the land was mortgaged to plaintiff by a registered mortgage accompanied with possession. In 1886 the defendant No. 2 obtained a decree upon his *san*-mortgage bond, in execution of which the mortgaged property was brought to sale and purchased by defendant No. 3.

Defendant No. 3 was afterwards put in possession by the Court. Thereupon the plaintiff sued to enforce his mortgage lien against the property in the hands of defendant No. 3, who pleaded that the

Registration Act (III of 1877)—(*Concluded*). PAGE

san-mortgages of 1875 were entitled to priority over the plaintiff's mortgage of 1885, and that he as purchaser at a sale under a decree obtained upon the *san*-mortgages held the property free from the plaintiff's claim.

Held, that the plaintiff's mortgage, having been executed and registered after Act III of 1877 had come into force, was entitled under s. 50 of the Act to priority over the unregistered *san*-mortgage bonds.

A *san*-mortgage is not within the exceptions mentioned in s. 50 of the Act.

Held, also, that under s. 47 of the Registration Act (III of 1877) the plaintiff's registered mortgage began to operate from the date of its execution and was not affected by the decree subsequently obtained upon the earlier mortgages.

By the custom of Gujarat, transfer of possession, which is necessary under general Hindu law, is not essential to validate *san*-mortgages, and such mortgages have always been held valid charges as between mortgagor and mortgagee, but they are liable to be defeated in case of the transfer of interest to third parties under registered instruments.

Apart from the doctrine of equitable notice, registration under Act XVI of 1864 and Act VIII of 1871 conferred no priority on a registered document as against a document the registration of which was optional. Since Act III of 1877, however, the competition obtains in a more general form, and confers priority on all documents required to be registered, and registered since Act III of 1877 was passed, over all prior unregistered deeds of an antagonistic character. JETHABHAI DAYALJI v. GIRDHAR, 20 B. 158 ... 664

Regulation IV of 1818 (Bombay Police).

See ACT VIII OF 1867 (BOMBAY VILLAGE POLICE), 19 B. 612.

Regulation II of 1827 (Bombay Caste Questions, Pleaders).

(1) S. 5, cl. 2 - See PRACTICE, 20 B. 50.

(2) S. 21—See CASTE QUESTION, 20 B. 190.

(3) S. 21—See HINDU LAW (CASTE), 19 B. 507.

Regulation V of 1827 (Bombay Aknowledgment of Debts; Interest; Mortgages).

S. 15, cl. (3)—See MORTGAGE (USUFRUCTUARY), 20 B. 296.

Regulation VIII of 1827 (Bombay Administration of Estates).

(1) *Succession Certificate Act* (VII *of* 1889), *ss.* 19 *and* 28—*Certificate of heirship—Order refusing certificate of heirship appealable—Appeal.*—An appeal lies from an order refusing to grant a certificate of heirship under Regulation VIII of 1827, by virtue of s. 19 of the Succession Certificate Act (VII of 1889). RANGUBAI v. ABAJI, 19 B. 399 ... 269

(2) See ESTOPPEL, 19 B. 374.

(3) See WILL, 19 B. 520.

(4) *S.* 4—*Certificate of heirship based on adoption—Regular suit to prove adoption—Adoption — Application for certificate of heirship.*—H applied under Regulation VIII of 1827 to a District Judge for a certificate of heirship to a deceased D. under a registered deed of adoption by his widow executed nearly fifty years after D.'s death. The opponent claimed to be the heir, and denied the legality of the adoption. The District Judge referred the applicant to a regular suit to establish the validity of his adoption

Held, in appeal, that the District Judge was bound to investigate the case, following the procedure laid down in s. 4 of Regulation VIII of 1827, and had no authority to dismiss the application and refer the applicant to a regular suit to establish the validity of the adoption. HARISING v. BHAUSING, 20 B. 548 ... 930

Regulation XII of 1827 (Bombay Police Duties and Powers of Magistrates).

See ACT VIII OF 1867 (BOMBAY VILLAGE POLICE), 19 B. 612.

Regulation XVI of 1827 (Bombay Collectors of Land-Revenue).

S. 20—See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 20 B. 423.

Release.

(1) Adoption—Relinquishment by the adopted son in favour of his adoptive mother of his rights as adopted son—Second adoption—Registration—Registration under the Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 56 and 60—General Registration Act (III of 1877)—Hindu law - See HINDU LAW (ADOPTION), 19 B. 239.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 210.

(3) See SURETY, 19 B. 245.

Relief.

(1) See POSSESSION, 20 B. 798.

(2) See STAMP, 19 B. 198.

Remand.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 303.

(2) See PRACTICE, 19 B. 551.

Removal.

See MUNICIPALITY, 19 B. 212.

Rent.

(1) See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 78.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 303.

(3) See LANDLORD AND TENANT, 19 B. 150.

Res Judicata.

(1) *Estoppel—Fraud—Judgment obtained by fraud—Not conclusive* inter partes—*Succession Certificate Act* (VII *of* 1889), *ss.* 18. *cls.* (*b*) *and* (*c*)—*Revocation of certificate.*—One Punja died in 1889, leaving behind him his daughter Mahali. Punja, it was alleged, had made a will appointing Kalidas and Kasandas as his executors. The executors applied for a certificate under the Succession Certificate Act VII of 1889 to recover a debt due to the deceased's estate from one Motiram. Mahali opposed this application, and claimed the certificate for herself by a separate application. The District Judge rejected Mahali's application, and issued a certificate to the executors on 14th September, 1892.

In the meantime, one Manchharam obtained a decree against Mahali as legal representative of Punja, and in execution bought Punja's right, title and interest in the debt due from Motiram. On 12th September, 1892, Manchharam applied for a certificate under Act VII of 1889 to recover this debt. The District Judge rejected this application. Manchharam appealed to the High Court. To this appeal the executors were made parties at their own request. The High Court reversed the District Judge's order and remanded the case for disposal on the merits. Upon the remand the executors did not appear before the District Judge to contest Manchharam's application, and the District Judge granted him a certificate. Thereupon he applied for revocation of the certificate previously granted to the executors; and the executors in their turn applied for a revocation of the certificate granted to him. The District Judge revoked Manchharam's certificate on the ground that he had fraudulently concealed from the Court the previous grant of a certificate to the executors.

Against this order Manchharam appealed to the High Court, contending *(inter alia)* that the executors not having resisted his application for a certificate after the case had been remanded by the High Court, were estopped, on the principle of *res judicata*, from applying for a revocation of the certificate granted to him.

Res Judicata—*(Concluded)*. PAGE

Held, that the executors were not estopped. The executors having applied to be made parties to the appeal proceedings, were bound to appear in the Court below, and their failure to do so disabled them from pleading objections, such as the collusive character of the decree and Mahali's want of title, but it did not operate as *res judicata*, especially when there was reason to suspect fraud on the part of Manchharam. The order obtained by him could not have the effect of *res judicata*, unless the executors being called on to dispute it, had failed to do so.

A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.

Held, also, that the District Judge had a right, under s. 18, cls. *(b)* or *(c)* of Act VII of 1889, to revoke the certificate he had granted under a mistake of fact to Manchharam. MANCHHARAM v. KALIDAS, 19 B. 821 ... 551

(2) See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 475.

(3) See EXECUTION OF DECREE, 19 B. 258.

Retrospective Effect.

See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 204.

Revenue.

See MORTGAGE (REDEMPTION), 20 B. 492.

Revenue Officer.

See ACT X OF 1876 (BOMBAY REVENUE JURISDICTION), 20 B. 764, 803.

Revenue Records.

See VENDOR AND PURCHASER, 19 B. 43.

Review.

(1) See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 113, 116; 20 B. 281.

(2) See MINOR, 19 B. 571.

Revision.

See ZANZIBAR, 20 B. 480.

Revocation.

See PROBATE, 20 B. 370.

Right of Action.

See PRACTICE, 20 B. 537.

Right of Way.

See EASEMENT, 19 B. 797.

Right to sue.

(1) See DECREE, 19 B. 546.

(2) See HINDU LAW (ADOPTION), 19 B. 614.

(3) See LIMITATION ACT (XV OF 1877), 20 B. 109, 801.

Rozina Allowance.

See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 19 B. 250.

Rule against Perpetulties.

Indian Succession Act (X of 1865), s. 101—Transfer of Property Act (IV of 1882), s. 14—Whether applies to moveable property—See TRUST, 20 B. 511.

Rule in Tagore Case.

See HINDU LAW (WILL), 20 B. 571.

Salary.

See INSOLVENCY, 19 B. 232.

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Sale.

(1) See ACT VI OF 1888 (BOMBAY GUJRAT TALUKDARS), 19 B. 80.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 127, 216.
(3) See EXECUTION OF DECREE, 19 B. 539.
(4) See MORTGAGE (PRIORITY), 20 B. 390.
(5) See PRACTICE, 19 B. 276.
(6) See VENDOR AND PURCHASER, 19 B. 391.

Sale-deed.

See EASEMENT, 19 B. 797.

Sanction.

(1) See ACT VI OF 1888 (BOMBAY GUJARAT TALUQDARS), 19 B. 80.
(2) See TRUST, 20 B. 46.

Sanction to prosecute.

See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 362.

San-mortgage.

See REGISTRATION ACT (III OF 1877). 20 B. 158.

Seaworthiness.

See SHIPPING, 19 B. 639.

Security.

(1) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 790.
(2) See SURETY, 19 B. 578.

Self-acquired Property.

(1) See HINDU LAW (JOINT FAMILY), 20 B. 316.
(2) See HINDU LAW (WILL), 20 B. 450.

Services.

See CONTRACT ACT (IX OF 1872), 20 B. 755.

Settlement.

(1) See STAMP ACT (I OF 1879), 20 B. 210.
(2) See TRUST, 20 B. 310.

Settlement Register.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 729.

Share-holder.

See COMPANY, 19 B. 1.

Shares.

See COMPANY, 20 B. 654.

Shipping.

Seaworthiness—Damage to goods by leakage while ship in dock—Bill of lading — Exception.—The plaintiffs' goods were loaded in the defendants' steamer then lying in dock to be carried from Bombay to certain ports in East Africa. At the time of loading, the ship was apparently in a sound and seaworthy condition. Two days after the goods had been put on board, and when the ship was still in dock, it sprung a leak, and the water came into the hold and damaged the plaintiffs' goods. The ship was taken to the dry dock, the cargo was shifted, and the leak repaired. It appeared that the leak had arisen from the fact that one of the plates of the ship had been worn thin in one particular spot, so that when the cargo was put on board, and the ship lay deeper in the water, the pressure became so great that a hole was made and the water rushed in. The plaintiffs sued the defendants for damages. The defendants pleaded (1) that the ship was in a seaworthy condition when the goods were put on board, (2) that they were protected by the bill of lading which contained the following exception, *viz.*, "Accident, loss and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam and all the perils, dangers and accidents of the sea, rivers,

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land carriage and steam navigation of whatever nature and kind and accident, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company or from any deviation excepted."

Held, that the defendants were liable. While the ship was in dock it was not seaworthy, and the exception in the bill of lading did not limit the implied warranty of seaworthiness. VITHULDAS GOBER v. THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, 19 B. 639 ... 427

Small Cause Court.

(1) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 20 B. 779.

(2) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 20 B. 283.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 127, 710.

(4) See EXECUTION OF DECREE, 20 B. 377.

Special Judge.

See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 116, 286; 20 B. 281.

Special Verdict.

See JURY, 20 B. 215.

Specific Performance.

Injunction—Negative agreement—Direction of Court—Agreement not to work for a rival tradesman—Specific Relief Act (I *of* 1877), *ss.* 22, 56 *and* 57—*Damages.*—The plaintiff was a milliner carrying on business in Bombay, and the defendant was in his employment up to the year 1890. In that year he left the plaintiff's service and the plaintiff alleged that at the time he left it, he was indebted to the plaintiff for moneys not accounted for and also in respect of loans made to him. The plaintiff instituted criminal proceedings in the Police Court against the defendant for criminal breach of trust, and procured a warrant for his arrest. The defendant surrendered, and at the time of the agreement hereafter mentioned, the proceedings in this matter were going on. The defendant was out on bail, and was then in the service of a rival milliner named Bhimji Jivan. On the 1st February, 1893, an agreement in writing was made between the plaintiff and the defendant whereby the defendant agreed as follows:—(1) to pay the plaintiff Rs. 1,950 in full settlement of the plaintiff's claim; (2) to enter the plaintiff's service as cutter and to serve him for ten years from the date of agreement; (3) to serve plaintiff honestly; (4) in case plaintiff was obliged to dismiss him for some "fault," then until the expiration of the said period of 10 years the defendant should not carry on the business of a cutter or tailor, either directly or indirectly, on his own account or as partner or servant of another, and in case he should do so, the plaintiff should be at liberty to stop him.

On the 15th February, 1893, the charge of criminal breach of trust against the defendant was dismissed the plaintiff offering no evidence in support of it. The plaintiff subsequently called on the defendant to enter his employment in accordance with the agreement, but the defendant refused, and remained in the service of Bhimji Jivan. The plaintiff, therefore, filed this suit praying for an injunction restraining the defendant from carrying on business as a cutter or tailor for ten years from the date of the agreement. The lower Court dismissed the suit.

Held, on appeal, that the lower Court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant, but that inasmuch as it had refused an injunction on the ground that pecuniary compensation was the plaintiff's proper remedy, it ought not to have dismissed the suit, but ought either

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itself to have awarded damages or to have ordered an inquiry as to damages. The plaintiff being held to be entitled to a remedy, the appropriate remedy should be awarded.

The appellate Court accordingly passed a decree against the defendant and awarded the plaintiff Rs. 10 as damages, with costs of the appeal. CALLIANJI HARJIVAN v. NARSI TRICUM, 19 B. 764 ... 512

Specific Relief Act (I of 1877).

(1) Ss. 17 and 18—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 B. 522.

(2) Ss. 22, 56 and 57—See SPECIFIC PERFORMANCE, 19 B. 764.

(3) S. 42—See HINDU LAW (ADOPTION), 20 B. 202.

(4) S. 42—See POSSESSION, 20 B. 798.

(5) Ss. 42, 43—See HINDU LAW (WILL), 19 B. 401.

(6) S. 54, cl. (*b*)—See EASEMENT, 20 B. 704.

Spy.

See EVIDENCE ACT (I OF 1872), 19 B. 363.

Stamp.

(1) *Letters submitting to arbitration.*—Letters written by parties authorizing arbitrators to arbitrate between them do not require to be stamped. GANGARAM KUSHABA RANGOLE v. NARAYAN BABAJI RANGOLE, 19 B. 32 ... 22

(2) Penalty—Offer to pay stamp duty and penalty in second appeal not allowed—Bond—Hundi—Dishonour—See BOND, 20 B. 791.

(3) *Stamp Act* (I *of* 1879), *s.* 3, *cl.* 15—*Policy of insurance or memorandum of proposed insurance—Document on the face of it not contemplating necessity of any other formal document.*—A document not being a mere "slip" or memorandum of a proposed insurance, and mentioning the sum for which the assurer declares the name of the ship, the voyage and the premium, and providing for the losses being paid on its production, in conformity with certain conditions in the possession of the assurers, and, lastly, expressly guaranteeing payment of losses and claims settled under it, and which on the face of it does not contemplate the necessity of any other document of a more formal character being passed to the assured, requires to be stamped as a policy under cl. 15, s. 3 of the Stamp Act (I of 1879). *In re* MARINE INSURANCE CERTIFICATE, 19 B. 130 (**F B.**) ... 87

(4) *Stamp Act* (I *of* 1879), *ss.* 11 *and* 16—Hundi—*Execution—Time of execution--Stamp affixed and subsequently cancelled--Evidence—Practice—Stamp.*—Where a *hundi* was written by the defendant and stamped by him with a one-anna stamp which was left uncancelled and the *hundi* was subsequently taken by him to the plaintiff's son who received it from him and at the time of receiving it cancelled the stamp by writing the date across it.

Held that the *hundi* was duly stamped under ss. 10 and 16 of the Stamp Act (I of 1879) and was admissible in evidence. If at the time of delivery, which completed its legal character, the *hundi* was stamped, and if the cancellation took place at that time as part of the same transaction, it was sufficient.

A deed is duly stamped if the stamp is affixed and cancelled at the time of execution, or if having been at any time previously affixed, it is cancelled at the time of execution.

When applied to a document the term "execution" means the last act or series of acts which completes it. It might be defined as formal completion. The contract on a negotiable instrument until delivery is incomplete and revocable. Until delivery a *hundi* is not clothed with the essential characteristics of a negotiable instrument. BHAWANJI HARBHUM v. DEVJI PUNJA, 19 B. 635 ... 424

(5) *Stamp Act* (I *of* 1879), *sch.* I, *art.* 21—*Company — Winding-up—Transfer of property by old to new company — Conveyance.*—An instrument, which is in terms a conveyance of property at an

Stamp—(*Concluded*). PAGE.

agreed value, is a sale of such property at that price, and is governed by art. 21, sch. I of the Indian Stamp Act (I of 1879). The circumstance that the transaction is a part of a larger transaction, cannot affect the character of the instrument. REFERENCE UNDER STAMP ACT (I OF 1879), S. 46, 20 B. 432. ... 851

(6) *Suits' Valuation Act* (VII *of* 1887), *s.* 8—*Suit to take accounts—Court fee stamp—Jurisdiction—Amount of claim as fixed by plaintiff—Relief incidental to the principal relief—Appeal.*—According to s. 8 of the Suits' Valuation Act (VII of 1887), in suits for taking an account, the Court-fee stamps and jurisdiction are both determined by the amount of claim as fixed by the plaintiff.

In a suit for taking account the plaint having contained several items which were all incidental to the chief item of relief, the plaint was held to be substantially one to have the minor plaintiffs' estate administered, that is, to have accounts taken and the accounting party ordered to pay what (if any) should be found due from him on the balance of such account.

The plaintiffs having put the valuation of the suit at Rs. 130 in the plaint.

Held, that the High Court had no jurisdiction to hear the appeal against an order rejecting the plaint. The appeal lay to the District Court. The appeal was, therefore, returned for presentation in the proper Court. BAI AMBA v. PRANJIVANDAS DULLABHRAM. 19 B. 128 ... 134

(7) See STAMP ACT (I OF 1879), 20 B. 210.

(8) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 19 B. 145.

Stamp Act (I of 1879).

(1) *Instrument—Trust-deed—Settlement--Testamentary document.*—An instrument called a trust deed by the party executing it was intended to have immediate operation. It vested the property in the trustees at once, and the provisions as to the management and the ultimate beneficial interest in the property showed that it was contemplated that its operation might extend beyond the lifetime of the owner.

Held, that the instrument fell under the definition of a settlement in the Stamp Act (I of 1879), and should be stamped accordingly. REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY, 20 B. 210 (F.B.) ... 699

(2) S. 3, cl. 15—See STAMP, 19 B. 130.

(3) Ss. 11 and 16—See STAMP, 19 B. 635.

(4) Sch. I, art. 21—See STAMP, 20 B. 432.

Statute 8, Anne c. 19.

See COPYRIGHT, 19 B. 557.

Statute 7, George IV, c. 57.

S. 57—See INSOLVENCY, 19 B. 778.

Statute 11, Geo. IV and 1 Will IV, c. 68.

See RAILWAY COMPANY, 19 B. 165.

Statute 2 and 3, Vic., c. 71.

S. 24—See ACT XIII OF 1856 (POLICE, PRESIDENCY TOWNS), 20 B. 348.

Statute 5 and 6 Vic., c. 45.

Ss. 5, 16—See COPYRIGHT, 19 B. 557.

Statute 6 and 7 Vic., c. 94.

See ZANZIBAR, 20 B. 480.

Statute 7 and 8 Vic., c. 12.

S. 18—See COPYRIGHT, 19 B. 557.

Statute 11 and 12 Vic., c. 21.

(1) See INSOLVENCY, 20 B. 403.

(2) Ss. 7 and 27 – See INSOLVENCY, 19 B. 232.

(3) Ss. 59 and 60—See INSOLVENT, 20 B. 636.

(4) S. 86—See INSOLVENCY, 19 B. 297, 778.

Statute 11 and 12 Vic., c. 42.

S. 17—See FRAUD, 19 B. 749.

Statute 15 and 16 Vic., c. 12.

S. 2—See COPYRIGHT, 19 B. 557.

Statute 17 and 18 Vic., c. 125.

S. 11—See ARBITRATION, 20 B. 232.

Statute 18 and 19 Vic., c. 122.

S. 3—See FAZENDAR, 20 B. 617.

Statute 20 and 21 Vic., c. 85.

S. 33—See DIVORCE, 20 B. 362.

Statute 23 and 24 Vic., c. 144.

S. 7—See DIVORCE, 20 B. 362.

Statute 24 and 25 Vic., c. 100.

Ss. 4 and 9—See PENAL CODE (ACT XLV OF 1860), 19 B. 105.

Statute 24 and 25 Vic., c. 134.

S. 9—See GUARDIAN AND WARD, 19 B. 96.

Statute 25 and 26 Vic., c. 114.

S. 2—See ACT XIII OF 1856 (POLICE, PRESIDENCY TOWNS), 20 B. 348.

Statute 29 and 30 Vic., c. 87.

S. 1—See ZANZIBAR, 20 B. 480.

Statute 30 and 31 Vic., c. 35.

See FRAUD, 19 B. 749.

Statute 33 and 34 Vic., c. 97.

S. 2—See STAMP, 19 B. 635.

Statute 41 and 42 Vic., c. 97.

See ZANZIBAR, 20 B. 480.

Statute 45 and 46 Vic., c. 61.

S. 21—See STAMP, 19 B. 635.

Statute 45 and 46 Vic., c. 61 and 65.

See HUNDI, 20 B. 133.

Statute 53 and 54 Vic., c 37.

See ZANZIBAR, 19 B. 741; 20 B. 480.

Stay of Execution.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 10.

(2) See SURETY, 19 B. 578.

Step-in aid of Execution.

(1) Decree—Execution—Civ. Pro. Code (Act XIV of 1882), s. 230—Application for execution—Limitation Act (XV of 1877), sch. II, art. 179, cl. 4—See LIMITATION ACT (XV OF 1877), 19 B. 261.

(2) See LIMITATION ACT (XV OF 1877), 20 B. 179.

Street.

See MUNICIPALITY, 20 B. 146.

Sub-lease.

See ACT I OF 1878 (OPIUM), 19 B. 626.

Succession,

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Borah Mahomedans—Suni Borahs—Conversion, effect of—Hindu converts to Mahomedanism—Inheritance—Succession among such converts—Native Christians—Law applied to Native Christians prior to Indian Succession Act (X of 1865)—Custom and usage of inheritance among converts—Burden of proof—Evidence—Matter of public interest—Decrees—Evidence of custom—Practice—See CONVERSION, 20 B. 53.

Succession Act (X of 1865).

(1) See CONVERSION, 20 B. 53.

(2) See NATIVE CHRISTIAN, 19 B. 783.

(3) See PROBATE, 20 B. 227.

(4) S. 4—See HUSBAND AND WIFE, 19 B. 293.

(5) S. 50—See HINDU LAW (WILL), 20 B. 674.

(6) S. 101—See TRUST, 20 B. 511.

(7) Ss. 101, 102 and 159—See HINDU LAW (WILL), 20 B. 450.

(8) Ss. 125 and 126—See WILL, 19 B. 221.

(9) S. 126—See WILL, 19 B. 770.

(10) S. 179—See PARTNERSHIP, 20 B. 15.

(11) *S.* 190—*Letters of Administration to the estate of a deceased Parsi—Right of suit—Mamlatdar's order—Suit to set aside the order—Bom. Act* III *of* 1876, *s.* 18.—No suit will lie to set aside an order validly passed by a Mamlatdar under Bombay Act III of 1876, though such an order may be superseded by a decree of a Civil Court.

The land in dispute belonged originally to a Parsi named Dadabhai, who died intestate. After his death, one of his brothers without taking out Letters of Administration sold the land to the plaintiff. The defendant claimed a right of way over this land, alleging that it was public land. He obtained an injunction from the Mamlatdar's Court, restraining the plaintiff from obstructing his alleged right of way. Thereupon the plaintiff filed a suit to set aside the Mamlatdar's order, and for a declaration that he was owner of the land, and that defendant had no right of way over it. Both the lower Courts rejected the plaintiff's claim on the ground that under s. 190 of the Succession Act (X of 1865) plaintiff could not establish his right to the land in the absence of Letters of Administration to the estate of Dadabhai, the original owner.

Held, reversing the decrees, that s. 190 of Act X of 1865 did not apply. Neither the plaintiff nor the defendant relied as the basis of his right on the previous title of Dadabhai. There was no question of administration.

Held, also, that a person sued as a trespasser cannot, without proof of his own right, oust an apparent owner by pointing out some defect in the title of the latter. TULJARAM v. BAMANJI KHARSEDJI, 19 B. 828 ... 555

(12) S. 195—See EXECUTOR, 19 B. 123.

Succession Certificate Act (VII of 1889).

(1) See EXECUTOR, 19 B. 123.

(2) *S.* 4—*Application for execution by legal representative of decree-holder without certificate—Necessity of certificate—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 179, *cl.* 4—*Execution of decree.*—An application for execution of a decree made by the legal representatives of a deceased decree-holder, without the production of a certificate under the Succession Certificate Act (VII of 1889), is nevertheless one made "in accordance with law" within the meaning of art. 179, cl. 4, of the Limitation Act (XV of 1877). BALKISHAN SHIWA BAKAS v. WAGARSING, 20 B. 76 ... 609

(3) *S.* 4—*Curator—Act* XIX *of* 1841.—A curator appointed under the Curator's Act (XIX of 1841) is not a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage, and is not required to take out a certificate under S. 4 of

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the Succession Certificate Act (VII of 1889) before he can obtain a decree. BABASAB v. NARSAPA, 20 B. 437 ... 855

(4) *S.* 4—*Joint family—Suit for family debt—No necessity for certificate—Hindu law—Evidence—Presumption as to nature of property where the family is joint*—Under the Succession Certificate Act VII of 1889 a plaintiff does not require a certificate where his claim is for family property by right of survivorship.

Where a plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by the plaintiff, the presumption is that it is a family debt. JAGMOHANDAS v. ALLU MARIA DUSLAL, 19 B. 338 ... 228

(5) *Ss.* 9 *and* 19—*Order granting certificate on the applicant's furnishing security—No appeal from such order—Practice—Procedure—Discretion—Jurisdiction—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 622—*Extraordinary jurisdiction.*—The widow of a deceased person having applied for a certificate under the Succession Certificate Act (VII of 1889), the Judge ordered the certificate to issue on the applicant's furnishing security under s. 9 of the Act.

Held, that such an order was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and was, therefore, not appealable. BAI DEVKORE v. LALCHAND JIVAN DAS, 19 B. 790 ... 530

(6) *Ss.* 17 *and* 20—*Certificate of heirship—Hindu family—Political Agent—Grant of certificate by Political Agent—Irregularities in making grant—Stamp on certificate—Court Fees' Act* VII *of* 1870, *s.* 26—*Notification of Governor-General.*—A District Judge cannot treat a certificate of heirship granted by the Political Agent in a Native State as invalid because the applicant had not given to him the requisite information as to the other members of the family and no notices had been issued to them. These irregularities of procedure may be a reason for the Political Agent to cancel the grant, but they do not enable the District Court to treat it as a nullity.

A certificate having been granted on an ordinary stamp of requisite value, it was contended that it was not properly stamped in accordance with the Court Fees' Act (VII of 1870) as required by s. 17 of the Succession Certificate Act (VII of 1889), because it did not bear upon it the words "Court Fees as directed in the notification of the Governor-General, No. 361, dated 18th April, 1883.

Held, that though s. 26 of the Court Fees' Act (VII of 1870) provides that the stamp used to denote the fee chargeable under the Act shall be of such particular kind as the Governor-General in India in Council may by notification, from time to time direct, and that though the Governor-General had issued such notification, still the direction in the notification, that the stamp should bear the words "Court-fees," was not a matter on which he had authority to give any direction under the terms of s. 26 of the Court Fees' Act, and, therefore, could only be regarded as a departmental order, the non-observance of which could not invalidate the stamp for the purpose of the Act.

A certificate of heirship stamped with the proper stamp, and granted by the Political Agent of a Native State, must be recognised by the Civil Courts in British India "as having the same effect in British India as a certificate granted under this Act" as provided by s. 17 of Act VII of 1889, and under s. 20 precludes the granting of a certificate by a Civil Court. ANNAPURNABAI v. LAKSHMAN BHIKAJI VAKHARKAR, 19 B. 145 ... 98

(7) S. 18, cls. (*b*) and (*c*)—Revocation of certificate—*Res judicata*—Estoppel—Fraud—Judgment obtained by fraud—Not conclusive *inter partes*—See RES JUDICATA, 19 B. 321.

(8) Ss. 19 and 28—Certificate of heirship—Order refusing certificate of heirship appealable—Appeal—Regulation VIII of 1827—See REGULATION VIII OF 1827 (BOMBAY ADMINISTRATION OF ESTATES), 19 B. 399.

Suni Borahs. PAGE

See CONVERSION, 20 B. 53.

Surety.

(1) *Decree—Execution—Stay of execution on giving security—Subsequent execution—Default of judgment debtor—Liability of surety in execution.*—The execution of a decree for partition was stayed pending appeal on the defendant giving security that he would satisfy such decree as might ultimately be passed against him by the appellate Court. That Court confirmed the decree of the lower Court. In obedience of the decree the judgment-debtor deposited in Court certain property in his possession consisting of bonds, decrees and other articles. But as he did not produce the whole of the property as ordered by the decree, the Court directed execution to proceed against his surety. The surety paid into Court the full sum stipulated in the surety bond. Thereupon the judgment-debtor applied that the property deposited by him in Court should be valued and made over to the decree-holder in part satisfaction of the decree *pro tanto*, and that only the balance then remaining due should be paid out of the money paid in by the surety. The Court refused, holding that the decree-holder was entitled to be paid over the whole sum paid in by the surety. On appeal,

Held (reversing the order of the lower Court) that the property already produced in Court by the judgment-debtor should be first applied towards the satisfaction of the partition decree, and if the decree-holder did not obtain complete satisfaction in this way, the money paid in by the surety should then be made available. GOPAL NANASHET v. JOHARMAL, 19 B. 578 ... 386

(2) Insolvency of a defendant—Surety under s. 349—Default of principal—Liability of surety—Mode of enforcing liability of surety—Practice—Procedure—Civ. Pro. Code (Act XIV of 1882), s. 349—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 694.

(3) Judgment-debtor—Surety—Judgment-debtor's application to be declared an insolvent—Release of the surety—Civ. Pro. Code (Act XIV of 1882), s. 336—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 210.

(4) *Surety for guardian of a minor's estate—Release of surety—Minor's Act* (XX *of* 1864), *s.* 12—*Contract Act* (IX *of* 1872), *s.* 130.—Where a surety for the guardian of a minor's estate appointed under the Minors' Act (XX of 1864) applied to be released from his obligation as surety on account of the guardian's mal-administration of the estate.

Held, that the very object of requiring security was to guarantee the minor's estate against such misconduct or mismanagement on the part of the guardian; that the surety, therefore, could not be discharged, and that s. 130 of the Contract Act (IX of 1872) was not applicable to the case.

Quære—Whether the surety may not apply to the Court for protection against guardian. BAI SOMI v. CHOKSHI ISHVARDAS MANGALDAS, 19 B. 245 ... 166

(5) See DOMICIL, 19 B. 697.

Survey Register.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 729.

Symbolical Possession.

See LIMITATION ACT (XV OF 1877), 19 B. 620.

Talukdar.

(1) *Gujarat Talukdars' Act* (*Bom. Act* VI *of* 1888), *s.* 31—*Mortgage of talukdari estate—Validity of mortgage before the Act—Decree upon the mortgage for sale of talukdari estate.*—A talukdar of the Ahmedabad district mortgaged his *talukdari* property in 1886. In 1892 the mortgagee sued to enforce his lien by sale of the mortgaged property. The Court passed a decree against the talukdar personally, holding that it had no power under ss. 31 and 32 of the Gujarat Talukdars' Act (VI of 1888) to direct a sale of the *talukdari* estate.

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Held reversing the decree, that the mortgage having been effected prior to the coming into force of the Gujarat Talukdars' Act (1888) was not invalidated by cl. 1 of s. 31 of the Act, and that the Court was bound to pass a decree for sale in default of payment of the mortgage-debt.

Quære—Whether the property could be sold without the sanction of the Governor in Council, regard being had to the provisions of cl. 2 of s. 31 of the Act. DOSHI FULCHAND v. MALEK DAJIRAJ, 20 B. 565 ... 942

(2) See ACT VI OF 1878 (TREASURE TROVE), 19 B. 668.

Talukdari Settlement Officer.

(1) See CONVERSION, 20 B. 181.

(2) See JUDGE, 19 B. 608.

Taran Gahan Mortgage.

See LIMITATION ACT (XV OF 1877), 20 B. 408.

Tax.

(1) See MUNICIPALITY, 20 B. 732.

(2) See PRACTICE, 20 B. 675.

Taxation.

Charity suit—Defendants' costs as between attorney and client ordered out of the charity estate—Charges allowed and disallowed as against estate—Discretion of Taxing Master.—In a suit brought by the Advocate General at the instance of relators for the purpose of removing the defendants from the position of directors of a Mahomedan mosque, and for administration of the property of the mosque, &c., the decree ordered that the defendants should have their costs taxed as between attorney and client out of the charity funds. The attorneys of the defendants accordingly brought in their bill of costs, and in taxation it was contended that they should be allowed out of the charity funds all the sums which the Taxing Master certified they should pay their attorneys.

Held, that where the Taxing Master decided that certain items allowed against the defendants should not come out of the charity funds, his decision could not be disturbed.

It does not follow that because a charge is proper to be allowed between an attorney and client, that the client, if trustee, should be allowed that charge out of the trust funds. ADVOCATE GENERAL OF BOMBAY v. MOULVI ABDUL KADUR JITAKER, 20 B. 301 ... 760

Temple.

(1) Manager—Alienations by manager—Necessity—Religious endowments —See HINDU LAW (RELIGIOUS ENDOWMENTS), 19 B. 271.

(2) Temple outside British India—Religious endowment—Property in British India of temple outside British India—Right to officiate in such temple—Right to share of such property—Partition—Jurisdiction—See JURISDICTION, 20 B. 495.

Tenancy.

See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 78.

Tenancy-at-will.

See LANDLORD AND TENANT, 19 B. 150.

Tenants-in-common.

See HINDU LAW (WIDOW), 19 B. 36.

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See LANDLORD AND TENANT, 20 B. 1.

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(1) See LANDLORD AND TENANT, 20 B. 354.

(2) See POSSESSION, 20 B. 270, 798.

Tolls.

See ACT III OF 1875 (BOMBAY TOLLS ON ROADS AND BRIDGES), 20 B. 668.

Transfer.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 216.

(2) See STAMP, 20 B. 432.

Transfer of Property Act (IV of 1882).

(1) See LEASE, 20 B. 439.

(2) S. 14—See TRUST, 20 B. 511.

(3) *S.* 55—*Meaning of words "material defects"—Vendor and purchaser—Concealment of claim against property—Whether such concealment entitles purchaser to rescind.*—The expression "material defect" in s. 55 of the Transfer of Property Act (IV of 1882) includes a defect in the title to an estate. HAJI ESSA SULLEMAN v. DAYABHAI PARMANANDAS, 20 B. 522 = Chitty's S.C.C.R. 460 ... 913

(4) Ss. 58, 97—See LIMITATION ACT (XV OF 1877), 20 B. 408.

(5) S. 75—See MORTGAGE (PRIORITY), 20 B. 390.

(6) Ss. 86 and 88—See MORTGAGE (GENERAL), 20 B. 744.

(7) S. 93—Mortgage—Redemption—Decree for payment and redemption within six months—Application for execution of decree after six months had expired—See MORTGAGE (REDEMPTION), 20 B. 279.

(8) S. 108—See LANDLORD AND TENANT, 20 B. 1.

(9) Ss. 111 and 117—See LANDLORD AND TENANT, 20 B. 354.

(10) Ss. 111 (*b*) and 116—See LANDLORD AND TENANT, 20 B. 759.

(11) *S.* 135—*Construction—Assignment of an actionable claim—Suit by the assignee—Recovery of the full amount of debt.*—Vishnu owed a sum of Rs. 483 to Govindsing, who assigned the debt to the plaintiff for Rs. 200. The plaintiff sued Vishnu to recover the whole amount.

Held, that under s. 135 of the Transfer of Property Act (IV of 1882) the plaintiff was entitled to recover the whole amount of the debt. VISHNU MAHADEV SONAR v. DAGADU, 19 B. 290 ... 196

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Tree.

(1) *Immoveable property—Sale of growing tree—Limitation*—A tree standing on land is immoveable property. SAKHARAM MULSHET MHADIK v. VISHRAM, 19 B. 207 ... 140

(2) Trees overhanging neighbour's land—Nuisance—Easement Act (V of 1882)—Easement—See EASEMENT, 19 B. 420.

Trespasser.

(1) See HINDU LAW (JOINT FAMILY), 19 B. 803.

(2) See LANDLORD AND TENANT, 19 B. 138.

Trust.

(1) *Beneficiary—Proviso for forfeiture of interest in case of insolvency--Insolvency of beneficiary—Subsequent withdrawal of petition in insolvency—Effect of withdrawal of petition—Deed of settlement.*—By a deed of settlement executed by the plaintiff's father, certain property was conveyed to trustees upon trust to recover the income thereof and to pay it to the settlor for life, and after his death to his seven sons, in equal shares, for the maintenance of them and their respective families. The deed provided that, in case any beneficiary became insolvent, "or do or suffer anything whereby his share or any part thereof would through his act or default or by operation of law" become vested in or payable to other persons, then the share and

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interest of such person should cease, and for the remainder of his life should be paid for the maintenance and support of the family of such persons.

In July, 1894, the plaintiff, who was one of the sons of the settlor, filed his petition in insolvency, but on the 5th December, 1894, he withdrew it.

Held, that the forfeiture clause did not take effect, and that the plaintiff was entitled to be paid by the trustee his share of the income of the trust property. HORMASJI N. DAVUR v. DADABHOY N. DAVUR, 20 B. 310 ... 766

(2) *Trust-deed—Invalid trusts - Recovery of property settled—When right to sue accrues—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 96 *and* 120 *—Rule against perpetuities—Indian Succession Act* (X *of* 1865), *s.* 101—*Transfer of Property Act* (IV *of* 1882), *s.* 14—*Whether applies to moveable property—Suit to follow trust property—Limitation Act* (XV *of* 1877), *s.* 10—*Whether applies to suit to invalidate the trust.* —The rule against perpetuities (Indian Succession Act X of 1865), s. 101, and Transfer of Property Act (IV of 1882), s. 14, applies to moveable as well as immoveable property.

Under art. 120, sch. II of the Limitation Act (XV of 1877) the right to recover property settled on invalid trusts accrues directly the property is conveyed to the trustees.

S. 10 of the Limitation Act (XV of 1877) does not save a suit brought to set aside the trusts specified in a trust-deed and enforce resulting trusts not so specified COWASJI N. POCHKHANAWALLA v. RUSTOMJI D. SETNA, 20 B. 511 ... 904

(3) *Trustees - Trustees raising money by mortgage of trust property—Sanction of Court.*—A testator by his will devised property in Bombay to trustees on certain religious and charitable trusts. The income of the property was more than was required for the purposes of the trust, and the trustees had a surplus of Rs. 19,000 in their hands. They were obliged to pull down a certain chawl which stood upon the land for the purposes of rebuilding upon it, and they proposed, with a view to improve the property, to erect a larger and more substantial building than the former one. They expended the surplus of Rs. 19,000 which was in their hands, but found that to complete the work a further sum of Rs. 20,000 was necessary. This they proposed to raise by mortgaging the trust property. They calculated that the whole mortgage-debt would be paid off out of the surplus rents of the trust property within three years. They filed this suit, praying that the Court would sanction the proposed mortgage. The Court, however, refused its sanction, and dismissed the suit. DINSHAW NOWROJI BODE v. NOWROJI NASARWANJI BODE, 20 B. 46 ... 589

(4) See HINDU LAW (WILL), 20 B. 571.

Trust-deed.

(1) See STAMP ACT (I OF 1879), 20 B. 210.

(2) See TRUST, 20 B. 511.

Trustees.

(1) Trustees raising money by mortgage of trust property—Sanction of Court—Trust—See TRUST, 20 B. 46.

(2) See DEED, 19 B. 12.

(3) See HINDU LAW (WILL), 19 B. 401.

Vacation.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 745.

Vakalatnama.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 193.

Valuation PAGE

(1) *Valuation of suit—Suit for account—Suits Valuation Act* VII *of* 1887, *s.* 8—*Court-Fees Act* (VII *of* 1870), *s.* 7 (*iv.*), *cl.* (*f*), *and s.* 11—*Appeal—Bombay Civil Courts Act* (XIV *of* 1869), *s.* 26—*Practice.*—In a suit for an account of partnership dealings, the plaintiffs valued the claim approximately at Rs. 600. The Subordinate Judge passed a decree awarding to the plaintiffs a sum of Rs. 30,830-9-2. The plaintiffs thereupon paid an additional Court-fee of Rs. 900 under s. 11 of the Court-Fees' Act (VII of 1870). The defendants appealed to the High Court from the decree of the Subordinate Judge. The plaintiffs objected that the appeal lay to the District Judge, and not to the High Court.

Held, that the value of the subject-matter of the suit exceeded Rs. 5,000; the appeal, therefore, lay to the High Court under s. 26 of Act XIV of 1869. IBRAHIMJI ISSAJI v. BEJANJI JAMSEDJI, 20 B. 265 ... 735

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 B. 736.

Vendor and Purchaser.

(1) *Broker—Brokerage from vendor and vendee—Position and rights of broker—Claim of brokerage from both vendor and vendee.*—A broker is entitled to his commission if the relation of buyer and seller is really brought about by him, although the actual sale has not been effected by him.

A broker is entitled to his commission where he has induced in the vendor the contracting mind, the willingness to open negotiations upon a reasonable basis even though a change or modification of the terms of the contract is made by the buyer and seller without his intervention.

A broker sued the Municipality of Bombay for brokerage in respect of land purchased by them.

Held, that, if during the time that the broker was negotiating with the vendor, the latter was induced to consent to the sale, the broker was entitled to his brokerage. It was not material to enquire what operated upon the mind of the vendor, and whether it was the advice of friends, or the knowledge that his land could be acquired compulsorily, or the persuasions of the broker. It was sufficient to support the broker's claim if the vendor's acceptance of the terms was brought about during his intervention; and the fact that the Municipal Commissioner stepped in at the last moment, and himself actually struck the bargain, did not deprive the broker of his brokerage.

Primarily a broker is merely the agent of the party by whom he is originally employed. To make the other side liable to pay him brokerage it must be shown that he has been employed by such party to act for him, or that in the contract he has agreed to pay brokerage. MUNICIPAL CORPORATION OF BOMBAY v. CUVERJI HIRJI; AND MOTLIBAI v. CUVERJI HIRJI, 20 B. 124 ... 641

(2) Concealment of claim against property—Whether such concealment entitles purchaser to rescind—Transfer of Property Act (IV of 1882), s. 55—Meaning of words "material defects."—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 B. 522.

(3) Easement—Right of way—Purchase of land adjoining purchaser's land—Way of access—Way of necessity—Sale-deed—Construction—Circumstances existing at the time of the sale—See EASEMENT, 19 B. 797.

(4) *Landlord and tenant—Sale by landlord subject to rights of tenants—Notice to purchaser of such rights—Suit by tenants to enforce rights against purchaser—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 30.—Section 30 of the Civ. Pro. Code (Act XIV of 1882) authorizes some of the raiyats of a village to sue the proprietor of it for themselves and the other raiyats for a declaration of their general rights, and for an injunction restraining the proprietor from interfering with their enjoyment of those rights.

Vendor and Purchaser—(*Concluded*). PAGE

In 1806, the East India Company granted a village to Ardesir Dady, subject to the raiyats' customary rights and privileges which were embodied in Reg. I of 1808, but the deed of conveyance was not passed until 1819, and it was then executed to the executors of Ardeshir, who had died in the meantime. This deed made no reference to rights and privileges of the raiyats. In 1868, the defendant purchased the village from its legal owners. In 1889, plaintiffs sued defendant for themselves and on behalf of the other raiyats of the village to enforce their rights. The defendant pleaded that as the deed of conveyance of 1819 made no mention of these rights, he was not bound by them.

Held, that as at the time of the conveyance of the village to the defendant, the lands were in the occupation of the raiyats, the defendant ought to have made inquiry as to their rights. Having failed to do this, he was bound by the rights of the tenants as much as if they had been specially mentioned in the conveyance to him.

Held, also, that as there had been no denial of plaintiff's rights until shortly before the suit, it was not barred by limitation. AHMEDBHOY HABIBBHOY v. BALAKRISHNA MUKUND, 19 B. 391 ... 264

(5) *Right of purchaser to have lands registered in his name in Revenue Records—Collector's books—Suit for declaration of such right—Limitation—Limitation applicable to such suit—Such right not an interest in immoveable property—Cause of action in respect of such right Declaratory decree—Jurisdiction—Objection taken for first time in second appeal—Practice.*—Plaintiffs having purchased certain lands in 1867 brought this suit in the year 1890 to obtain a declaration of their right to have the land registered in their name in the Revenue Records. The lower Court dismissed the suit as barred under art. 144, sch. II of the Limitation Act (XV of 1877).

Held, reversing the decree, that a right to be placed on the register was not an interest in immoveable property, and that art. 144 of the Limitation Act did not apply. The right is one which does not give rise to a cause of action until it is asserted or denied. And a suit for a declaratory decree in respect to it must be brought within a period of six years from that date. In the present case, the right had not been asserted or denied until the suit was filed, and the suit was therefore not barred.

An objection having been raised, in second appeal, that the Court had no jurisdiction to entertain the suit, as the plaintiffs had not previously asked the Collector to place them on the register.

Held, that this circumstance was not necessary to give jurisdiction, although it might be a reason for treating the suit as premature. That objection, being taken for the first time in second appeal, was disallowed. BHIKAJI BAJI v. PANDU, 19 B. 43 ... 29

(6) Subsequent suit for redemption by mortgagor against mortgagee and his vendee—Plea by vendee of purchase for value without notice—*Bona fides*, meaning of—Purchaser, meaning of, in art. 134—Limitation Act (XV of 1877), sch. II, art. 134—Limitation—Mortgage—Decree obtained by mortgagee for possession until payment of mortgage-debt—Possession taken by mortgagee under decree—Continuance after decree of relation of mortgagor and mortgagee—Sale by mortgagee—See LIMITATION ACT (XV OF 1877), 19 B. 140.

Verdict.

(1) Special verdict—Duty of Judge—Practice—Procedure—Crim. Pro. Code (Act X of 1882), ss. 298 and 302—Jury—See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 735.

(2) Verdict of jury—Special verdict—Murder—Culpable homicide—Grave and sudden provocation—Loss of self-control—Burden of proving loss of self-control on accused—Penal Code (Act XLV of 1860), ss. 299 and 300—Crim. Pro. Code (Act X of 1882), ss. 239, 303 and 307—High Court's power of interfering with the verdict of a jury—See JURY, 20 B. 215.

Waiver.

PAGE

(1) See LEASE, 20 B. 439.

(2) See LIMITATION ACT (XV OF 1877), 20 B. 109.

Warrant.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 72.

(2) See MALICIOUS PROSECUTION, 19 B. 485.

Watan.

(1) *Bombay Act* III *of* 1874, *s.* 17—*Collector's power to determine the amount of payments of a fluctuating character—Act* X *of* 1876, *s.* 4, *cl.* (*c*)—*Jurisdiction.*—The payments referred to in s. 17 of Bombay Act III of 1872 are those mentioned in s. 4, namely, "customary fees or perquisites in money or in kind whether at fixed times or otherwise." It is the commutation of these customary and fluctuating payments that is provided for by ss. 17—21. But the Collector has no power under s. 17 to impose new burdens on the land-owner in cases where the payment being constant already there is nothing to determine.

Plaintiff was the Inamdar of a certain village. Defendant No. 3 was the watandar Kulkarni of the village. He enjoyed for the performance of his duties some inam lands and a cash allowance of Rs. 5 paid annually by the Inamdar. In 1884, defendant No. 3 having failed to perform the service in person or by deputy, the Collector appointed defendant No. 2 to act as Kulkarni. Defendant No. 2 officiated from 20th November, 1884, to 4th December, 1886. On the application of defendant No. 2 the Collector increased his remuneration according to the scale fixed for Government villages, known as the Wingate scale, and ordered plaintiff to pay the increased remuneration, so as to make up the amount due under that scale. On 26th September, 1890, the Collector recovered the sum of Rs. 171 from the plaintiff by attachment of his property The plaintiff thereupon sued the Secretary of State for India in Council to recover this amount as being illegally levied. The defendant pleaded that the Collector, having determined the amount of defendant No. 2's, remuneration under s. 17 of Bombay Act III of 1874, the plaintiff had no cause of action against him, and that the suit was barred under s. 4, cl. 3 of Act X of 1876.

Held, that as the cash payment made by the plaintiff to the watandar was certain, and not of a fluctuating or indeterminate character, the Collector had no power to increase the remuneration of the officiator under s. 17 of Bombay Act III of 1874.

Held, also, that the suit was not barred by s. 4 (*c*) of Act X of 1876. ANANTACHARYA v. THE SECRETARY OF STATE FOR INDIA, 19 B. 581 ... 389

(2) See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 20 B. 423.

(3) See HINDU LAW (ADOPTION), 19 B. 614.

Watandar.

See ACT III OF 1874 (BOMBAY HEREDITARY OFFICES), 20 B. 423.

Water Tax.

See MUNICIPALITY, 20 B. 732.

Widow.

(1) See DOMICIL, 19 B. 697.

(2) See WILL, 19 B. 770.

Will.

(1) *Certificate—Regulation* VIII *of* 1827—*Amendment of plaint—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 144.—A plaintiff can sue to establish his title under a will without producing a certificate under Reg. VIII of 1827.

For the purposes of limitation a suit must be considered to have commenced from the date on which the plaint was originally presented, and not from the date of its amendment. PATEL MAFATLAL v. BAI PARSON, 19 B. 320 ... 217

Will—(*Continued*). PAGE

(2) *Construction—Absolute gift—Gift over to widow or issue of donee—Life-interest—Costs.*—Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died in April, 1884, leaving three sons, Michael, Silveiro and Joaquim (defendant No. 3) and two daughters, (Rose and Caroline.) By her will, she directed that her daughter Rose should enjoy the rents and profits of certain immoveable property for her life, and that after her death the said property should be sold, and the sale proceeds (after payment of two legacies thereout) be divided equally between her two sons, Silveiro and Joaquim (defendant No. 3). The seventh clause of the will was as follows :—

7. "I further direct that the amount which may fall to the share of my son Joaquim Amador Bocarro under (*c*) of paragraph 6 above should be held in trust by my executors hereinafter named and converted by them into Government securities ; the interest accruing therefrom should be paid for the maintenance of my said son Joaquim Amador Bocarro. Should my said son die leaving a widow or issue, his share shall be given to such widow or issue according as he may devise and bequeath. Should my said son Joaquim Amador Bocarro reform himself, and take off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (*c*) of paragraph sixth above or such part or parts thereof as to my executors may appear proper."

Held, on appeal, confirming the decree of the lower Court, that under the above clause of the will there was a clear gift to the wife or issue of Joaquim, but that Joaquim was to have the power of designating how they were to take. To that extent the absolute gift to Joaquim was qualified. Should the gift over fail, the absolute gift to Joaquim would remain unimpaired. BECHAR AKHA v. P. DE CRUZ, 19 B. 770 ... 516

(3) *Construction—Gift of life interest or* corpus—*Discretion of executors to hand over* corpus—*Costs.*—Anna Maria Bocarro, a Portuguese inhabitant of Bombay, died in April, 1884, leaving three sons, Michael, Silveiro, and Joaquim (defendant No. 3), and two daughters, Rose and Caroline. By her will she directed that her daughter Rose should enjoy the rents and profits of certain immoveable property for her life, and that after her death the said property should be sold, and the sale-proceeds (after payment of two legacies thereout) be divided equally between her two sons Silveiro and Joaquim (defendant No. 3). She further, however, directed that Joaquim's share of such proceeds should be held in trust by her executors and invested in Government securities, the interest of which should be applied to Joaquim's maintenance, and that in case Joaquim should die leaving a widow or issue, his share should go to them as he should devise or bequeath. The will then continued :—"Should my said son Joaquim Amador Bocarro reform himself, and shake off all his evil tendencies, and lead a steady, quiet and orderly life, or should he on account of illness or other reasonable cause be in urgent need of pecuniary assistance, I leave it to the discretion of my executors either to make over to my said son Joaquim Amador Bocarro for his absolute use the whole of the amount which he may be entitled to under (*c*) of paragraph sixth above, or such part or parts thereof as to my executors may appear proper."

Silveiro died in 1885, unmarried and intestate, leaving his two brothers Michael and Joaquim and his two sisters Rose and Caroline him surviving. Michael died in 1889, leaving a widow and children.

In 1891 Joaquim (defendent No. 3) mortgaged all his interest under the said will to the plaintiffs to secure a loan of Rs. 6,100. In 1893 Rose died, and in 1894 Caroline died.

Will—(*Concluded*).

PAGE

Subsequently the executors were proceeding to sell the property mentioned in the will when the plaintiffs filed this suit praying for a declaration that they had a valid charge upon Joaquim's interest herein, and that his interest should be ascertained and declared, and he himself ordered to pay the amount of their claim; that the property should be sold and their claim paid out of the funds; that the executors should be restrained from selling, save subject to their (plaintiffs') rights, &c.

The plaintiffs and Joaquim contended that he (Joaquim) in the events that Lad happened was entitled to the whole of the proceeds of the property absolutely, and that the gift in the sixth clause of the will could not be cut down by the provisions of the seventh clause.

Held:—(1) That the defendant Joaquim had no interest in the house mentioned in the will. He was only entitled to a share of the proceeds after it had been sold.

(2) That his interest in his share of such proceeds was merely a life-interest, with power to appoint to his widow or issue, and that he was not entitled to be paid the *corpus* of such share, but that the executors might under certain circumstances and at their discretion hand over to him the said *corpus*.

(3) That neither the plaintiffs nor Joaquim could interfere in the sale of the said property.

(4) That the plaintiffs had a valid charge upon Joaquim's interest in the sale-proceeds of the said property to the extent of their mortgage.

(5) That Joaquim's interest was (after deducting the legacies given by the sixth clause) an absolute interest in one-fourth share of Silveiro's moiety and a life-interest in his (Joaquim's) moiety subject to contingency of the executors in their discretion handing over the *corpus* of the share, or part thereof, for his absolute use, in which event the plaintiffs had the right to the same so far as their debt was unsatisfied.

(6) As to costs, the plaintiffs and third defendant Joaquim should pay their own costs; that the executors and defendants Nos. 4 to 12 should have their costs paid out of Joaquim's share in Silveiro's moiety of the sale-proceeds, and, if that fund were not sufficient to pay such costs, the plaintiffs and the third defendant Joaquim to pay the deficiency. BECHAR AKHA v. P. DE CRUZ, 19 B. 221 ... 150

(4) Executor who has acted required to lodge will and obtain probate —Probate—See PROBATE, 20 B. 227.

(5) New page of will not duly executed substituted by testator after execution of will — Defendant relative — Revocation — Probate—See PROBATE, 20 B. 370.

(6) See ACT VIII OF 1890 (GUARDIAN AND WARDS), 19 B. 832.

(7) See REGISTRATION ACT (III OF 1877), 20 B. 562.

Winding up.

(1) See COMPANY, 19 B. 88; 20 B. 654.

(2) See STAMP, 20 B. 432.

Words and Phrases.

(1) "Adhi"—See MORTGAGE (REDEMPTION), 20 B. 721.

(2) "Athikari"—See CASTE QUESTION, 20 B. 190.

(3) "Any difference"—See ARBITRATION, 20 B. 232.

(4) "As long as I am alive, I have authority to increase or decrease" —See STAMP ACT (I OF 1879), 20 B. 210.

(5) "Caste"—See CASTE QUESTION, 20 B. 190.

(6) "Children"—See HINDU LAW (WILL), 20 B. 571.

(7) "Chithi"—See LIMITATION ACT (XV OF 1877), 20 B. 8.

(8) "Completion"—See MUNICIPALITY, 19 B. 372.

Words and Phrases—(*Continued*). PAGE

(9) "Defects in the property"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 B. 522.

(10) "Determinable"—See VALUATION, 20 B. 265.

(11) "Earn the means of livelihood"—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 255.

(12) "Executed"—See STAMP, 19 B. 635.

(13) "Execution"—See STAMP, 19 B. 635.

(14) "Falsely charging"—See PENAL CODE (ACT XLV OF 1860), 19 B. 51.

(15) "Good cause to suspect"—See ACT XIII OF 1856 (POLICE PRESIDENCY TOWNS), 20 B. 348.

(16) "Grade"—See CIV. PRO. CODE (ACT XIV OF 1882), 19 B. 127.

(17) "Hiba"—See REGISTRATION ACT (III OF 1877), 20 B. 562.

(18) "Hold"—See COMPANY, 19 B. 1.

(19) "Holder"—See COMPANY, 19 B. 1.

(20) "In accordance with law"—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 20 B. 76.

(21) "Instituted"—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 46.

(22) "In trust for Tribhovan and his heirs"—See HINDU LAW (WILL), 19 B. 401.

(23) "Jangad"—See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 20 B. 779.

(24) "Khasgi"—See KHOTI LAND, 19 B. 528.

(25) "Khatedar Kul"—See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), 20 B. 475.

(26) "Kothu"—See REGISTRATION ACT (III OF 1877), 20 B. 562.

(27) "Loss, destruction or deterioration"—See RAILWAY COMPANY, 19 B. 159.

(28) "Makta"—See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 729.

(29) "Makta"—See KHOTIE LAND, 19 B. 528.

(30) "Material defects"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 B. 522.

(31) "Named"—See ARBITRATION, 20 B. 232.

(32) "Nazar"—See LIMITATION ACT (XV OF 1877), 20 B. 408.

(33) "Near a street"—See ACT IV OF 1890 (BOMBAY DISTRICT POLICE), 19 B. 737.

(34) "Obscene"—See PENAL CODE (ACT XLV OF 1860), 20 B. 193.

(35) "Offence"—See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 72.

(36) "Opportunity to examine"—See FRAUD, 19 B. 749.

(37) "Owner"—See FAZENDAR, 20 B. 617.

(38) "Polia"—See MUNICIPALITY, 20 B. 146.

(39) "Premises"—See FAZENDAR, 20 B. 617.

(40) "Re-hearing"—See COMPANY, 19 B. 208.

(41) "Sarva hakk wa sambandh"—See EASEMENT, 19 B. 797.

(42) "Share-holder"—See COMPANY, 19 B. 1.

(43) "Show cause"—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 20 B. 208.

Words and Phrases—(*Concluded*). PAGE

(44) "Street"—See MUNICIPALITY, 20 B. 83, 146.

(45) "Sufficient cause"—See LIMITATION, 20 B. 104.

(46) "Takshim"—See KHOTI LAND, 19 B. 528.

(47) "Taran gahan"—See LIMITATION ACT (XV OF 1877), 20 B. 408.

(48) "Thal"—See ACT I OF 1880 (BOMBAY KHOTI SETTLEMENT), 20 B. 729.

(49) "The course of proceedings under the decree"—See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), 19 B. 318.

(50) "Vahivat of assessment"—See LIMITATION ACT (XV OF 1877), 19 B. 663.

(51) "Wadi"—See LANDLORD AND TENANT, 19 B. 150.

Wrongful Arrest.

See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 72.

Wrongful Confinement.

See CRIM. PRO. CODE (ACT X OF 1882), 19 B. 72.

Wrongful Execution.

See MALICIOUS PROSECUTION, 19 B. 485.

Yearly Tenancy.

See LANDLORD AND TENANT, 19 B. 150.

Yearly Tenant.

See LANDLORD AND TENANT, 20 B. 759.

Zanzibar.

(1) *Jurisdiction—Local allegiance—English Consular Court—Greek residents at Zanzibar—Jurisdiction of the British Consular Court at Zanzibar over foreign subjects enjoying British protection—Order in Council, dated 29th November*, 1884, *s.* 6.—The Greek residents at Zanzibar having been by international action placed under British protection are liable to the British criminal law in force at Zanzibar.

The accused, who was a Greek under British protection at Zanzibar, was convicted by the British Consular Court at Zanzibar of culpable homicide not amounting to murder and sentenced to ten years' rigorous imprisonment under s. 304 of the Indian Penal Code (Act XLV of 1860). He appealed to the High Court of Bombay contending, *inter alia*, that he was a Greek subject, and as such not liable to be tried by the Consular Court.

Held, that it was competent to Her Majesty to exercise jurisdiction in one foreign State over the subjects of another foreign State; that under s. 6, cl. (*b*) of Her Majesty's Order in Council dated 29th November 1884, the provisions referring to British subjects were applicable to foreigners enjoying British protection in so far as by treaty, capitulation, grant, usage, sufferance, or other lawful means, Her Majesty had jurisdiction at Zanzibar in relation to such persons; and that the prisoner, being a British protected person within the meaning of s. 4, cl. (*b*) of the Order, was amenable to the jurisdiction of the Consular Court. QUEEN-EMPRESS v. REGO MONTOPOULO, 19 B. 741 ... 497

(2) *Jurisdiction of High Court over Consular Court of Zanzibar—High Court at Bombay—Power of revision—Appeal—Jurisdiction—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 622—*Zanzibar Order in Council*, 1884, *arts.* 7, 8, 9, 21, 27, 30.—The High Court at Bombay has no power of revision over civil cases tried by the Consular Court at Zanzibar, though it is authorized to hear appeals from the decisions of that Court as a District Court by the Zanzibar Order in Council of 1884.

Zanzibar—(*Concluded*). PAGE

A power of revision is not an incident of appellate powers, but on the contrary can only be exercised where there is no appeal, and had it been intended to give such powers to the High Court at Bombay, it would necessarily have been expressly provided for.

Per JARDINE, J. (dissenting) :—Under any circumstances the Consular Court at Zanzibar is bound to obey a writ issued by the High Court for certifying the papers of a civil case. Under ss. 9 and 10 of the Bombay Civil Courts' Act (XIV of 1869) taken with art. 21 of the Zanzibar Order in Council of 1884 and s. 622 of the Civ. Pro. Code (Act XIV of 1882), the High Court is competent to exercise revisionary jurisdiction in civil matters tried by the Consular Court at Zanzibar. KHOJA SHIVJI v. HASHAM GULAM, 20 B. 480 (**F.B.**) ... 884

Zanzibar Order in Council.

Arts. 7, 8, 9, 21, 27, 30—See ZANZIBAR, 20 B. 480.

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